**IN THE COURT OF APPEAL**
**ON APPEAL FROM THE HIGH COURT**

**CRIMINAL APPEAL NO. AAU 66 of 2012**
**(Criminal Action No. HAC 27 of 2009)**

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| **BETWEEN** | : | **LAISENIA QARASE** |
| | | ***Appellant*** |
| **AND** | : | **FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION** |
| | | ***Respondent*** |
| **Coram** | : | **Calanchini AP**<br>**Chandra JA**<br>**Basnayake JA** |
| **Counsel** | : | **Mr Van De Wiel, Ms T Draunidalo and Ms S Waqabitu for the Appellant**<br>**Mr Blanchflower and Ms E Yang for the Respondent** |
| **Date of Hearing** | : | **25 - 27 February 2013** |
| **Date of Judgment** | : | **30 May 2013** |

**JUDGMENT**

**Calanchini AP**

[1] I have had the opportunity of reading the draft judgment of Chandra JA and agree with his conclusion that the appeal should be dismissed.

**Chandra JA**

[2] The Appellant was charged in the High Court at Suva on 6 counts of abuse of office contrary to Section 111 of the Penal Code and 3 counts of Discharge of duty with respect to property in which he has a private interest contrary to Section 109 of the Penal Code (Cap.17).

Count 1 was in relation to the application for shares by the Appellant in the name of Q-Ten Investment Ltd for the issuance of Class "A shares in Fiji Holdings Ltd.

Count 2 was in relation to the facilitation by the Appellant of the approval of the issuance and allotment of Class "A" shares in Fiji Holdings Ltd. to Q-Ten Investment Ltd.

Count 3 was in relation to the application for shares by the Appellant in the name of Cicia Plantation Co-op Society Ltd for the issuance of Class "A" shares in Fiji Holdings Ltd.

Count 4 was in relation to the facilitation by the Appellant of the approval of the issuance and allotment of Class "A" shares to Cicia Plantation Co-op Society Ltd.

Count 5 was in relation to the application for shares by the Appellant in the name of Mavana Investments Ltd for the issuance of Class "A" shares in Fiji Holdings Ltd.

Count 6 was in relation to the facilitation by the Appellant of the approval of the issuance and allotment of Class "A" shares to Mavana Investments Ltd.

Count 7 was in relation to discharge of duty in respect of the shares of Q-Ten Investments Ltd in Fijian Holdings Ltd.

Count 8 was in relation to discharge of duty in respect of the shares of Cicia Plantation Co-op Society Ltd in Fijian Holdings Ltd.

Count 9 was in relation to discharge of duty in respect of the shares of Mavana Investment Ltd in Fijian Holdings Ltd.

[3] There were 36 Agreed Facts between the Prosecution and the Defence agreed in terms of Section 135 of the Criminal Procedure Decree 2009 and an agreed bundle of documents.

As much of the material placed before Court was in relation to the Agreed Facts it would be pertinent to list the Agreed Facts which are as follows:

1. *It is agreed that the Accused is LAISENIA QARASE of 6 Moti Street, Samabula, Suva ("the Accused").*

2. *It is agreed that the Accused was appointed as the Financial Advisor of the Fijian Affairs Board ("FAB") on 8 March 1979 pursuant to the Fijian Affairs Act and the Fijian Affairs (Fijian Affairs Board) Regulations and was the Financial Advisor of the said Board at all material times relevant to the charges of this case.*

3. *It is agreed that the FAB at the meeting on 14 February 1984 decided that the Accused was to be paid a retainer fee for his services as the Financial Advisor of FAB on a quarterly basis.*

4. *It is agreed that in 1984 the GCC endorsed the incorporation of Fijian Holdings Limited ("FHL") as a private limited liability company to be the investment vehicle of the indigenous people in Fiji, and to accelerate and broaden their participation in commerce and industries. Initial shareholding was restricted to Native Land Trust Board, FAB and Provincial Councils.*

5. *It is agreed that on or about 27 June 1984, FHL was established as a private limited liability company.*

6. *It is agreed that the Accused was appointed as a director of FHL on 26 January 1989 and was a director of the said company at all material times relevant to the information of this case.*

7. *It is agreed that on or about 9 June 1989, FHL increased its nominal capital to $25,000,000 : divided into 5,000,000 Class A shares and 20,000,000 Class B shares.*

8. *It is agreed that in or about August 1989 the Government of Fiji provided an interest free loan of $20,000,000 to FAB to be repaid over 10 years from 1999 for the purpose of purchasing shares in FHL. FAB in turn used this loan to buy shares in FHL and was issued 20,000,000 Class B shares. In about the year 2001. The $20,000,000 loan was converted by the Government as a grant.*

9. *It is agreed that upon the creation of Class B shares, the authority for the Accused's directorship in FHL was provided through the appointment of the Minister of Fijian Affairs to represent Class B shares pursuant to FHL's Articles of Association.*

10. *It is agreed that according to the share register of FHL as at 30 June 1991, the shareholders of FHL consisted of Native Land Trust Board, Fijian Affairs Board, Ba Provincial Council, Lomaiviti Provincial Council, Nadroga Provincial Council, Macuata Provincial Council, Rewa Provincial Council, Lau*

*Provincial Council, Cakaudrove Provincial Council, Bua Provincial Council, Koula Trust, Kadavu Development Co. Ltd., Naitasiri Province Co-op Association Ltd, Ra Provincial Council, Tailevu Provincial Council, Serua Provincial Council and Namosi Provincial Council.*

11. *It is agreed that in or about 1991, the Board of Directors of FHL proposed to extend its shareholding to Tikinas, businesses and organizations that are wholly owned by Fijians, and private Fijian individuals whose names were registered in the Vola ni Kawa Bula.*

12. *It is agreed that on or about 9 August 1991, FAB approved the aforementioned recommendation by FHL to open up its shareholding and stated that a paper would be prepared to be tabled before GCC.*

13. *It is agreed that on or about 2 or 3 October 1991, the accused made a presentation to the GCC about the opening up of FHL shareholding. It is agreed that Document No. [1] of the Agreed Bundle is the English translation of the aforementioned presentation to GCC by the Accused.*

14. *It is agreed that in or about October 1991, GCC endorsed the opening up of FHL shareholding.*

15. *It is agreed that on or about 12 November 1991, the aforementioned approvals were noted by the Board of Directors of FHL, at a meeting which the Accused was present as a director.*

16. *It is agreed that on or about 20 November 1991, the Accused, on behalf of Cicia Plantation Co-op Society Ltd ("CPCS"), applied for 180,000 Class A shares.*

17. *It is agreed that on or about 24 December 1991, FHL informed the then existing shareholders of the decision to open up the FHL shareholding.*

18. *It is agreed that on or about 27 December 1991, the Board of Directors of FHL approved the issue and allotment of 180,000 Class shares to CPCS.*

19. *It is agreed that on or about 7 February 1992, the Accused, on behalf of Mavana Investments Limited ("Mavana"), applied for 200,000 Class A shares.*

20. *It is agreed that on or about 28 February 1992, the Board of Directors of FHL approved the issue and allotment of 200,000*

*Class shares to Mavana.* (The type of class of the share has not been included in the Agreed Facts).

21. *It is agreed that on or about 23 April 1992, the Accused on behalf of CPCS applied for 220,000 Class shares.* (The type of class of the share has not been included in the Agreed Facts).

22. *It is agreed that in about March to May 1992, the Accused, on behalf of Q-Ten Investments Limited ("Q-Ten"), applied for 200,000 Class A shares.*

23. *It is agreed that on or about 29 May 1992, the Board of Directors of FHL approved the issue and allotment of 220,000 Class A shares to CPCS and 200,000 Class A shares to Q-Ten.*

24. *It is agreed that on or about 30 September 1992, the Board of Directors of FHL approved the Substitutionary Memorandum and Articles of Association. On the same day, the shareholders of FHL at the Annual General Meeting adopted the substitutionary Memorandum and Articles of Association, and increased the capital of FHL to $40,000,000: divided into 20,000,000 Class A shares and 20,000,000 Class B shares.*

25. *It is agreed that by a special resolution dated 23rd October 1992, it was recorded that FHL by Annual General Meeting resolved that, inter alia, it should henceforth be a public company.*

26. *It is agreed that the Accused was an authorized signatory of CPCS bank account at all material times relevant to the charges of this case.*

27. *It is agreed that since about November 1974 until about February 1977, Leba Laveti Qarase was a director of Mavana. In about February 1977, Leba Laveti Qarase resigned and the Accused replaced her as a director of Mavana. In about August and September 1983, the Accused resigned and Leba Laveti Qarase replaced him as a director of Mavana. On or about 2 September 1991, the Accused was appointed as a director of Mavana again and remained a director at all material times relevant to the charges of this case.*

28. *It is agreed that since about November 1974 Leba Laveti Qarase was a shareholder of Mavana and at all material times relevant to the charges of this case. On or about 11 August 1992, the Accused acquired shares in Mavana.*

29. *It is agreed that Q-Ten was a company wholly owned by the family members of the Accused at all material times relevant to the information of this case.*

30. *It is agreed that since about December 1990, the Accused was a director and a majority shareholder of about 53% of Q-Ten.*

31. *It is agreed that on or about 15 December 1991, the Accused transferred all his shares in Q-Ten to his son Josefa Daucakacaka Qarase.*

32. *It is agreed that on or about 17th January 1992, the Accused resigned as director of Q-Ten.*

33. *It is agreed in about February 1995, Q-Ten sold all its shares in FHL.*

34. *It is agreed that the Accused resigned as Financial Advisor to FAB with effect from 19th March 1999.*

35. *It is agreed that the Accused resigned as director of FHL with effect from 11th August 2000.*

36. *It is agreed that the Accused attended and participated at Board meetings of FHL at which the Board of Directors decided upon payments of dividends to Classes A and B shares at all material times relevant to the charges of the case."*

[4] The trial commenced before the Judge and three Assessors on 5th July 2012. The Defence filed a motion for permanent stay on that day but the learned Judge requested the parties to file written submissions regarding same. The prosecution commenced leading evidence on the 5th July 2012 and concluded its case on 13 July 2012. The Defence filed written submissions regarding the motion for a permanent stay on 11 July 2012 while the prosecution filed their submissions on 13 July 2012. The learned trial Judge by his ruling dated 19 July 2012 refused the application for permanent stay. After the conclusion of the prosecution case the Defence took up the position of no case to answer, regarding which written submissions were also filed by both parties on 12 July 2012 and the learned trial Judge ruled that there was a case for the defence to answer by his ruling dated 19 July 2012. The defence case commenced on 20 July 2012 and the evidence of six witnesses were led and the closing addresses were concluded on 25 July 2012. The learned trial Judge gave his

summing up on 30 July 2012 and the Assessors gave their unanimous verdict in finding the Appellant guilty on all counts after deliberating for two and half hours. The learned trial Judge delivered his judgment on 31 July 2012 convicting the Appellant. Thereafter evidence was given on behalf of the Appellant by three witnesses regarding his character on 1 August 2012. On 2 August 2012 the Appellant was sentenced to 12 months imprisonment on Counts 1 to 6 each and six months on each of the counts 7 to 9, the sentences to run concurrently.

[5] The Appellant filed notice of leave to appeal against his conviction on 29 August 2012 and was granted leave to appeal to the Court of Appeal. The Appellant filed a supplementary notice of additional grounds of appeal on 19th November 2012 and a second supplementary notice of appeal on 11th February 2013 setting out grounds of appeal against his sentence.

Grounds of Appeal in the first notice of appeal:

That the trial Judge erred in his summing up to the Assessors:

1. *"In law by failing to direct the assessors that it was necessary that the prosecution prove that Appellant held all three positions of :*

*(a) director of Fijian Holdings Limited (FHL)*
*(b) adviser to the Fijian Affairs Board (FAB) and*
*(c) adviser to the Great Council of Chiefs (GCC).*

2. *In law and fact by failing to correctly and adequately direct the assessors regarding the law and evidence applicable and relevant to determining whether each of the elements of the offence of abuse of office, contrary to section 111 of the Penal Code, were established by the Prosecution.*

3. *In law and fact by failing to correctly and adequately direct the Assessors (or direct them at all) regarding the distinction between the acts of :*

   *(a) applying for shares (Counts 1, 3, 5) and*
   *(b) "facilitating approval" for the issue of shares (Counts 2, 4, 6)*

4. *In law and fact by failing to direct the assessors regarding the law of employment and how that was to be applied to the Appellant's relationship with FAB.*

5. *In fact by improperly by stating that it was perfectly plain that the relationship between the government and the Appellant was 'that of employer and employee ... it was not an independent contract'.*

6. *In law and fact by failing to properly direct the Assessors on the law regarding the element of an 'arbitrary act' in the context of the case.*

7. *In law and fact by failing to properly direct the Assessors on the law regarding the element of abuse of office in the context of the case.*

8. *In law and fact by failing to properly direct the Assessors on the law regarding the element of prejudice to others in the context of the case.*

9. *In law and fact by failing to properly direct the Assessors on the law regarding the element of 'gain' in the offence of abuse of office and how that was to be applied to the facts of the case against the Appellant.*

10. *In law and fact by failing to draw Assessors' attention to the concession of PW1 (Bainimarama) in cross-examination that there existed no position of 'adviser to the GCC'.*

11. *In law and fact failing to refer and draw the Assessors' attention to evidence and argument that :*

    *(a) a financial adviser to the FAB was not under the control of FAB or the Minister and*
    *(b) the position of financial adviser derived and exercised no power from the FAB or the Minister (and therefore had no 'authority' to do anything capable of being an offence under section 111 of the Penal Code).*

12. *In law and fact by failing to draw Assessors' attention to the fact that PW2 (Weleilakeba) had previously faced charges brought by the Prosecution which had subsequently been withdrawn and the impact this may have on the credibility of his evidence.*

13. *In law and fact by failing to correctly analyse (or analyse at all) the evidence of the periods when there was low or no public*

*demand for shares in FHL against the periods when demand was strong.*

14. *In law and fact by failing to correctly analyse (or analyse at all) the quality of the evidence supporting the proposition that the Appellant had failed to disclose his interest to each of FHL, FAB and GCC in each of :*

    *(a) Cicia Plantation Co-operative Society Limited*
    *(b) Mavana Investments Limited*
    *(c) Q-Ten Investments Limited*

15. *In law and fact by failing to correctly analyse (or analyse at all) the quality of the evidence of 'prejudice' (specifically the evidence adduced through PW2 (Weleilakeba) to others arising from the alleged abuse of office of Appellant.*

16. *In law and fact by failing to correctly and adequately direct the assessors regarding the law and evidence applicable and relevant to determining whether each of the elements of the offence of Officers Charged with Administration of Property of a Special Character or with Special Duties, contrary to section 109 of the Penal Code, were established by the Prosecution.*

17. *In law and fact by failing to adequately and correctly direct the Assessors (if at all) regarding the element of Appellant's allegedly being 'charged by virtue of employment with … administrative duties' in the context of Counts 7-9.*

18. *In law and in fact by failing to adequately and correctly direct the Assessors (if at all) on the nature of 'property of a special character' or 'carrying on business of a special character' in the context of Counts 7-9.*

19. *In law and fact by failing to adequately and correctly direct the Assessors regarding the Appellant's relationship alleged private interest (in the context of Counts 7-9) with each of :*

    *(a) Cicia Plantation Co-operative Society Limited*
    *(b) Mavana Investments Limited*
    *(c) Q-Ten Investments Limited*

    *and how such private interest might arise (or not arise) in the context of the Appellant's position as a director of FHL.*

20. *In law and in fact by failing to adequately and correctly direct the Assessors (if at all) on the question of 'discharge of duty' in the context of the case and Counts 7-9 in particular."*

Grounds of appeal in the Supplementary Notice of Appeal:

*"1. That the trial judge ought to have directed the assessors on the question of whether I had (in the alternative) breached Section 201 of the Companies Act ;*

*2. Further, that the trial judge ought to have independently assessed whether or not my defence raised any reasonable doubt to the case laid out by the prosecution;*

*3. That the trial judge should have independently assessed whether or not it was a miscarriage of justice that the assessors found me guilty in all of the circumstances which includes the fact that I was charged with the offences about sixteen years after they were alleged to have occurred.*

*4. That the trial judge should have independently assessed whether or not it was a miscarriage of justice that the assessors found me guilty when the prosecution's main witness PW2 was charged with me but the charges against him were dropped after he gave the prosecution an undisclosed plain statement.*

*5. That the trial judge should have independently assessed whether or not it was miscarriage of justice that the assessors found me guilty when the prosecution's first witness PW1 gave evidence that in my position as Advisor to the Fijian Affairs Board – I held no authority.*

*6. That the trial judge should have independently assessed whether or not it was a miscarriage of justice that the assessors found me guilty when the prosecution's first witness PW1 gave evidence that there was no position of Adviser to the Great Council of Chiefs;*

*7. That the trial judge should have independently assessed whether or not it was a miscarriage of justice that the assessors found me guilty when the prosecution's third witness PW3 gave evidence on matters which occurred before he was appointed Minister for Fijian Affairs;*

*8. That the trial judge should have independently assessed whether or not it was a miscarriage of justice that the assessors found me guilty when the prosecution's third witness PW3 gave evidence that his predecessor and 'ultimate protector of Fijian interests' – the Minister of Fijian Affairs sat on the Board of Fijian Holding*

*Limited with me at all relevant times and did not object to any policy or vote taken by the Board with regard to the matters forming the basis of the charges against me."*

Second Supplementary Notice of Additional Ground of Appeal

*"1. That the learned trial judge erred in not taking into account the age and seriousness of the charges and/or the level of criminality when he ordered that I serve a custodial sentence;*

*2. That the learned trial judge erred in not taking into account the age and seriousness of the charges and/or the level of criminality to thereby order that I serve a non-custodial sentence under the Community Work Act 1994 (as amended);*

*3. That the learned trial judge erred in not taking into account the age and seriousness of the charges and/or the level of criminality as required by the Sentencing and Penalties Decree 2009.*

*4. That the learned judge erred in not taking into account the age and seriousness of the charges and/or the level of criminality to thereby order that I carry out suitable work under the Community Work Act 1994 (as amended) in lieu of a custodial sentence.*

*5. That the learned trial judge erred in not taking into account the age and seriousness of the charges and/or the level of criminality as required by the Sentencing and Penalties Decree 2009 and thereby order that I carry out suitable work under the Community Work Act 1994 (as amended) in lieu of a custodial sentence."*

**FACTUAL MATRIX**

[6] The following facts have been set out in the Agreed Facts set out at paragraph [3] above.

[7] The Appellant was Financial Advisor of the Fijian Affairs Board ("FAB") having been appointed on 8 March 1979 pursuant to the Fijian Affairs Act and the Fijian Affairs (Fijian Affairs Board) Regulations and was the Financial Advisor of the said Board until he resigned with effect from 19 March 1999.(Agreed Facts – 2, 34). He was paid a retainer fee for his services as the Financial Advisor of FAB on a

quarterly basis.(Agreed Fact 3). He was also the Financial Advisor of the Great Council of Chiefs ("GCC") (Agreed Fact 13 and Agreed Document PE 1).

[8] In 1984 the GCC had endorsed the incorporation of Fijian Holdings Limited ("FHL") as a private limited liability company to be the investment vehicle of the indigenous people in Fiji, and to accelerate and broaden their participation in commerce and industries. Initial shareholding was restricted to Native Land Trust Board, FAB and Provincial Councils. FHL was established as a private limited liability company on or about 27 June 1984. (Agreed Facts – 4, 5). The Appellant was appointed as a Director of FHL on 26 January 1989 until he resigned in August 2000.
(Agreed Facts – 6, 35).

[9] On or about 9 June 1989 FHL increased its nominal capital to $ 25,000,000 divided into 5,000,000 Class A shares and 20,000,000 Class B shares. In or about August 1989 the Government of Fiji provided an interest free loan of $20,000,000 to FAB to be repaid over 10 years from 1989 for the purpose of purchasing shares in FHL. FAB in turn used this loan to buy shares in FHL and was issued 20,000,000 Class B shares. In about the year 2001 the $ 20,000,000 loan was converted by the Government as a grant. Upon the creation of Class B shares, the authority for the Appellant's directorship in FHL was provided through the appointment of the Minister of Fijian Affairs to represent Class B shares pursuant to FHL's Articles of Association. The shareholders as at 30 June 1991 were the Native Land Trust Board, FAB 12 Provincial Councils, Koula Trust, Kadavu Development Co. Ltd and Naitasiri Province Co-op Association Ltd).(Agreed Facts 7, 8, 9, 10).

[10] In or about 1991 the Board of Directors of FHL had proposed to extend its shareholding to Tikinas, businesses and organizations that were wholly owned by Fijians and private Fijian individuals whose names were registered in the Vola ni Kawa Bula. This proposal was approved by FAB on or about 9 August 1991 and stated that a paper would be prepared to be tabled before GCC. On or about the 2 or 3 October 1991, the Appellant made a presentation to GCC about the opening up of FHL shareholding and the document (PE 1) states that it is by the Appellant in his capacity as Financial Advisor to GCC. In or about 1991 GCC endorsed the opening

up of FHL shareholding and on or about 12 November 1991 the said approvals were noted by the Board of Directors of FHL at a meeting when the Appellant was present as a director. (Agreed Facts 11, 12, 13, 14, 15).

[11] On or about 20 November 1991 the Appellant on behalf of Cicia Plantation Co-op Society Ltd ("CPCS") applied for 180,000 Class A shares. On or about 27 December 1991 , the Board of Directors of FHL at which the Appellant was present, approved the issue and allotment of 180,000 Class A shares to CPCS. (Agreed Facts 16,18, Agreed Document PE12A).

[12] On or about 7 February 1992 the Appellant on behalf of Mavana Investments limited *("Mavana")* applied for 200,000 Class A shares. On or about 28 February 1992, the Board of Directors of FHL at which the Appellant was present, approved the issue and allotment of 200,000 Class A shares to Mavana. (Agreed Facts 19, 20 Agreed Document PE 15).

[13] On or about 23 April 1992, the Appellant on behalf of CPCS applied for 220,000 Class A shares and on or about 29 May 1992 the Board of Directors of FHL at which the Appellant was present, approved the issue and allotment of 220,000 Class A shares to CPCS. (Agreed Facts 21, 23, Agreed Document PE 22).

[14] In about March to May 1992, the Appellant on behalf of Q-Ten Investments Limited ("Q-Ten") applied for 200,000 Class A shares. On or about 29 May 1992 the Board of Directors of FHL at which the Appellant was present, approved the issue and allotment of 200,000 Class A shares to Q-Ten. (Agreed Facts 22, 23, Agreed Document PE 22).

[15] The Board of Directors of FHL by a special resolution dated 23 October 1992 decided that it should henceforth be a public company having increased the capital of FHL to $40,000,000 divided into 20,000,000 Class A shares and 20,000,000 Class B shares. (Agreed Facts 24, 25).

[16] From about November 1974 till about February 1977, Leba Laveti Qarase (Appellant's wife) was a director of Mavana. In about 1977 Leba Laveti Qarase resigned and the Appellant replaced her as a director of Mavana. In about August and September 1983, the Appellant resigned and Leba Laveti replaced him as a director of Mavana. On or about 2 September 1991, the Appellant was appointed as a director of Mavana again. Since about November 1974, Leba Laveti Qarase was a shareholder of Mavana. On or about 11 August 1992 the Appellant acquired shares in Mavana. (Agreed Facts 27, 28).

[17] Q-Ten was a company wholly owned by the family members of the Appellant . Since about December 1990 the Appellant was a director and a majority shareholder of about 53% of Q-Ten. On or about 15 December 1991 the Appellant transferred all his shares in Q-Ten to his son Josefa Daucakacaka Qarase. The Appellant resigned as director of Q-Ten on or about 17 January 1992. In or about February 1995 , Q-Ten sold all its shares in FHL. (Agreed Facts 29 to 33).

[18] The Appellant had attended and participated at Board meetings of FHL at which the Board of Directors had decided upon payments of dividends to Classes A and B shares at all material times relevant to the charges of the case (Agreed Fact 36).

**PROSECUTION CASE**

[19] The prosecution based its case regarding the charges on the Appellant being in the public service during the relevant period. That being in the public service the Appellant had in applying for shares as stated above, and being involved in the allotment of shares and payment of dividends to the three companies, namely Q-Ten, CPCS and Mavana had acted in breach of the trust placed in him towards the public and allowed himself to be influenced by interests which benefitted his family, villagers or companies that he was associated with.

[20] The Appellant by applying for shares and being involved in the allotment of shares as aforesaid had abused his position and thereby committed the offence set out in section 111 of the Penal Code, and by being involved in the decision of the Company

in the payment of dividends committed the offence set out in section 109 of the Penal Code.

[21] As set out in the agreed facts, the Appellant had applied for shares on behalf of the said companies and the prosecution case was that he had not declared his interests in those companies when the applications were considered by the Board as there was a conflict of interest, and that he had participated in the decisions to allot the shares which actions were prejudicial to other Fijians and later on regarding the decisions to pay dividends to those companies.

[22] The prosecution led evidence of eight witnesses which was to a great extent facilitated by the Agreed Facts (set out in paragraph 3 above) and the Agreed Bundle of Documents.

**DEFENCE CASE** (as set out in the applications for Permanent Stay and No Case to Answer)

[23] As stated above at paragraph [4], after the trial commenced, the Defence made an application for a Permanent Stay which was disallowed after consideration by the learned trial Judge. The Defence also made an application for No Case to Answer which was also disallowed after consideration by the learned trial Judge. It is thereafter that the Defence commenced to lead evidence of six witnesses, the Appellant having chosen not to give evidence.

[24] The submissions made by the Defence regarding the application for No Case to Answer, revealed that the basis of the Defence case was:

(1) The position that the Appellant enjoyed in that he was not a person employed in public service;
(2) That the elements of the charges leveled against the Appellant were not established;
(3) That the prosecution was seeking to match public law accountability principles in relation to the conduct of the Appellant in Fijian Holdings Limited which was a private Company.

**EVIDENCE LED BY THE PROSECUTION**

[25] The Prosecution led the evidence of Eight witnesses and it would be relevant to give a summary of the evidence of the said witnesses.

[26] The first witness was Mr. Meli Bainimarama. He had been the Permanent Secretary for Fijian Affairs during 1991to 1993 and from 1999 to 2008. He stated that the Fijian Affairs Board (FAB) and the Great Council of Chiefs (GCC) were established under the provisions of the Fijian Affairs Act. The Minister for Fijian Affairs was empowered to appoint Legal and Financial Advisors to the FAB in terms of the Regulations of the Fijian Affairs Board on the recommendation of the Board. The Financial Advisor would provide advice to the FAB and GCC on financial matters. The GCC was established to provide advice to the Government on matters relating to good governance and welfare of the Fijian people – the itaukei.

[27] The Appellant had been appointed as Financial Advisor to FAB in 1979 and had been paid a retainer. Witness was the Secretary of the Fijian Affairs Board when the Appellant was the Financial Adviser.

[28] FHL was established to enable Fijians to enter the commercial sector economy. The Government granted $ 20 million to FAB in 1989 which was invested by FAB with FHL and FAB became a share holder of FHL and took up Class B shares. The Appellant was appointed as a Director of FHL to represent the B Class shares. There was a proposal by FHL in August 1991 to the Minister to encourage opening of shares to Tikina Councils and Fijian individuals which was approved by the FAB and the GCC by October 1991. There had been a demand for shares in FHL.

[29] Second witness – Sitiveni Jitoko Weleilakeba. He had joined FHL in 1987 as Company Secretary and in February 1992 was appointed CEO of FHL. He was Managing Director of FHL from 1996 to June 2006. He had been the Company Secretary when the Appellant was a Director of FHL. FHL had been established in November 1984 to accelerate indigenous Fijian participation in commerce and industry in Fiji. FHL was a private company at the beginning with the shareholders

limited to 50 and the shareholders had been the 14 Provincial Councils, the FAB, NLTB and Koula Trust.

[30] He had recorded the minutes of the Board meetings and the draft minutes of the previous Board meeting had been circulated before the next Board Meeting among the Directors and the Board members had the opportunity to make amendments in the minutes if there were any corrections or omissions. Before the minutes had been confirmed the Chairman would normally ask the Directors if there were any corrections to be made before there was a move to confirm the minutes. He said that Directors had a duty to declare their interest or involvement in a matter to be discussed and decided upon by the Board. Where a Director made such a declaration then the Chairman would ask him to leave the meeting room and would proceed to make a decision before he was recalled to continue with the meeting. If a declaration was made it was recorded in the minutes. Usually the decisions recorded were unanimous. If a specific Director had asked the Chairman to record his dissent it would be recorded. He had not come across a situation where a director had made such a request. If a Director had abstained from voting such abstention would be recorded in the minutes.

[31] On 26.6.91 (Document PE 4) he as Secretary had sent a letter to the Minister of Fijian Affairs regarding sale of FHL shares to Tikinas and private Fijians the objective being to reduce dependence on Government funding, to widen participation of the Fijian community and to spread the benefit widely to the community. On this proposal being approved by the FAB and GCC there had been a tremendous interest shown by Tikinas and Fijian individuals to take up FHL shares. At the meeting of the Board of FHL on 12th November 1991 the approval for the sale of shares was recorded as the Ministry of Fijian Affairs had sent a letter granting such approval on 14th October 1991. The Appellant had signed an application for purchase of shares by CPCS and sent to FHL on 20th November 1991. The information regarding opening of shares was conveyed to the Provincial Councils after the 24th of December 1991.

[32] At the Board meeting held on 27th December 1991 it had been resolved to issue shares to four companies which included the issue of 180,000 shares to CPCS. No dissent nor record of any interest by any Board member had been recorded in the

minutes of that Board Meeting. On 7th February 1992 the Appellant had signed an application for purchase of 200,000 shares for Mavana Ltd. The witness too had made an application to purchase shares on behalf of Stiks Investment Ltd and Apta (Pacific) Property Ltd, and he as CEO had recorded his involvement in those Companies which was recorded in the minutes of 28th February 1992 (PE 15). He had absented himself after declaring his interest and had not participated in the decision regarding allocation of shares to that Company. At that same meeting Mavana Ltd had been allotted 200,000 shares. There had been no declaration of interest by the Appellant recorded in those minutes. A list of Companies which had applied for shares but not yet allotted were also included in the said minutes. The said list included Q Ten Investments Ltd as having applied for 200,000 shares. On 23rd April 1992 Appellant had signed another application to purchase 220,000 A class shares for CPCS. The minutes of the meetings of the FHL Board of Directors held on 29th May 1992 had recorded that Q Ten Investments limited had been allotted 200,000 shares and CPCS had been allotted 220,000 shares. There had been no declaration of interest by any Board member in those minutes.

[33] The applications for shares had been dealt with on the basis of first come first serve basis. He said that some of the applicants who had applied for shares were written to stating that they could not be allotted shares as the members were restricted to 50 and that the shares had been taken up. As at 30th June 1992, CPCS had been the second largest shareholder, the fourth largest shareholders had been Mavana Investments and Q Ten Investments Limited.

[34] At the 7th AGM of FHL held on 30th September 1992, the Appellant had been appointed to vote on behalf of Q Ten and Mavana Investments Ltd. At that meeting it was resolved to make the payment of a final dividend. He stated the manner in which the dividends were paid to the shareholders as set out in the documents. Some had been direct payments and in some to the Fiji Development Bank to cover up the loans taken by such companies.

[35] He also stated that the Appellant facilitated share acquisitions not only for the Companies like CPCS, Mavana and Q Ten but also for many of the Provincial Council Corporate Entities. The only other Director who applied and got shares was

Mr. Joe Mar. He also said that FHL was a unique Company and that there was no other Company in Fiji like that except Unit Trust of Fiji.

[36] He produced letter dated 7/5/1992 (PE 19) which was a request for purchase of shares on behalf of two Fijian companies asking the Directors to give up some of their shares and to accommodate them.

[37] FHL had become a public company on 27th October 1992 and the demand for shares had become very high and shares had even been oversubscribed. Throughout his evidence he was referred to the documents that had been agreed upon and the attention of the Assessors were drawn to those documents when the documents were produced.

[38] Third Witness – Ratu Timoci Vesikula

He had been the Minister for Fijian Affairs and Regional Development from 1992 June to October 1993 and was also the Deputy Prime Minister. He had also been a member of the GCC established under the Fijian Affairs Act. He stated that the FAB was the Secretariat of the GCC and explained the role of the GCC. He set out the purpose of establishing FHL which was in 1984 being the need for greater Fijian participation in areas of industrial and commerce in Fiji for the Fijian people to contribute more to the economy of the nation. He also spoke about the Fijian Society being communalistic where everything was shared. In June 1992 the Appellant was already the Financial Advisor to the FAB and the GCC. The Appellant had been involved in the establishment of FHL from the very beginning and was appointed as a Director to represent the Class B shares. He had expected the Appellant to be the protector of the interests of the Fijian Affairs and the GCC, the institutions of the Fijians, Provincial Councils, Tikina Councils and Village Councils. The Appellant was in FHL as a Director on appointment of the FAB to protect the interests of the Fijian people at large. He said that it was the Appellant's fiduciary duty to protect the interests of the Fijian Affairs, the GCC and other Fijian Institutions under them. Though the Minister of Fijian Affairs was the ultimate protector, as Financial Advisor to the FAB and to the GCC, the Financial Advisor had a greater responsibility there because of that role. He had not come across any declaration of

interests by the Appellant in respect of Q-Ten, CPCS and Mavana in the files of the Ministry of Fijian Affairs nor in the GCC. When he assumed office, he had occasion to see the file pertaining to FHL shares and was shocked to see that 80% of A Class shares were owned by Fijian families and the Provincial Councils, NLTB, FAB and the Koula people owned only 20% shares as the Company was established for Fijian Institutions on behalf of the Fijian people.

[39] Fourth Witness – Isireli Mokunitulevu

He was a School Teacher and he explained the position of CPCS where the shareholders were Mataqalis and it had been established in 1970. He was a shareholder and was the Chairman of the Board of Directors of CPCS. The Appellant had been an Advisor from about the 1980's to 2008 and even thereafter. On the Appellant's advice the Company had sold properties in Suva to buy shares in FHL. The Appellant was from the Island of Cicia and Village of Mavana in the province of Lau. He and the Appellant had been the signatories to the Bank Account of CPCS at Westpac. The Appellant had managed the properties of CPCS. He was not paid for his services. The CPCS earned about $80,000 annually from the shares in FHL. The company had given $2000 to the Appellant for elections.

[40] Fifth Witness – Adriu Ledua Raumaiyake

He had been the Secretary of CPCS from 1982 for 13 years. He stated that the Appellant was its Advisor.

[41] Sixth Witness – Epeli Ulunawainovo Racule

He was the Senior Operational Risk and Compliance Officer of Westpac Bank. He stated that according to document PE 31 the Appellant had signed as Trustee for CPCS and in document PE 33 he had signed as Director in those documents regarding CPCS and the Bank.

[42] Seventh Witness – Abhi Ram

The Acting Registrar of Companies. He set out the share distribution of Q Ten as shown in the document PE 38 (Return of allotment of shares) as at 12/12/90 which showed that the Appellant was the Major share holder while his wife and children

too held shares. He also referred to document PE 39 which showed the particulars of Directors and Secretaries of Q Ten which indicated that the Appellant was appointed as a Director on 13/12/1990 and the appointments of the other Directors as well as the Secretary of the Company. He also stated that according to PE 40, which was the Annual Return of Q Ten dated 18/5/92 the Appellant had transferred his shares to his son Josefa on 15/12/1991. According to document PE 41 the Appellant had resigned as Director on 17/1/92 but remained as Secretary.

[43] Eighth Witness – Salimoni Karusi

He was a Barrister and Solicitor and the Senior Legal Officer of Fiji Development Bank. He stated that the Fiji Development Bank was established under the Fiji Development Bank Act (Cap.214) and that the Fiji Government was the only shareholder. The Appellant was the Chairman of the Bank . According to document PE 28 minutes of the Board Meeting of 30.4.1992, the Appellant had been absent when the loan of $180,000 had been approved to Q Ten.

**EVIDENCE FOR THE DEFENCE**

[44] First witness Usaia Ratumaiwai Ravono

He was the Operational Officer of Westpac Bank. Speaking about document PE33 he said that it was a notice of authority and taken at the opening of an account. It contained a form which indicated payment of dividends to shareholders of CPCS.

[45] Second Witness – Bai Tikokoro

He was a Shareholder of CPCS. He stated that the Appellant was the Financial Advisor of CPCS.

[46] Third Witness – Navitalai Cukucaka

Bank Officer from FJD being the General Manager Business Risk Services. The Fijian Loan Scheme had started a soft loan scheme for Fijians in VKA in 1975 and the scheme financed the purchase of shares also. During that time there had been a rush to the Bank. The Bank financed FHL shares in 1991. Lots of people were interested in buying FHL shares. The Appellant and his wife had guaranteed the loan

to Q Ten. The dividend income from FHL to Q Ten was $40,000, the loan payment was $25,000 and the profit was $ 15,000 per annum according to the particulars in documents PE 44 which was a Board paper of FJD regarding Q Ten.

[47] Fourth Witness – Naulumatua Josateki Koroi

Shareholder of Mavana. Appellant was a Director of Mavana and was related to him. The Appellant was also the Financial Advisor of Mavana. They had obtained a loan from FDB. The Villagers had raised 20% of $200,000. The Appellant had told them that he could arrange a loan from FDB. The Annual Return dated 24/2/95 – PE 69 showed that Leba Qarase was the 4th largest shareholder of Mavana. The Appellant had been a Director and Secretary. The Annual Return for 1999 PE 70 showed that Q Ten had the 2nd largest number of shares in Mavana being 42000 which had increased to 48000 in the year 2000.

[48] Fifth Witness – Josua Toa

He was a shareholder of Mavana. The Appellant was the Financial Adviser and had recommended buying FHL shares at the Village Meeting in 1991.

[49] Sixth Witness – Josaia Naivalurua Mar

He had been the General Manager Shell Fiji from 1988 to 1992 and had thereafter held several key positions as Director of Reserve Bank of Fiji, Chairman of Yaqara Pastoral Company, Commissioner in Fiji Public Service Committee, Director of FHL and Chairman of Fiji Electrical Authority from 2001 to 2007 after retiring from Shell Fiji.

[50] He had been appointed to the FHL Board in 1989 on the request of the Minister of Finance Mr. Josefata Kamikanica. He stated about the dominance of the Chairman of the FHL Mr.Cupitt at Board Meetings and that the Minutes of the Board Meetings reflect the Resolutions, the decisions and actions taken at such meetings.

[51] He had no special duty as a Director to the Fijian Institutions. In 1991 there was an effort to get more indigenous Fijians to participate in FHL. He had a family Company and he had got the approval from the Board to buy shares in FHL. The

Chairman had requested them to declare their interests and not to take part in the vote but to be there to answer any questions with regard to their interests. He stated that he would have voted for others but not for his company and that he would have abstained and that he would have declared his interest. He could not recall any formal disclosure made by the Appellant regarding his involvement with CPCS, Mavana and Q Ten. He stated that the minutes of the relevant Board Meetings, PE 12A, PE 22, PE 15 did not state about any disclosures. In the Board Minutes of 31/7/92 there was a statement made by Director Barrack to the effect that the Board should consider and pursue a policy for allotment of shares which will ensure an equitable distribution of shares within the Fijian community. The Board members voted on the payment of dividends and that he could not recall any dissent or disagreements to pay dividends. The dividends on Class "A" shares had been attractive and were higher than the rate of interest paid on loans from FDB.

[52] He was referred to the Memorandum and Articles of Association of FHL, specially Clause 77 which referred to the powers of the Minister of Fijian Affairs to appoint six Directors after consultation with the Minister of Finance and the Prime Minister. Clause 85 thereof had referred to disclosure of interest directly or indirectly and the duty of the Secretary of the Company to record any disclosures made by Directors. He stated that the Board Minutes of Meetings were circulated before the next meeting and that there was an opportunity to correct or have the minutes corrected at the next meeting if there was an omission of a declaration of interest. He said that it was a concern for him that his interest was not recorded and that it is a matter of regret as to why he did not get it corrected. He also stated that the disclosure made by the CEO of the Company regarding his interests in Stiks Ltd had been recorded in the minutes.

**LAW RELATING TO THE CHARGES**

[53] The charges against the Appellant as stated above para [2] were six counts (counts 1 – 6) of "Abuse of Office" contrary to s.111 of the Penal Code and three counts (7 – 9) of "Discharge of duty with respect to property to which he has a private interest" contrary to s.109 of the Penal Code (Cap. 17).

s.111 - *"Any person who, being employed in the public service, does or directs to be done, in abuse of authority of his office, any arbitrary act prejudicial to the rights of another, is guilty of misdemeanor.*

*If the act is done or directed to be done for purpose of gain, he is guilty of a felony."*

[54] The 1st Count against the Appellant was as follows:

*Statement of Offence (a)*

*ABUSE OF OFFICE: Contrary to Section 111 of the Penal Code Cap.17.*

*Particulars of the Offence (b)*

*LAISENIA QARASE, in or about March to May 1992, at Suva in the Central Division, whilst being employed in the public service as:*

*a) Director of Fijian Holdings Limited "FHL");*
*b) Financial Advisor of the Fijian Affairs Board ("FAB") ;and*
*c) Advisor to the Great Council of Chiefs ("GCC").*

*And in the course of and in relation to his public office, and in abuse of the authority of his office, did an arbitrary act, in that he applied in the name of Q-Ten Investment Ltd ("Q-Ten") for the issuance and allotment of Class "A" shares in FHL, in priority to other eligible Provincial and Tikina Councils, FAB and indigenous Fijian people, and whilst doing so failed to disclose his interest in and relationship with Q-Ten to FHL , FAB or GCC, for the purpose of gain, namely to benefit and give an unfair advantage to the shareholders of the said Q-Ten; which is an act prejudicial to the rights of Provincial and Tikina Councils, FAB and all other eligible indigenous Fijian people.*

[55] The 2nd Count against the Appellant was:

*Statement of Offence (a)*

*ABUSE OF OFFICE: Contrary to Section 111 of the Penal Code Cap.17*

*Particulars of the Offence (b)*

*LAISENIA QARASE, in or about April and may of 1992, at Suva in the Central Division, whilst being employed in the public service as:*

*a) Director of Fijian Holdings Limited ("FHL")*
*b) Financial Advisor of the Fijian Affairs Board ("FAB") and*
*c) Advisor to the Greater Council of Chiefs ("GCC"),*

*And in the course of and in relation to his public office and in the abuse of the authority of his office, did an arbitrary act, in that he facilitated the approval of the issuance and allotment of Class "A" shares in FHL, in priority to other eligible Provincial and Tikina Councils, FAB and indigenous Fijian people, to Q-Ten Investment Ltd ("Q-Ten") and whilst doing so failed to disclose his interest in an relationship with Q-Ten to FHL, FAB or GCC, for the purpose of gain, namely to benefit and give an unfair advantage to the shareholders of the said Q-Ten; which is an act prejudicial to the rights of Provincial and Tikina Councils, FAB and all other eligible indigenous Fijian people.*

[56] The 3rd and 4th Counts were on similar lines in relation to the application for the issuance and allotment of shares on behalf of Cicia Plantation Coop Society Ltd ("CPCS") and facilitating the approval of the issuance and allotment of shares to CPCS.

[57] The 5th and 6th Counts were on similar lines in relation to the application for the issuance and allotment of shares on behalf of Mavana Investments Ltd ("Mavana") and facilitating the approval of the issuance and allotment of shares to Mavana.

s.109 – "*Any person who, being employed in the public service, and being charged by virtue of his employment with any judicial or administrative duties respecting property of a special character, or respecting the carrying on of any manufacture, trade or business of a special character, and having acquired or holding, directly or indirectly, a private interest in any such property, manufacture, trade or business, discharges any such duties with respect to the property, manufacture, trade or business in which he has such interest or with respect to the conduct of any person in relation thereto, is guilty of misdemeanor.*

[58] The 7th Count against the Appellant was:

> *Statement of Offence (a)*
>
> *DISCHARGE OF DUTY WITH RESPECT TO PROPERTY IN WHICH HE HAS A PRIVATE INTEREST: Contrary to Section 109 of the Penal Code Cap.17*
>
> *Particulars of the offence (b)*
>
> *LAISENA QARASE, BETWEEN AND INCLUDING ABOUT May 1992 and February 1995, at Suva in the Central Division, whilst being employed in the public services as :*
>
> *(a) Director of Fijian Holdings Limited ("FHL")*
> *(b) Financial Advisor of the Fijian Affairs Board ("FAB"); and*
> *(c) Advisor to the Great Council of Chiefs ("GCC"),*
>
> *And, being charged by virtue of his employment, with the administrative duties respecting the business of FHL and/or the property namely the shares of FHL (both Class "A" and "B" shares), such business and/or property being of a special character, namely being held for the benefit of indigenous Fijian people and to accelerate and broaden Fijian participation in commercial and industrial sectors, and having acquired a private interest in such business and/or property being 200,000 Class "A" shares in FHL by means of a Qarase family company being Q-Ten Investments Ltd, discharged his administrative duties at FHL with respect to such business and/or property in which he has such interest.*

[59] Count 8 was on the same lines as Count 7 in relation to 180,000 Class "A" shares in FHL in November 1991 and 220,000 Class "A" shares in FHL in April 1992 of Cicia Plantation Co-op Society Ltd.("CPCS") during the period November 1992 and August 2000.

[60] Count 9 was on the same lines as Count 7 in relation to 200,000 Class "A" shares in FHL of Mavana Investments Ltd. ("Mavana") during the period February 1992 and August 2000.

[61] The common law dealt with misconduct by holders of public office in the course of carrying out their public duties in respect of their offices. In Fiji there have been

cases where charges have been levelled against holders of public office in terms of the provisions of S.111 of the Penal Code on the basis of abuse of office.

[62] The main elements in S.111 which require proof are:

(1) That the accused was employed in public service;
(2) That he did an arbitrary act;
(3) The act was in abuse of the authority of his office;
(4) The act was prejudicial to the rights of another.
It constitutes a felony where
(5) The act was done for the purpose of gain.

[63] (i) Employment in the public service

S.4 of the Penal Code provides a wide definition of "person employed in the public service". For the purposes of the present case a consideration of the following provisions would suffice :

"person employed in the public service" means any person holding any of the following offices or performing the duty hereof whether as a deputy or otherwise, namely –

(i) Any civil office including the office of Governor General the power of appointing a person to which or of removing from which is vested in Her Majesty or in the Governor General in a Minister or in any Public Commission or Board; or
(ii) Any office to which a person is appointed or nominated under the provisions of any Act or by election;

(iii) Any civil office, the power of appointing to which or removing from which is vested in any person or persons holding any office of any kind included in either of paragraphs (i) or (ii) ; or …….

[64] (ii) Arbitrary act

In **Tomasi Kubunavanua v The State** Criminal Appeal No.AAU0008 of 1992 (5th May 1993) a Police Officer was charged in terms of S.111 of the Penal Code when he had removed a screen and video deck which were productions in a pending case from the exhibit room of the Police Station. In interpreting S.111 the Court stated that the word "arbitrary" in the section indicated nothing more than the exercise of one's own free will. In relation to the interpretation that should be given to the term "rights" in s.111 it was stated that it has a wide meaning to cover a situation where the police officers who were expected to be responsible for the items meant the entitlement of those officers not to be exposed to criticism, contumously or adverse official action by reason of the wrongful acts of a superior officer.

In **Beniamino Naiveli v The State** Criminal Appeal No. CAV0001 of 1994 (23rd November 1995) where an Assistant Commissioner of Police was charged under S.111 it was stated that :

> *"Central to the commission of any offence under s.111 is the doing or directing to be done an arbitrary act, "in abuse of the authority of" the accused's "office". What differentiates something done in abuse of office from something not done in abuse of office in many cases will be the state of mind of the accused. An act done or direction given, which is otherwise within the power of authority of an officer of the public service, will constitute an abuse of office, if it is done or given maliciously with the intention of causing loss or harm to another or with the intention of conferring some advantage or benefit on the officer. They are just two instances of abuse of office. No doubt other instances may be given. But it would be unwise for us to attempt an exhaustive definition of what constitutes an abuse of office, to use a shorthand description of the statutory expression "abuse of the authority of his office."*

The Court went on to state that:

> *"Although the provisions of S.111 do not reflect the language in which the common law offence of misbehaviour in a public office has been expressed, some guidance in the interpretation of the section is provided by the English authorities on the common law offence. In R. v Dytham (1979) 3 All ER 641 Lord Widjery C.J.*

> *pointed out (at p.643) that in most of the 18th and 19th century cases the misconduct asserted involved some corrupt taint but that this was not a necessary incident of the offence. His Lordship went on to say that in some cases the conduct impugned cannot be shown to be misconduct unless it was done with a corrupt or oblique motive."*

Jesuratnam J in **State v Humphrey Kamsoon Chang** Criminal Case No. HAC 0008 of 1991 (1 November 1991) stated that an "arbitrary act" is an autocratic act, an act not guided by normal procedures but by the "whims and fancies" of the accused.

In **State v Vakaloloma** HAA 0042 of 1993 (15th October 1993) Fatiaki J (as he then was) stated that "the arbitrary" nature of the offending act(s) is a question of fact and inference and is undoubtedly coloured by its close association with the alleged abuse of authority by the accused.

In **State v Rokovunisei** Criminal Case No. HAC 37 of 2010 (26th April 2012) the meaning of "arbitrary act "was said to include an unreasonable act, a despotic act which is not guided by rules and regulations but by the whims of the accused.

In **Mahendra Motibhai Patel and Another v. Fiji Independent Commission Against Corruption** Criminal Appeal No.AAU0039 of 2011 (Judgment of 28th October 2011), Marshall JA traced the history relating to Misconduct in a public office in the common law and cited several judgments from the United Kingdom and Hong Kong (**Shum Kwok Sher v HKSA** FACC 1 of 2002 dated 10th July 2002) and also the decision in **Beniamino Naiveli v The State** (supra). In Patel's case, Patel who was the Chairman of Post Fiji, was charged for abuse of office as he had done an arbitrary act, namely authorizing the purchase of an external Seiko clock from Prouds a company in which he had a significant financial interest.

At para 146 it was said:

> *"Applying the principles cited in paragraph 15,16, and 17 above, from Beniamino Naveli v The State, I am of the view that in the context of "misconduct by partiality" "any arbitrary act prejudicial to the rights of another" means no more and no less*

*than what is required for the common law offence of "misconduct by partiality". Therefore a public official who in the context of "misconduct by partiality" willfully and intentionally fails to put a proposed supply contract out of tender, thereby failing to perform a duty to which he is subject by virtue of his office, does an "arbitrary act prejudicial to the rights of another." The emphasis in this strand of the offence is upon internal misconduct resulting in partiality. That act is "arbitrary and despotic" although the words are more suited to external acts of misconduct such as occurred in the case Beniamino Naiveli."*

As regards the culpability of Patel, Marshall JA stated :

*180. "There is no doubt that this misconduct was a serious matter and that Mr.Patel intended the consequences as well as the actions involved so that the offence was willful and intentional. It was a culpable act without any reasonable excuse or justification."*

*181. This was misconduct in a public office. In terms of Section 111 it was an "arbitrary act in abuse of Mr.Patel's authority of office and was prejudicial to the rights of Post Fiji Limited" It was also done for the purpose of Mr.Patel's personal gain."*

From the decision in Patel, the meaning that can be given to an "arbitrary act" can be determined in relative terms to the aspect of "gain" referred to in S.111 which would in turn be prejudicial to the rights of another.

[65] (iii) Acting in abuse of the authority of office

It has to be established that the act committed by the person holding public office was an arbitrary act done in abuse of the authority of his office. This would mean that the act complained of should be done under colour of his office where use is made of such office by the accused. In determining this element, the state of mind of the accused would become relevant.

In **Naiveli v State** (Supra) the Supreme Court held at page 3:

> *"What differentiates something done in abuse of office from something not done in abuse of office in many cases will be the state of mind of the accused. An act done or direction given, which is otherwise within the power or authority of an officer of the public service, will constitute an abuse of office if it is done or given maliciously with the intention of causing loss or harm to another, or with intention of conferring some advantage or benefit on the office. They are just two instances of abuse of office. No doubt other instances may be given. But it would be unwise for us to attempt any exhaustive definition of what constitutes an abuse of office, to use a shorthand description of the statutory expression 'abuse of the authority of the office.'"*

It would seem therefore that giving someone an advantage or favour would come within the ambit of abuse of office.

[66] (iv) The act being prejudicial to the rights of another.

An act which would result in some advantage or favour to oneself, friends, relations, individuals or corporate would constitute an arbitrary act prejudicial to the rights of another as was stated in **Patel v FICAC** (Supra).

[67] (v) The act being done for the purpose of gain

Gain can be for the accused himself or to others. Marshall JA dealt with the aspect of gain referred to in S.111 namely, "done for the purpose of gain", and related it to the "arbitrary act" and stated :

> *166. "This gives rise to what is to be proved in respect of the codified additional element of "done for the purpose of gain". In my opinion if it is done for the purpose of gain to the public officer or to a friend or relative, corporate or individual this element is proved without more. The usual situation is that it is presumed as in* ***Shum Kwok Sher*** *that the Public officer "gains" by benefitting the friend or relative, corporate or individual".*
>
> *167. ....But in respect of Mr. Patel the motive for which the relevant acts are done or not done is the purpose of gain to himself and to Motibhai Limited of which he is Chairman and a 12 ½ percent shareholder. This motive attracts the aggravated version of the offence under section 111. If the purpose of gain is for himself is for himself for Motibhai Limited or for relatives or friends,*

*corporate or individual then this element of the offence is satisfied. Motibhai Limited is clearly a corporate friend or relative. The prosecution do not have to prove that an actual gain is realized by anyone and it is "purpose of gain" only that must be proved."*

[68] The main elements of S.109 of the Penal Code are:

(i) The accused's employment in the public service
(ii) By virtue of his employment being charged with administrative duties respecting property of a special character.
(iii) He acquired or was holding, directly or indirectly a private interest in such property or business etc.
(iv) He discharged his administrative duties with respect to such property business etc.

[69] As regards the application of S.109 there are no cases in Fiji which have had occasion to consider its application. The same provision is found in the Penal Codes of some common law jurisdictions such as British Virgin Islands, Australia, Papua New Guinea, Solomon Islands, Gilbert Islands, Tuvalu. The Privy Council had occasion to consider its application in a case from British Virgin Islands, **Wheatley v The Commissioner of Police of the British Virgin Islands** [2006] UKPC 24 (4 May 2006). S.82 of the British Virgin Islands has the same provision as S.109 of the Fiji Penal Code.

[70] In Wheatley's case he was employed by the Government as Financial Secretary and was bound by orders and regulations applicable to the conduct of public officers. These orders and regulations forbade an officer from engaging in any private activity which might conflict with his official duties or responsibilities, or which might place him or give the appearance of placing him in a position to use his official position for his private benefit. An officer who formed the opinion that any private activity in which he was engaged against this prohibition was obliged to declare it fully to the Governor and either discontinue the activity or divest himself of the interest or undertake not to pursue the activity save on conditions laid down by the Governor. No government contract was to be let to a public officer in the contracting

department or to any partnership or company of which he was a member or director unless the interest had been disclosed and permission given to proceed. If an officer considered that he was being required to act illegally, improperly or unethically he was obliged to report the matter. One of the duties of the first appellant was to administer, and act as accounting officer for, certain public works projects.

[71] The Appellant, Wheatley, had a direct interest and played a very prominent role in, and acted as a management consultant to two business enterprises. He did not disclose his interest in the two enterprises and in two construction contracts he signed on behalf of the government. He had been one of the signatories for the payment vouchers and payments for those contracts.

[72] The Privy Council confirmed that Wheatley, the appellant had a direct interest and played a very prominent role in, and acted as a management consultant to, two enterprises owned by the 2nd appellant.

[73] Lord Bingham in his judgment set out the strictness with which this section was applied:

> *"In the Table of Offences and Penalties in Schedule 1 to the code, the nature of the section 82 offence is summarized as "Public Officer exercising powers in respect of matter in which he has private interest." The object of the section is plainly to penalize public servants who discharged public duties when subject to a private interest of their own in relation to the subject matter of their public duties. As Lindley L J said of any earlier English enactment to like effect (**Nutton v Wilson** (1889) 22 QBD 744, 748, "The object obviously was to prevent the conflict between interest and duty that might otherwise inevitably arise." It is not an ingredient of the offence that the public should have suffered detriment as a result of the conflict. Nor is it an ingredient of the offence that the public servant should have suffered detriment as a result of the conflict. Nor is it an ingredient of the offence that the public servant should have acted dishonestly, fraudulently or maliciously. It will be enough that he acted knowingly. He need not be shown to have profited directly or indirectly from the transaction because of his private interest, but in most cases (as in this) he is no doubt likely to have done so. The code provides no defence to a charge under the section when the existence of the conflict is proved. The English authorities illustrate the strictness with which comparable provisions have been applied: see **Nutton v***

> ***Wilson**, above; **England v Inglis** [1920]2KB 636; **Rands v Oldroyd** [1959] 1 QB 204. Such strictness is necessary to ensure that public powers are exercise to serve exclusively public purposes."*

[74] The decision in Wheatley's case clearly illustrates the application of the elements of S.109 set out above. One of the most important aspects arising from that decision is the fact that it is not necessary to establish dishonest, fraudulent or malicious conduct on the part of the accused, it being sufficient that the accused had committed the act knowingly which shows the strictness with which the section is applied.

**CONSIDERATION OF THE GROUNDS OF APPEAL**

[75] As a preface to the consideration of the grounds of appeal filed by the Appellant it would be relevant to consider the position of the case before the learned High Court Judge addressed the Assessors in his summing up. The present case is unique in that it involved the actions of the Appellant in relation to his position as a Director of FHL regarding the application of shares in respect of companies where it was shown by the prosecution that he had an interest, his presence and voting at Board meetings when such applications were considered for allotting of shares and his presence and voting for the payment of dividends to the shareholders which included the companies where he was said to have an interest. No such case had come up in Fiji prior to this.

[76] As stated above before leading evidence the prosecution had outlined their case and had proceeded to lead evidence. At the commencement of leading evidence the Assessors had been given copies of the Agreed Facts (referred to above in para.[3]) and the agreed bundle of documents. During the process of leading evidence of the prosecution witnesses, the Assessors had been referred to the relevant material in the Agreed Facts and the bundle of documents.

[77] At the conclusion of the Prosecution case, the applications for Permanent Stay and No Case to Answer had been considered and dealt with by the learned High Court

Judge and gave his rulings regarding same. By this process during which exhaustive written submissions had been tendered by both parties, the nature of the prosecution case and the nature of the defence was made known to the learned High Court Judge.

[78] The evidence given on behalf of the defence was to the effect that they substantiated most of the positions taken up by the prosecution regarding the Appellant's conduct in relation to which the charges had been leveled against the Appellant and his interests in relation to the three companies, Q Ten, CPCS and Mavana.

[79] At the conclusion of the evidence for the defence, by their closing addresses before the learned Judge and the Assessors, they made out their cases, during which process both parties referred to the evidence and the law relating to the charges in great detail. After his summing up, the Judge asked the prosecution and defence counsel whether they sought any re-direction on any matters of law to which the response by the Appellant's Counsel was in the negative.

[80] The unique position in this case at the close of the defence case was that almost the entirety of the factual position was not in dispute as most of them were covered by the agreed facts and the agreed bundle of documents.

[81] As set out in paragraph [5], 33 grounds of appeal were filed on behalf of the Appellant. Counsel for the Appellant when making his submissions before the Full Court stated that he was not pursuing some of the grounds of appeal. One of the main grounds that was taken up on behalf of the Appellant **during the course of the trial** was that the Appellant was not in public service.

[82] **Before this Court, it was conceded by Counsel for the Appellant that the Appellant came within the definition of public servant in S.4(i) of the Penal Code.** As revealed in the Agreed Facts, agreed documents and evidence, the Appellant had been appointed as the Financial Advisor of the Fijian Affairs Board on 8 March 1979 and was also the Financial Advisor of the GCC until his resignation from such positions in March 1999.

[83] The main contention of Counsel for the Appellant throughout his submissions before this Court was that the prosecution had failed to prove the charges against the Appellant and that the learned High Court Judge's summing up to the Assessors was inadequate. In fact Grounds 1 to 20 of the grounds of appeal relate to the inadequacy of the summing up and are repetitive.

[84] It would be relevant to set out the position of Fijian Holdings Limited of which the Appellant was a Director, as the main contention of the Appellant was that the said Company was a private company and that the prosecution was trying to equate matters relating to that private company to that of a public institution.

[85] As it transpired from the Agreed Facts, the documents and the evidence, in 1984 the Great Council of Chiefs (GCC) endorsed the incorporation of Fijian Holdings Limited (FHL) as a private limited liability company to be the investment vehicle of the indigenous people in Fiji, and to accelerate and broaden their participation in commerce and industries. The initial shareholding was restricted to Native Land Trust Board, FAB and Provincial Councils. FHL was established on 27th June 1984 as a private limited liability company. The Appellant was one of the architects of FHL who had done studies about a similar institution in Malaysia.

[86] The initial capital was $2,000,000 which was later increased to $25,000,000 divided into 5,000,000 Class "A" shares $ 1.00 each and $20,000,000 Class "B" shares of $ 1.00 each in 1989. The holders of the Class "B" shares were entitled to appoint through the Minister for Fijian Affairs, 6 directors out of the maximum of 9 in terms of Article 77 of the Articles of Association of the Company. Such directors were to be appointed after consultation and agreement with the Minister of Finance and Prime Minister.

[87] On 26 January 1989 the Appellant was appointed a director of FHL. Upon the creation of Class B shares and with the granting of $20 million loan by the Government, FAB became the only shareholder of B Class shares and the Appellant was appointed to represent Class B shares through the Minister of Fijian Affairs. He resigned in August 2000 as director of FHL.

[88] According to Ratu Timoci Vesikula, who was Minister for Fijian Affairs and Regional Development from 1992 to October 1993 and who was also the Deputy Prime Minister, and who gave evidence for the prosecution, the Appellant had played a major role in FHL from the beginning and that his appointment as director of FHL was to protect the interest of the Fijian people at large, and that it was his fiduciary duty to protect the interests of the Fijian Affairs, the GCC and other Fijian Institutions under them.

[89] Although Counsel for the Appellant was referring to FHL as an ordinary private company, it was not so as seen from the above facts. It was a unique company though incorporated as a private company. There was a specific purpose in establishing same. By Article 77 six of its directors had to be appointed by the Minister of Fijian Affairs with the concurrence of the Minister of Finance and the Prime Minister and its shareholders were clearly defined as being The Fijian Affairs Board, the NLTB and the provincial Councils. When it wanted to extend its shareholding to Tikinas, businesses and organizations that were wholly owned by Fijians and private Fijian individuals whose names were registered in the Vola ni Kawa Bula it had to get the approval of the FAB and the GCC. These are special characteristics which are not found in mere private companies.

[90] The Appellant's relationship with the FAB and the GCC is also significant in dealing with the grounds of appeal. According to the Agreed Facts he was appointed as the Financial Advisor of the FAB and was paid a retainer and he was also the Financial Advisor to the GCC. It was submitted on behalf of the Appellant that there was no position called Financial Advisor to the GCC, but the evidence of the prosecution witnesses were otherwise. Further in the document P1 which was a presentation by the Appellant to the GCC he was designated as Financial Advisor to the GCC.

[91] It would also be relevant to consider the relationship of the Appellant with the three companies, Q-Ten, CPCS and Mavana as the charges relate to his interests in them which were not in dispute as revealed by the agreed facts, the documents and the evidence.

[92] Q-Ten was a family company of the Qarase family, and in December 1990 he was a Director and the major shareholder while his wife and children were the other shareholders. On 15 December 1991 he transferred all his shares to his son and on 17 January 1992 he had resigned as Director. Between March and May 1992 he had applied to FHL for 200,000 shares on behalf of Q-Ten. The Appellant had guaranteed Q-Ten's loans with Fiji Development Bank togehtehr with FHL shares as security in January 1995.

[93] The Appellant's wife had become a shareholder of Mavana in November 1974. In September 1991 the Appellant was a Director, Company secretary and Financial Advisor of Mavana while his wife was a shareholder. The Appellant applied for 200,000 shares in FHL on behalf of Mavana. In August 1992 he became a shareholder of Mavana. By 31 December 1999 Q-Ten became the second largest shareholder of Mavana (11%) and his wife was the fourth largest shareholder. By the year 2000 Q-Ten shareholding had increased to 13%.

[94] As at 1990 the Appellant was the Financial Advisor, Trustee, Signatory and Director of CPCS. On 20 November 1991 he applied for 180,000 shares of FHL on behalf of CPCS. On 23 April 1992 he had applied for 220,000 shares of FHL on behalf of CPCS.

[95] There was no dispute regarding the acts alleged against the Applicant regarding his presence at Board Meetings of FHL when the application for shares were taken up for purposes of allotment and for purposes of declaring dividends according to the Agreed Facts, the documents and the evidence.

[96] The area of dispute regarding the Appellant's conduct during Board Meetings of FHL when shares were allotted and dividends were declared was as regards any disclosures being made by him during such processes according to the submissions made before the Full Court. The minutes of the Board Meetings relevant to such allotments of shares and payment of dividends to shareholders did not reveal any disclosure of interests by the Appellant.

[97] While on that subject of disclosure of interest it would be pertinent to state that Article 85 of the Articles of Association of FHL dealt with disclosures by Directors. In terms of Article 85(a) a director who has in any way, directly or indirectly, an interest in a contract or arrangement has a duty to declare the nature of his interest at the Board Meeting. Article 85(c) imposes a duty on the company secretary to record such declaration in the minutes of the meeting.

[98] It is of interest to note that a similar provision exists in relation to disclosure in the Regulations framed under the Fijian Affairs Act (Cap.120) which is as follows:

> "*Disclosure of interests*
>
> *19(1) A member or Adviser who has any interests pecuniary or other interests, direct or indirect, in any contract, proposed contract or other matter, and is present at a meeting of the Board at which the contract or other matter is being considered, shall as soon as practicable after the commencement of the meeting disclose of such interests.*
>
> *(2) A member or Adviser who has declared an interest under subsection (1) shall not take part in the consideration or discussion of any contract, proposed contract or other matter or vote on any question with respect to it, unless the Chairperson is satisfied and makes a decision that it will be in order for the member or Adviser to participate unconditionally or upon conditions, at that meeting.*
>
> *Subsections (3) to (5) provide for the consequences regarding disclosure and excluding a member or Adviser from a meeting."*

[99] The importance of a disclosure of interests at a Board meeting is thus a generally accepted concept in corporate affairs. Considering the evidence at the trial specially the evidence of Mr. Weleilakeba for the prosecution and Mr. Mar for the defence, they spoke about disclosure of interests and that it was observed at the meetings of FHL. Mr. Mar in fact stated in his evidence that it had dawned on him that it was a matter of great concern for him when he had discovered that the minutes of the meeting had no record of any disclosure by him when he had applied for shares for a company where he had personal interests, although he had occasion to correct the minutes when they were circulated among the directors prior to them being confirmed. Counsel for the Appellant in his submissions stated that a general

disclosure was sufficient as all the Directors knew the involvement of the Appellant in the three companies on whose behalf the applications for shares had been made. It is not good governance regarding company matters to have such a procedure as it makes the provisions in the Articles of the Company regarding disclosure of interest meaningless. However, this submission of the Appellant amounts to an admission of the fact that the Appellant had interests in those three companies and does not ensure to the benefit of the Appellant.

[100] Getting on to the grounds of appeal, as stated above, grounds 1 to 20 are on the basis of the inadequacy of the summing up to the Assessors by the learned trial Judge. In Archbold, Criminal Pleading, Evidence and Practice – 2011 at 4-368 referring to the overall structure of a summing up (which would be relevant to Assessors as well) it is stated :

> *"It has been said before but obviously requires to be said again. The purpose of a direction to a jury is not best achieved by a disquisition or jurisprudence or philosophy or a universally applicable circular tour round the area of law affected by the case. The search for universally applicable definitions is often productive or more obscurity than light. A direction is seldom improved and may be considerably damaged by copious recitations from the total content of a judge's notebook. A direction to a jury should be custom-built to make the jury understand their task in relation to a particular case. Of course it must include references to the burden of proof and the respective roles of jury and judge. But it should also include a succinct but accurate summary of the issues of fact as to which a decision is required, a correct but concise summary of the evidence and arguments on both sides and a correct statement of the inferences which the jury are entitled to draw from the particular conclusions about the primary facts." (per Lord Hailsham L.C. in* ***R v Lawrence*** *[1982] A.C. 510 at 5`19, HL)" .*

In Fiji, the Court of Appeal in **Silatolu v State** (10th March 2006) Criminal Appeal No. AAU 0024 of 2003 referred to **R v Lawrence** (supra) and stated :

> *"12. ……. It is not part of this court's role to try and see into the assessors' minds or to determine the manner in which they reached their conclusions. The role of the appellate court is to analyse the summing up as a whole and to intervene if it finds they are*

> *confusing in themselves or if the assessors' opinions suggest confusion.*
>
> *13. When summing up to a jury or to assessors, the judge's directions should be tailored to the particular case and should include a succinct but accurate summary of the issues of fact as to which decision is required, a correct but concise summary of the evidence and of the arguments of both sides and a correct statement of the inferences which the jury is entitled to draw from their particular conclusions about the primary facts;* ***R v Lawrence*** *(supra). It should be an orderly, objective and balanced analysis of the case;* ***R v Fotu*** *[1953] 3NZLR 129 …*

[101] In the present case, in view of the fact that much of the prosecution case was established by way of agreed facts and agreed documents, the summing up must be considered in that background. The learned trial Judge had structured his summing up referring to the relevant law regarding burden of proof, the elements of the several offences, a summary of evidence and the prosecution and defence versions with respect to their positions. As stated above, the Appellants Counsel in his submissions stated that the said summing up was inadequate in that there wasn't sufficient explanation of the relevant legal principles, the documents that were placed before the Court for the consideration by the Assessors. It was a general complaint made on behalf of the Appellant and was not helpful in drawing the attention of court to any serious errors of law.

[102] As stated above, as Counsel for the Appellant conceded that the Appellant was in public service by virtue of his appointment as Financial Advisor to the Fijian Affairs Board, Ground 1, referring to the fact that the Appellant was not in public service need not be considered. Further the ground taken up that the prosecution had to prove that he should have all three positions simultaneously needs no further consideration as the evidence before Court through the agreed facts, documents and the oral evidence was that he held all three positions.

[103] Grounds 2,6,7,8 and 9 can be grouped together as there is a considerable amount of overlapping and repetition in setting out those grounds. When the Appellant's application for leave to appeal was heard, the written submissions filed on behalf of the Appellant set out the manner in which the learned Judge should have addressed

the Assessors rather than pointing out any errors therein. When the appeal was argued in this Court that type of reasoning out was not adopted but a general complaint was made stating that the summing up was inadequate regarding the elements of s.111 of the Penal Code. The learned trial Judge in his summing up set out the elements of s.111 and related them to the evidence before Court in paras. [10] to [24]. Having set out the necessary elements of s.111 the learned trial Judge gave a summary of the evidence of the witnesses of the prosecution and the defence. Thereafter the learned trial Judge embarked on an analysis of the different counts in relation to the evidence that was placed before Court. This line of approach is seen from the following paragraphs in the summing up:

> *"[168] The prosecution says that the accused in abuse of authority of his office did an arbitrary act, in that he applied for the shares of FHL to be allotted to the three companies which he had interest without disclosing such interest. Counts No.1,3 and 5 relates to the said allegation. In regard to counts No.2,4 and 6, the prosecution says that the accused in abuse of authority of his office did an arbitrary act, in that he facilitated the approval of shares to the companies he had interest and whilst doing that he failed to disclose his interest.*
>
> *[169] The defence says that the accused was not in abuse of authority of his office and that no arbitrary act was done. Further defence says that the accused declared his interest, but is not recorded in the minutes. Defence further says that the accused did not conceal anything and that all necessary information was available to the directors at the meeting."*
>
> *[170] Prosecution has called evidence to show the interest the accused had and the connections the accused had with the three companies Q-Ten, CPCS and Mavana. PW2 in his evidence said that if a declaration is not made at the board meeting it is not recorded in the minutes. At the next board meeting, before the minutes of the previous meetings are confirmed, against the member has the opportunity to get it corrected if the declaration he made is not recorded. It is evidence that no such declaration of interest by the accused is recorded in the minutes.*
>
> *[171] Defence witness Mr.Josaia Mara said that he cannot recall whether the accused declared his interest. However he said that it does not mean that he did not declare. Memorandum and Articles of Association of FHL was produced in court. Article 85 refers to disclosure of interest by directors. It is also the duty of the secretary to record such disclosure in the minutes. Although PW2*

*was not a director at that time as CEO he had disclosed and recorded his interest in Stiks Investments Ltd. Therefore considering all the evidence placed you decide whether the accused had disclosed his interest in the companies according to the law of the company.*

*[172] You may also consider the dates and the sequence of events when deciding whether the accused acted in bad faith and whether his motive was improper. It is evidence that the secretary to the FHL board PW2 advised the board of the approval from FAB and GCC for the widening of FHL shares to Tikina Councils, wholly owned Fijian companies and individual Fijians registered in VKB on 12 November 1991 when accused was present. You may consider the sequence of events thereafter including the dates on which the accused made the applications and the dates on which approval was granted for allotment of shares to the three companies in issue.*

*[173] You decide whether he abused his authority of his office and whether he did an arbitrary act as I explained to you.*

*[174] Section 111 of the Penal Code also provides that where the arbitrary act is done or directed to be done for the purpose of gain, he is guilty of a felony. So you are required to consider whether the accused acted for gain. As I explained there are different types of gain, financial or political gain and gain can be obtained for others as well as personally. The defence says that the accused did not gain. Prosecution called witnesses to show his interest in the three companies to which the shares were allotted. Considering all the evidence, you decide whether the accused acted the purpose of gain."*

[104] A consideration of the above paragraphs [168] to [174] would show that the learned trial Judge had given a clear concise summary of the relevant evidence and the positions taken up by the prosecution and the defence. A further fact that can be observed is that the learned trial Judge has not expressed any opinion of his regarding such items of evidence and has left it to the Assessors to decide upon the relevant issues before them. In view of this position the summing up of the trial Judge cannot be faulted on the basis that it was insufficient or inadequate.

[105] Ground 3 of the Appellant is on the basis that the learned trial Judge failed to direct the Assessors adequately regarding the distinction between "applying" for shares and "facilitating approval" for the issuance of shares. The counts which related to

application for shares were counts 1,3 and 5 while the counts relating to facilitating approval were counts 2,4 and 6 , which counts were separate charges. The evidence relating to the application for shares and the Board meetings of FHL where such applications were considered and shares allotted were not in dispute as the agreed facts and the documents clearly elicited the details and they were not challenged or disputed. The learned Judge addressed these two issues in his summing up in paragraph [168} cited above. Therefore there is no merit in this ground of appeal as the summing up was quite clear and adequate on that issue.

[106] Grounds 4 and 5 relate to the Appellant' position regarding his being in public service. This was dealt with above and stated therein the Appellant's Counsel conceded that the Appellant was in public service and therefore these two grounds do not need any further consideration.

[107] Ground 10 was on the basis that there was no position called "Adviser to the GCC". It was in evidence that the Appellant had been the Financial Adviser of the GCC. The evidence of the first witness for the prosecution that the Appellant had participated in the meetings of the GCC in his capacity as Financial Adviser was not challenged. The third witness for the prosecution also gave evidence to the effect that the Appellant was the Financial Advisor to the GCC. Further the speech made by the Appellant, which was produced as a document and not disputed, showed that the Appellant was designated as the Financial Adviser to the GCC. In view of this position there is no merit in this ground of appeal.

[108] Ground 11 referred to the failure of the trial Judge to draw the Assessors' attention to evidence and arguments that the Appellant had no authority to do anything capable of being an offence under s.111. In his summing up, having set out the elements of s.111 the learned trial Judge referred to each of the elements separately and with reference to the element of "abuse of authority of office" stated:

> *"[22] The 3rd element of the offence of Abuse of office is that the act must be in abuse of the authority of office. When someone abuses the authority of his office, he uses his position for some illegitimate agenda some reason which is not a proper reason and not according to the institutional procedure. He acts in bad faith,*

*for an improper motive to harm someone or to give someone an advantage or favour. To decide what is an abuse of office you need to consider what motivated the accused to act the way he did. If he had some improper motive, or acted in bad faith and used his position to achieve his motive, then this element is proven. In order to understand what the accused had in mind, you need to look at all the evidence, in this case including the dates of applications for shares and sequence of events and draw your own conclusions and decide whether he acted in abuse of office or not."*

This element of "abuse of authority of office" has been referred to as "abuse of office" in the decision in **Naiveli v The State** (supra), where the Supreme Court went on to state that what differentiates something done is abuse of office from something not done in abuse of office in many cases will be the state of mind of the accused. The learned trial Judge in the above cited paragraph [22] has expressed this position as stated in Naiveli's case. As stated earlier the Appellant had a responsibility in protecting the interests of FAB, GCC and other Fijian Institutions under them in his capacity as Financial Adviser to the FAB. He was appointed to FHL to protect those interests when the Class B shares were created, FAB being the sole shareholder of those shares. Although it was submitted by Counsel for the Appellant that motive was irrelevant in determining this element, motive is in fact relevant and the learned trial Judge was correct in bringing it to the attention of the Assessors. When the sequence of events from the opening up of the shareholding of FHL to Fijian Institutions and individual Fijians up to the time of the application and allocation of shares is taken into account as shown earlier in this judgment the motive of the Appellant would be relevant in determining this element. Therefore it cannot be said that there was a failure on the part of the learned trial Judge to adequate direct the Assessors as regards this element.

[109] Ground 12 was not pursued by Counsel for the Appellant in this Court and therefore does not need any consideration.

[110] Ground 13 dealt with the position that there was no analysis of the evidence regarding the demand for shares in FHL and that therefore there was no assistance given to the Assessors by the trial Judge. The demand for shares as submitted by the

Respondent was not relevant to the charges. However, the learned trial Judge at paragraphs [49] to [51], [55], [56], [58], [122] and [123] directed the Assessors regarding the position of shares from the time it was a private company up to the time that it was converted to a public company, and the nature of the demand for shares prior to it being made a public company and afterwards. Considering the manner in which the learned Judge directed the Assessors in the said paragraphs it cannot be said that the directions of the learned Judge were inadequate and therefore this ground does not deserve any merit.

[111] In Ground 14, the Appellant takes up the position that there was no correct analysis regarding the evidence that the Appellant had failed to disclose to each of FHL, FAB and GCC his interests in each of the three companies CPCS, Mavana and Q-Ten.

[112] The importance of disclosure of interest was discussed earlier in paragraphs [97] to [99]. The evidence regarding non-disclosure of interests by the Appellant was the evidence given by the prosecution witnesses as well as the defence witnesses and the documentary evidence which were the minutes of the relevant meetings of the Company FHL. The manner in which the recording of the minutes was done was explained by the Company Secretary who was a prosecution witness which was virtually accepted by the defence witness Mr. Mar. The minutes of the meetings had been circulated among the Directors prior to the next meeting and the Directors had an opportunity to express their concerns regarding such minutes and to correct any errors or point out any omissions before they were confirmed at the next meeting of the Board of Directors. Although the Appellant submitted that the minutes were not accurate recordings of the proceedings of the meetings, and could not be relied upon, the documents that were produced showed the manner in which the minutes had been recorded which was very much in the manner disclosed by the witnesses. It was quite clear from such documents that the Appellant had not disclosed his interests regarding the three companies at the relevant stages which were the basis of the charges against him, especially when considering the fact that the CEO's disclosure regarding his interests in his private Company Stiks Investments Ltd had been recorded in the minutes. He also chose not to give evidence at the trial. Therefore the totality of such evidence would show that the Appellant had not disclosed his interests in the three companies at the relevant times. There was also the

unchallenged evidence of witness Vesikula that the Appellant had not declared his interests even in the files of the GCC.

[113] The learned Judge in his summing up referred to the non disclosure by the Appellant of his interests in several paragraphs of the summing up when dealing with the evidence of the individual witnesses. When referring to Mr. Weleilakeba's evidence he referred to this fact in paragraphs [46] to [48], [53] to [55], [60] to [61], [67] to [68], [79] to [80] and [83] to [84]. Paragraph [88] referred to Mr.Vesikula's evidence, while paragraphs [143-144], [149] to 154], [158] to 159] , [161] to [164] and [170] to [171] referred to the evidence of defence witness Mr.Mar. When the said paragraphs are considered it cannot be said that the learned Judge did not analyse the evidence as alleged by the Appellant in this ground of appeal and therefore it fails.

[114] Ground 15 is to the effect that there was no analysis by the learned Judge regarding the quality of the evidence of 'prejudice' arising from the alleged abuse of office of the Appellant.

[115] The learned trial Judge in explaining the elements of S.111 of the Penal Code at paragraph [23] of his summing up stated thus:

> *"[23] The last element is that the act of the accused must have prejudiced the rights of another. In all six counts (Counts No.1-6) of abuse of office the prosecution alleges that the rights of Provincial and Tikina Councils, FAB and all other indigenous Fijian people were prejudiced. So the question for you is whether the accused's actions prejudicied the rights of the said Provincial and Tikina Councils, FAB and other eligible indigenous Fijian people as alleged."*

[116] The learned Judge thereafter referred to the evidence of the prosecution as well as the defence witnesses regarding this element in his summing up in paragraphs 49-58 , 122-123 and 125.

[117] The evidence disclosed the fact that after the opening up of the shares to Tikina Councils, Wholly owned Fijian Companies and private Fijian individuals registered

in VKB, there was a tremendous interest shown to purchase FHL shares. The Appellant had applied for shares soon after the approval was given by the FAB and the GCC on behalf of CPCS, Mavana and Q-Ten. As a result of the shares being limited to fifty members, some applicants who had applied for shares had to be turned down and suspended till such time as the Company was made a Public Company. The evidence also showed that some Applicants for shares who had been turned down had suggested that the shares taken by the Directors of FHL be reduced to accommodate them. Ratu Timoci Vesikula in his evidence stated that he was shocked to see the number of shares taken up by the Directors. Through the applications made by the Appellant, CPCS became FHL's second largest shareholder, and Mavana and Q-Ten became the fourth largest shareholders in FHL. His family Company and the people from his village and Lau Province came to be the major shareholders of the FHL which was prejudicial to the rights of other eligible Fijian Institutions and people. As stated in Patel v FICAC (Supra) regarding acts prejudicial to others, the Appellant's actions favoured his family, friends, individual and corporate bodies.

[118] The element relating to prejudice to others in S.111 refers to the "act being prejudicial to the rights of another person". In **Tomasi Kubunavanua v The State** [1993] FJCA 8 the Court of Appeal stated:

> *"On behalf of the appellant it was argued that the Judge erred in not giving the assessors sufficient guidance by defining the word "rights". It is true that the Judge did not attempt to do so, and we have some sympathy for that omission. In all probability it can be said that the word requires no attempt at precise definition. We do not consider it is used in s.111 as contended by Mr.Patel for the appellant, the restricted meaning of a legal right. Quite simply, there is nothing mysterious about the word and we have no doubt the assessors will have been well able to understand how it should be construed."*

[119] In the present case too, the evidence placed before Court regarding the Appellant's actions regarding the applications for shares and the resultant effect of them and the learned Judge referring to such evidence in his summing up would have been sufficient for the Assessors to determine as to how they should construe the element of the act being prejudicial to rights of others. Therefore it cannot be said that the

learned trial Judge failed to correctly analyse the evidence of prejudice to others as stated in Ground 15.

[120] Grounds 16 to 20 are to the effect that the learned Judge failed to correctly and adequately direct the Assessors regarding the elements of s.109 of the Penal Code and the application of the evidence regarding the Appellant's liability.

[121] The law relating to S.109 was discussed above at paragraphs [68] to [74]. The learned Judge explained to the Assessors in his summing the elements relating to S.109 in very much the same manner in which these elements were considered in Wheatley's case (supra) at paragraphs [27] to [31] in his summing up and in relation to the evidence at paragraphs [177] to [181]. It may be relevant to reproduce these paragraphs to consider these grounds of appeal:

> *"[27] This offence has four elements that the prosecution must prove beyond reasonable doubt.*
>
> 1. *The accused was employed in the public service.*
> 2. *By virtue of his employment he was charged with an administrative duty respecting property of a special character.*
> 3. *He had a private interest in respect of such property, and*
> 4. *He discharged any such duty in respect of that property.*
>
> *[28] The first element, 'Employed in the public service', I explained to you before.*
>
> *[29] The second element, the prosecution alleges that the accused by virtue of him being employed in the public service was charged with the administrative duty respecting the business of the property being of a special character namely the shares of FHL being held for the benefit of indigenous Fijian people and to accelerate and broaden Fijian participation in commercial and industrial sectors.*
>
> *[30] The third element, the prosecution alleges that the accused had a private interest in those shares when allotted, as he had private interest in those companies Q-Ten investments limited, Cicia Plantation Co-op Society Limited and Mavana Investment Limited to which the shares were allotted.*

*[31] The fourth element, the prosecution alleges that the accused discharged an administrative duty in respect of those shares when he took part in allotting those shares to the said companies which he had private interest, being a board member and taking part in the relevant board meetings of FHL.*

*...*

*[177] Prosecution says that the accused was charged with an administrative duty respecting property of a special character. The defence says that the accused was a director of FHL and was not performing any administrative duties.*

*[178] The accused was appointed as a director FHL to represent the class B shares. (Agreed fact No.9) He was not appointed as an ordinary director, the prosecution says. FHL was incorporated to be the investment vehicle of the indigenous people in Fiji, and to accelerate and broaden their participation in commerce and industries. (Agreed fact No.4) Prosecution says that the letter P4 and its paper confirm the special character of the FHL property and business.*

*[179] Did the accused acquire any private interest? Evidence was placed before the court the interest the accused had in the three companies CPCS, Q-Ten and Mavana. The three companies acquired shares of FHL, which is not disputed.*

*[180] Did he discharge any such duty in respect of that property? It is also an agreed fact that the accused attended and participated at the board meetings of FHL at which the board of directors decided upon payments of dividends to class A and B shares at all material times relevant to the charges of this case. (Agreed fact 36)*

*[181] May I also direct you that it is not an element of the offence of 'Discharge of Duty with respect to property in which he has a private interest' that the accused should have acted dishonestly, fraudulently, or maliciously. It will be enough that he acted knowingly. Also he need not be shown to have profited directly or indirectly. It is also not an element of the offence that his act caused prejudice to the others."*

[122] By his above direction to the Assessors the learned Judge had explained the elements of S.109 and also brought to their attention the relevant evidence regarding the said offence. As has been said earlier in this judgment, this direction to the Assessors has

to be viewed in the background that there were Agreed Facts and agreed documents before the Assessors which established much of the prosecution case.

[123] As far as the elements of the offence of s.109 was concerned, regarding the first element, although it was a matter contested by the Appellant in the grounds of appeal, it was conceded by Counsel at the argument stage that the Appellant was in public service.

[124] The second element of s.109, refers to the Appellant being charged with an administrative duty respecting property of a special character. It was the contention of Counsel for the Appellant that since the Appellant was just an ordinary director of FHL and FHL being a mere private company there was no administrative duty bestowed upon him as contemplated by the section. As has been dealt with earlier in this judgment, FHL was not a mere private company it had a special character though incorporated as a private company, its shares were available only to specified categories of institutions and even for opening of the sale of shares to Fijian Institutions and Fijian individuals it needed the approval of the FAB and the GCC. It was agreed that the Appellant was in public service and that he was appointed as a Director of FHL to represent the shares of FAB. It was in evidence that the Appellant had an administrative duty and according to witness Vesikula the Appellant had a fiduciary duty to protect the interests of Fijian Affairs, GCC and other Fijian institutions under them and that the Appellant had a greater responsibility as Financial Advisor to the board and the GCC. Further the shares of FHL being confined earlier to the specified categories and later after approval by the FAB and GCC being available to the Tikina councils, Fijian Institutions and the Fijian individuals became property of a special character unlike in the case of a mere private company. These items of evidence were referred to in the learned Judge's summing up to the Assessors.

[125] The third element in S.109 refers to the Appellant having a private interest in respect of such property. As has been discussed previously in this judgment, the Appellant had a private interest in Q-Ten, CPCS and Mavana to which shares were allotted. The learned Judge referred to these items of evidence in his summing up to the

Assessors. Counsel for the Appellant before the High Court in her closing address to the Assessors stated that the Appellant had an interest in Mavana and Q Ten as shareholders and that the Appellant's wife had shares and had an interest in Mavana which would then amount to an acceptance of the fact that the Appellant had an interest in those three companies.

[126] The fourth element in s.109 refers to the Appellant discharging any such duty in respect of that property. The discharge of his duty come in the form of his participating in the Board Meetings of FHL and voting when dividends were declared to the shareholders among whom were the three companies where the Appellant had an interest namely CPCS, Q-Ten and Mavana. This was admitted by the Appellant in Agreed Fact 36. The learned trial Judge referred to this at para [181] of his summing up with special reference to the fact that there was no requirement in S.109 to prove that the Appellant had acted dishonestly, fraudulently or maliciously and that it was sufficient if he had acted knowingly. This was the effect of the decision in Wheatley's case (supra). By participating and voting at the relevant Board Meetings to pay dividends to the shareholders which included the three companies where he had a private interest ,the Appellant had discharged his duty knowingly.

[127] Therefore the grounds of appeal 16 to 20 in the notice of appeal of the Appellant would fail as the learned trial Judge had adequately dealt with the issues raised in those grounds adequately.

**Grounds of Appeal in the Supplementary Notice of Appeal**

[128] The first ground of appeal was in relation to S.201 of the Companies Act. The 4th ground of appeal was in relation to dropping of charges against witness PW2. These grounds were nor proceeded with before this Court and therefore needs no consideration.

[129] Grounds 2 to 8 are based on the need for independent assessment by the Judge regarding the raising of a reasonable doubt to the prosecution case, regarding the fact

that the Appellant was charged after sixteen years after the occurrence of the alleged offences, that the Appellant held no authority in his position as Advisor to FAB, that there was no position as Adviser to the GCC, that the third prosecution witness gave evidence on matters which occurred before he was appointed Minister for Fijian Affairs and that the Minister of Fijian Affairs sat on the Board of FHL with the Appellant at all relevant times and had not objected to any policy or vote taken by the Board with regard to the matters forming the basis of the charges against the Appellant.

[130] The need for independent assessment by the trial Judge was considered in **Ram v State** [2012] FJSC 12, Crim. App. 1 of 2011 (9 May 2012) where Justice Marsoof stated:

> *"80. ...In independently assessing the evidence in the case, it is necessary for a trial judge or appellate court to be satisfied that the ultimate verdict is supported by the evidence and is not perverse. The function of the Court of Appeal or even this Court in evaluating the evidence, and making an independent assessment thereof, is essentially of a supervisory nature, and an appellate court will not set aside a verdict of a lower court unless the verdict is unsafe an dangerous having regard to the totality of the evidence in the case."*

[131] S.237 of the Criminal Procedure Decree of 2009 provides :

> *(1) When the case for the prosecution and the defence is closed, the judge shall sum up and shall then require each of the assessors to state their opinion orally, and shall record each opinion.*
>
> *(2) The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors.*
>
> *(3) Notwithstanding the provisions of section 142(1) and subject to sub-section(2), where the judge's summing up of the evidence under the provisions of subsection(1) is on record, it shall not be necessary for any judgment (other than the decision of the court shall be written down) to be given, or for any such judgment (if given) –*

*(a) to be written down, ; or*
*(b) to follow any of the procedure laid down in section 141; or*
*(c) to contain or include any of the matters prescribed by section 142.*

*(4) When the judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, which shall be –*
*(a) Written down; and*
*(b) Pronounced in open court.*

*(5) In every such case the judge's summing up and the decision of the court together with (where appropriate) the judge's reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court all purposes.*

[132] Commenting on Section 237 in **State v John Miller and Others** Crim. App. No. CAV0008 of 2009 (15 April 2011) The Supreme Court stated:

> *"[30] It is clear the judge's judgment at the close of a criminal trial in non-conformity of the assessor's opinions must be written down with reasons given (s.237(3) and(4)). However a short written judgment, even where conforming with the assessors opinions is a sound practice."*

[133] In the present case the learned trial Judge who had occasion to do rulings on Application for Permanent Stay and No Case to Answer after considering exhaustive submissions from both parties and which rulings were not challenged, concluded his summing up and after the verdict of the Assessors, delivered his written judgment having deliberated overnight having had the benefit of the written copies of the closing addresses of the prosecution and defence. Considering the judgment of the learned Judge, it cannot be said that there was no independent assessment of the evidence in the case. It is a well considered judgment based on the evidence in the case.

[134] As regards the specific issue raised by the Appellant that there was no independent assessment by the trial Judge regarding the defence raised by the Appellant creating a reasonable doubt on the prosecution case, it has to be reiterated that one of the main planks of the defence case that the Appellant was not in public service was conceded

at the hearing of the appeal stage and the conclusion reached by the trial Judge that he was so cannot be faulted. Further the other main defence of the Appellant that the prosecution was equating the affairs of a private company to that of a public institution, which as has been discussed above was seen not to be the case.

[135] As regards the issue raised by the Appellant that there was no independent assessment by the trial Judge regarding the fact that the Appellant was charged with the offences about sixteen years after they were alleged to have occurred, it was in evidence that the Respondent FICAC came into existence in the year 2006 and that investigations regarding the Appellant had commenced in 2007 and that the trial commenced in the year 2012 after adjournments at the instance of both parties. As has been pointed out earlier, most of the matters in relation to the charges were available in the form of documents which were agreed to by both parties and the documents that were agreed upon were also contemporaneous documents regarding which the witnesses who gave evidence for both the prosecution and the defence had clear memories of. In such circumstances it cannot be stated that there was no independent assessment by the trial Judge on account of the fact that the occurrences dated back to more than sixteen years as the Appellant had a fair trial.

[136] The next issue raised by the Appellant was that there was no independent assessment by the trial Judge regarding the fact that the prosecution's first witness in his evidence had stated that the Appellant held no authority as Advisor to FAB. The said witnesses' evidence was to the effect that the Chair of the Board did not control the Appellant regarding the manner in which he did his job as the Appellant was there to advise the Board and did not speak of any authority that the Appellant had. The Appellant's complaint on this issue is therefore not correct as the said witnesses did not say that the Appellant had no authority. The element of "abuse of the authority of office" in s. 111 of the Penal Code has been referred to as "abuse of office" in **Naiveli v The State** (supra). The Appellant had a duty and greater responsibility to protect the interests of FAB, GCC and other Fijian institutions under them as Financial Advisor to the FAB. FAB appointed him to FHL to protect those interests. The authority of the Appellant's directorship in FHL was provided through the Minister of Fijian Affairs to represent Class B shares. As stated earlier, the learned

Judge referred to the evidence of the 1st witness for the prosecution in his summing up and therefore would have considered same when he gave his judgment after hearing the verdict of the Assessors.

[137] The Appellant raised the issue that there was no independent assessment by the trial Judge regarding the fact that the prosecution's first witness had in his evidence stated that there was no position of Adviser to the GCC. A perusal of the evidence of the said witness reveals that the witness referred to the Appellant as being the Financial Adviser to the FAB as well as the GCC. As stated earlier his address to the GCC which was documented referred to the Appellant as the Financial Adviser to the GCC. The 3rd witness too stated in his evidence that the Appellant was the Financial Adviser to the GCC. The learned trial Judge too referred to the evidence of these witnesses in his summing up to the Assessors. Therefore it cannot be said that there was no independent assessment by the trial Judge regarding this issue.

[138] The Appellant also raised the issue that the learned trial Judge should have independently assessed whether there was a miscarriage of justice when the Assessors found him guilty when the third witness for the prosecution gave evidence on matters which occurred before he was appointed Minister for Fijian Affairs. It was pointed earlier in this judgment that the witnesses were referred to the contemporaneous documents during the course of their evidence. It was so in the case of the third witness too. Further the evidence of the third witness revealed that he was very much aware and familiar with the happenings of the FAB, the GCC and the FHL as he had been in several important positions even prior to his being appointed as Minister for Fijian Affairs. The learned trial Judge referred the evidence of this witnesses to the Assessors in his summing up and was therefore mindful of same when he delivered his judgment.

[139] The eight issue in the supplementary notice of appeal was that there was no independent assessment by the learned trial Judge regarding the fact that the third witness for the prosecution gave evidence to the effect that his predecessor, the Minister of Fijian Affairs had sat on the Board of FHL at all relevant times and did not object to any policy or vote taken by the Board with regard to the matters

forming the basis of the charges against the Appellant. The crucial meetings were the meetings of the Board of FHL when the policy of opening-up of FHL"s shareholding was decided upon when the Minister was present regarding which no complaint can be made as the decision to open up the shareholding was not the basis of any of the charges against the Appellant. However, at the meetings of the Board when the decision to allot shares was taken for the three companies where the Appellant had a private interest, the Minister of Fijian Affairs was not present so that the question of not objecting to same by the Minister did not arise. The learned trial Judge referred to these matters in his summing up to the Assessors and therefore was mindful of same when he delivered his judgment.

[140] As stated earlier, the evidence in this case was gone through and brought to the attention and consideration of the trial Judge during the Application for Permanent Stay, the Application for no case to Answer, the closing addresses of the prosecution and the defence. He referred in his judgment dated the 31st July 2012 that he adjourned overnight to consider his judgment and that he directed himself in accordance with his summing up and the evidence adduced at the trial. This shows that the learned trial Judge had made an independent assessment regarding the proof of the charges against the Appellant and therefore grounds 1 to 8 in the supplementary notice of appeal fail.

**Grounds of Appeal in the second Supplementary Notice of Appeal**

[141] The Appellant filed five grounds of appeal relating to the sentence imposed upon him on 11 February 2013. These grounds relate to the imposing of a custodial sentence, the consideration of the age of the appellant, the seriousness of the charges and the alternative sentences.

[142] The trial Judge before imposing the sentence on the Appellant heard the evidence of three witnesses who testified regarding the Appellant's position. The Judge in imposing his sentence dealt with the matters complained of by the Appellant in great detail.

[143] The trial Judge cited several cases where the position regarding the imposition of a custodial sentence had been dealt with specially in relation to persons holding high office. He cited the decision in **Naiveli v State** (supra) where the Court had stated:

> *"We wish to make it clear however that people in high office who abuse their power may well in the future be required to serve an immediate prison sentence. This comment should serve as notice to any such people that the courts are not prepared to regard such offences lightly and that they will not suspend sentences just because the consequences for such a person are severe."*

[144] The above citation amply shows the manner in which persons charged for abuse of office have to be dealt with by imposing a custodial sentence. Similar views have been expressed in **FICAC v Farzard Ahmed Khan** Crim. Case No. HAC 82 of 2010 (28th April 2010), **State v Kunatuba** Crim. Case No. HAC 18 of 2006, **State v Prasad** Crim. Case No. HAC 9 of 2002 (30th October 2003), **FICAC v Olota Rokovunisei** HAC 37 of 2010 (2nd May 2012) and **FICAC v Tevita Peni Mau and Mahendra Patel** HAC 89 of 2010 (12th April 2011).

[145] The learned Judge concluded in the following manner at paragraph 16:

> *"16. You have held a very high office in the public sector. You were appointed Financial Advisor to FAB pursuant to the Fijian Affairs Act and Regulations. You were the Financial Advisor to GCC. You were also appointed a Director to FHL to represent Class B shares. By virtue of these appointments, the government and the public vested their trust and confidence in you. FHL was established to be the investment vehicle of the indigenous people of Fiji, and to accelerate and broaden their participation in the commerce and industries. You had a duty to safeguard the FAB and the institutions like Provincial and Tikina Councils and indigenous Fijian people as a whole. Instead you applied for and facilitated the allotment of shares of FHL to three companies which you had personal interest, without disclosing your interest. This was done in priority to the said Provincial and Tikina Councils and other eligible indigenous Fijian people. You thus received gain by abuse of your office. You continued to gain by receiving dividends from the said FHL shares. You have breached the trust and confidence bestowed in you. You have deprived the said institutions and eligible Fijians of their entitlements. Your actions are not only illegal but against the moral values. The*

*punishment that you ought to receive must reflect the breach of the public confidence."*

[146] The above conclusion reached by the trial Judge shows that he had considered the gravity of the charges and the manner in which the sentence should be imposed on such an offender. However, his age, health condition, his family members and the community work he had been involved in, the fact that he was a first offender with a previous good character were all taken into account in imposing the sentence on the Appellant. Therefore it cannot be said that the learned Judge erred in imposing the sentence on the Appellant.

[147] The learned Judge also considered the aspect of suspended sentence when he stated at paragraph 27 as follows:

"*In the instant case I find your age and previous good record can be considered as grounds for suspending the sentence. However, the gravity of the offence, premeditation and planning and gross breach of public trust are grounds for a custodial sentence. These grounds override the grounds mentioned for a suspended sentence. When imposing the sentence I also take into account the absence of remorse or repentance by you. This is a case which warrants an immediate custodial sentence as mentioned before."*

[148] From the foregoing findings of the learned Judge it cannot be stated that there was any error in not considering the imposition of a suspended sentence or making an order under the Community Work Act 1994 in lieu of a custodial sentence.

**Other Matters**

[149] Apart from dealing with the grounds of appeal which were in the petitions of appeal, Counsel for the Appellant in the course of his submissions submitted on certain other matters which were not included in the grounds of appeal.

[150] Counsel for the Appellant submitted that the good character of the Appellant should have been dealt with the by the learned Judge. The Appellant did not put his character in issue at the trial and he chose not to give evidence at the trial. Counsel cited the case of **Melbourne v The Queen** 1999 HCA 32 a decision of the High Court of Australia where it was held that a judge is not obliged to direct a jury about an accused's good character but has a discretion whether or not to do so after evaluating the probative significance of the evidence in relation to the accused's propensity to commit the crime charged and the accused's credibility.

In **Mark France, Rupert Vassel v The Queen** [2012] UKPC 28 the Privy Council in an appeal from the Court of Appeal of Jamaica cited the dictum of Lord Carswell in **Teeluck v State of Trinidad and Tobago** [2005] 1 WLR 2421 at para 33 which states :

> *"The defendant's good character must be distinctly raised, by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witnesses:* ***Barrow v. The State*** *[1998] AC 846, 852, following* ***Thompson v The Queen*** *[1998] AC 811, 844. It is a necessary part of counsel's duty to his client to ensure that a good character direction is obtained where the defendant is entitled to it and likely to benefit from it. The duty of raising the issue is to be discharged by the defence, not by the judge, and it if it is not raised by the defence the judge is under no duty to raise it himself. Thompson v The Queen, at p.844 …"*

These decisions accord with the well established principle that if character has not been put in issue and specially if the accused does not give evidence, there need not be a character direction by the trial judge. In the present case as the charges have been established on the basis of documentary evidence which have been agreed upon the relevance of character is of no significance and the learned Judge cannot be faulted for not having directed the Assessors regarding the character of the Appellant.

[151] Counsel for the Appellant stated on two occasions that Counsel who appeared for the Appellant in the trial before the High Court was not very familiar with criminal

matters and therefore that put a heavier burden on the trial Judge to direct the Assessors much more than had been done in the case. A perusal of the record of the High Court would show that Counsel for the Appellant in the High Court had taken great pains in conducting the defence when considering the manner in which she had conducted the case, taking up all possible objections, cross examining the prosecution witnesses at length, seeking a Permanent Stay, making an Application for No Case to Answer, making exhaustive submissions regarding those applications and making an exhaustive closing address to the Assessors at the conclusion of the evidence.

[152] In **Lole Vulaca and two others v The State** Criminal Appeal No.AAU0038 of 2008 it was stated by Goundar JA as follows regarding inadequacy of trial Counsel:

> *" There exists an assumption that legal practitioners, representing a person at trial will exhibit competence in their knowledge of the relevant law, awareness of applicable procedures and judgment in the forensic decisions that have to be made (**Nudd v The Queen** [2006] HCA 9 (9 March 2006). An Appellate Court will only interfere with a conviction on the ground that counsel had not conducted the case properly if it is satisfied that the manner in which it was conducted in court amounted to flagrant incompetence or in any other way it was such that there had been a miscarriage of justice (**Lasarusa Rakula v The State** Criminal Appeal No.AAU0018 of 2004S(26 November 2004). It will not regard the fact that counsel has taken a course of conduct which later appeared to have been mistaken or unwise as a significant ground of appeal (**Ensor v R**) [1989] 89 Cr App R 139)."*

[153] The above observations would apply to the present case too and in any event inadequacy of counsel at the trial was not a ground of appeal that was taken up on behalf of the Appellant.

[154] Counsel for the Appellant submitted that there was no bad faith on the part of the Appellant regarding his conduct. This was to state that he had no dishonest or fraudulent intention in the commission of the alleged offences. The question of bad faith was considered in detail in England in **Attorney General's Reference** (No 3 of 2003) [2004] EWCA Crim. 868. There the Court of Appeal considered the

application of the Common Law offence of Misconduct in public office in relation to five police officers who were charged with manslaughter by gross negligence and misconduct in public office. The Court cited a dictum of Lord Parker CJ from the decision in **R v Llewellyn-Jones** [1968] 1 QB 429 which was as follows:

> *"……Assuming in [counsel for the defendant's] favour that there must be some element of dishonesty involved, a dishonest motive, a fraudulent motive, it seems to his court that that is inherent in the words of the count. It is really impossible to conceive of a case in which action of this sort in not taken with the intention of gaining personal advantage and without regards to the interests of the beneficiary. It is true the word 'dishonestly' or 'fraudulently' does not there appear, but it is inherent in the description of the offence."*

[155] In the present case, the conduct of the Appellant in applying for shares on behalf of the three companies aforementioned, voting with the other Directors in allotting the shares to the said companies and failing to disclose his interests when such acts were done by him were in question. From the evidence and the documents that were before the Court, the manner in which the Appellant set about these actions of his and the sequence of events that were unfolded show that he had a motive to indulge in such actions. If those were to be recounted, it all started with the opening up of the shares of FHL to a wider sector which included the individual Fijians. The acceptance of the opening up of the shares was approved by the FAB and the GCC and it was declared by the FHL on 12th November 1991, by the 20th of November the Appellant made the application on behalf of CPCS for 180,000 shares, then followed it up with a further application on behalf of CPCS for a further 220,000 shares on 23rd April 1992. He also made application on behalf of his own family company the Q-Ten and Mavana before the end of May 1992 just before the shares were fully taken up. This was in the background that FHL had been making profits from the inception and paying attractive dividends up to that time and there was a good future for such investments in FHL. The Fijian Development Bank of which the Appellant was the Chairman started a soft loans scheme to cater to prospective shareholders of FHL. The evidence revealed that it was quite a profitable venture to take a loan from the FDB and invest in shares of FHL as the loan instalment could easily be paid out of such dividends. The Appellant in December 1991 transferred all

his shares in Q-Ten to his son and resigned from its Directorate, so that when the application came in for shares for Q-Ten it would have given the impression that he held no shares or positions in that Company. By his acts of applying for shares CPCS became the second largest shareholder of FHL and Q-Ten and Mavana became the fourth largest shareholders of FHL. When some of the indigenous Fijian companies applied for shares they were not successful as all the shares had been taken up and the then Minister of Fijian Affairs, Ratu Timoci Vesikula stated in his evidence that he was shocked to see so many shares taken up by the Directors of FHL. Some of the unsuccessful applicants for shares had requested that the Directors should give up some of their shares to accommodate the unsuccessful applicants. Taking all these matters into account as a whole, the Appellant's motive to help his family, his associates, his friends and his villagers was quite apparent and his bona fides would be in question. That would supply the required *mens rea* for the offence as these actions would show that he acted in bad faith which as stated in **R v Llewellyn Jones** (supra) would account for the satisfaction of the element of dishonesty which was required for the commission of the offences alleged against the Appellant.

[156] Finally, in considering the effect of S.23 of the Court of Appeal Act which states:

> *"The Court may, notwithstanding that they are of the opinion that the point raised in the appeal against conviction might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has occurred."*

In the present case none of the grounds raised on behalf of the Appellant had any material substance and therefore even if any of them had raised a point in favour of the appellant, which is not conceded in this judgment, no substantial miscarriage has occurred.

[157] For the reasons set out above, the grounds of appeal adduced on behalf of the Appellant fail and the appeal of the Appellant is dismissed.

**Basnayake JA**

[158] I also agree with the decision and the conclusion arrived at by Chandra JA.

**Hon. Justice W D Calanchini**
**ACTING PRESIDENT**

**Hon. Justice S Chandra**
**JUSTICE OF APPEAL**

**Hon. Justice E Basnayake**
**JUSTICE OF APPEAL**