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

CIVIL ACTION No. HPP 38/2015

BETWEEN	**KELERA RAILOA** of Mountain View Estate, Martintar, Nadi **PLAINTIFF**
AND	**DENIS STANDRING** of 14 Blyhfield Place, Taradale, Napier 4112 New Zealand, Businessman, and **RONALD RITESH SINGH** of Namaka, Nadi, Driver **FIRST DEFENDANTS**
AND	**DENIS STANDRING** Businessman, and **RONALD RITESH SINGH** Driver as Executors and Trustees in the Estate of **DONALD WILLIAM STANDRING** **SECOND DEFENDANTS**
AND	**JACQUELINE JANE SINGH** of 19 Coniston Avenue, Te Atatu South, Auckland, New Zealand. **THIRD DEFENDANT**
APPEARANCES :	Ms S Veitokiyaki for the Plaintiff Mr H Singh for the First, Second and Third Defendants
DATE OF HEARING :	10 March 2020
DATE OF JUDGMENT :	12 June 2020

DECISION

Introduction

1 This proceeding concerns the estate of the late Donald William Standring, who died in North Shore Hospital, Auckland New Zealand on the 25th October 2012 at the age of 82 years. The cause of death is shown on the death certificate to be pneumonia, after years of chronic obstructive pulmonary disease, and a lifetime of asthma.

2 Although Mr Standring died in New Zealand, he had lived and worked in Fiji for at least the last 27 years of his life, and most of his property was in Fiji. Probate of his last will, made in New Zealand on the 4th July 2012, was granted in Fiji on 3 December 2014 to the second defendants as his named executors.

3 In this proceeding, commenced by Writ of Summons filed in the High Court at Suva on 16 September 2015, Mr Standring's widow, Mrs Kelera Railoa, seeks to revoke the grant of probate of Mr Standring's last will on the basis that the will was invalid for

lack of capacity, undue influence and fraud. The first and second defendants are the executors of the estate of Mr Standring, to whom probate was granted as set out in paragraph 2. The third defendant is the adopted daughter of Mr Standring, who is the principal beneficiary of his estate in terms of the probated will.

4 This proceeding was first certified as being ready for trial in March 2017, when minutes of the pre-trial conference were signed by counsel for the parties. An application was then made by the plaintiff to transfer the proceedings to the High Court at Lautoka, and orders were made unopposed to this effect in August 2017. The case was set down for a four day trial due to start on 8 April 2019. Unfortunately the judge before whom the matter was scheduled to be heard retired from the bench before that date, and the trial was adjourned for a three day hearing scheduled to begin on 15 July 2019. At that point (for reasons that are unclear, but are probably related to the lack of a judge to hear it) the matter was further adjourned, but eventually was heard before me in one day on the 9th March 2020.

5 Order 76 Rule 4(1)(b) High Court Rules provides:

> ***Lodgment of grant in action for revocation*** *(O.76, r.4)*
>
> ***4****(1)* *Where, at the commencement of an action for the revocation of a grant of probate of the will or letters of administration of the estate of a deceased person, the probate or letters of administration as the case may be, have not been lodged in court, then–*
>
> *(a) if the action is commenced by a person to whom the grant was made, he shall lodge the probate or letters of administration in the Registry within 7 days after the issue of the writ;*
>
> *(b) if any defendant to the action has the probate or letters of administration in his possession or under his control, he shall lodge it or them in the Registry within 14 days after the service of the writ upon him.*
>
> *(2) Any person who fails to comply with paragraph (1) may, on the application of any party to the action, be ordered by the Court to lodge the probate or letters of administration in the office of the Registrar within a specified time; and any person against whom such an order is made shall not be entitled to take any step in the action without the leave of the Court until he has complied with the order.*

Although there is evidence on the Court file that this provision has been brought to the attention of the defendants, it is not clear whether it has been complied with. However no application was made to the Court under sub-rule (2), and in any case it seems clear that the administration of Mr Strandring's estate has not been progressed pending the outcome of this matter. I also note in closing submissions filed for the defendants a request for probate to be released. I therefore assume that probate was lodged with the Court as required by the Rule referred to above.

6 Statements of claim and defence, and a reply to the defence, have been filed in the usual way, but none of them are models of the art of pleading. The key allegations of the plaintiff's claim appear in paragraphs 18-21 of the statement of claim, in which the plaintiff asserts:

18. *That Mr Standring used to travel to New Zealand every year for medical check-up and returned after spending 1 or 2 months in New Zealand*
19. *That the late Mr Standring had history of suffering from Asthmatic Chronic disease before his death on 25 October 2012.*
20 *In late June 2012 he again went to New Zealand for medical checkup. Before he left the late Mr Standring suffered from memory loss due to his old age and Asthmatic Chronic Disease. Hence the Testator was not of sound mind or memory to understand the contents of the Will before execution.*
21 *The preparation and execution of the 2012 Will was obtained by under [I assume that this should be 'Undue'] influence and or fraud by the Defendants.*

PARTICULARS OF FRAUD

i. *With the knowledge that the testator suffered from old age, loss of memory and Asthmatic Chronic Disease induced the said testator to execute the Wil*
ii. *Due to the testator's memory loss and Asthmatic Chronic disease, the said testator did not give instruction to prepare another will being Will dated 4th July 2012.*
iii. *With the knowledge that Messrs Hari Ram to appoint a person as trustee and executor of the testator's Will failed to comply as per the said Will.*
iv. *Deleting without approval the names of the Plaintiff as one of the beneficiaries of the estate of Mr Standring except for vehicle registration no. EF 415.*
v. *With knowledge that the Plaintiff was married to the Testamentor misrepresented to the registrar of death in New Zealand that the Testator was not legally married.*
vi. *With the knowledge that there is an existing Will with Hari Ram Lawyers, Suva induced the testator to execute another Will being Will dated 4th July 2012 in Auckland.*

7 The statement of claim seeks the following relief:

1. *An order for declaration that the last Wil and Testament executed by the testator on 4th July 2012 is void and of no legal effect.*
2. *An order that the grant of Probate Number 55825 to appoint Denis Standring and Ronald Ritesh Singh as Executors and Trustees of the Estate of Donald William Standring be revoked forthwith.*
3. *An order for declaration that Ronald Ritesh Singh was never appointed by Messrs Hari Ram Lawyers as one of the Executor and Trustee of the Estate of Donald Standring after the testator's death.*
4. *An order for declaration that the property situates at Lot 47 Mountain View Estate, Martintar being Certificate of Title No. 19128 describe as Lot 47 DP 4509 is a matrimonial property pursuant to Family Law Act wherein the Plaintiff has 50% share therein.*
5. *An order that the true and last Will and Testament of Donald Standring is the Will executed on 30th December 2006.*
6. *An order that Messrs Hari Ram of Ram's Law, solicitors of Nadi do appoint the second executor and trustee in accordance with the last Will and Testament dated 30th December 2006.*
7. *An order that the Executors and Trustees of the estate of the late Mr Standring distributed his estates in accordance to his last Will and Testament dated 30th December 2006.*
8. *Costs*
9. *Further or any other relief this Honourable Court deems just.*

8 In response to this pleading the statement of defence says:

10. *With respect to Paragraphs 18, 19 and 20 of the Claim the Defendants repeats the contents of Paragraph 4 of their Statement of Defence stated hereinabove.*
11 *Paragraph 21 of the Claim is denied by the Defendants and they further say that all the requirements pertaining to the Wills Act Cap 39 were followed and the contents of the Will*

dated 4th July 2012 was explained to the Testator in English language after which the deceased executed the document.

9 Paragraph 4 of the Statement of Defence (referred to in paragraph 10) said:

4. With respect to Paragraphs 5, 6, 7, 8, 9 and 10 of the Claim the Defendants say as follows:

a. The property described as Lot 47 on Certificate of Title No. 19128 is solely registered in the name of the Deceased.
b. The Property which was jointly purchased by the Deceased and the Plaintiff is Lot 20 being Native Lease No. 23708 and not Lot 14 Mountain View Estate as claimed by the Plaintiff.
c. The Deceased operated the Melanesian hotel solely and later sold it.
d. The Deceased used to travel to New Zealand every six months not for his medical checkups but to visit his friends and families.
e. The deceased last went to New Zealand on the 21st April 2012 and never returned to Fiji.
f. The deceased was tired of the relationship which he shared with the Plaintiff and got separated from the Defendant by leaving her back in Fiji in 2012.
g. It was the intention of the Deceased to file his application for dissolution of marriage after the expiration of 12 months from the Plaintiff.
h. Before the 12 month separation could be attained the Deceased died on the 25th October 2012.
i. The Plaintiff till to date continues to reside on the property described as Lot 47 being Certificate of Title No. 19128.
j. The rest of the allegations contained in Paragraphs 5, 6, 7, 8, 9 and 10 are denied by the Defendants.

It will be noted that what is said in Paragraph 4 of the statement of defence does not address the particular allegations in paragraph 20 of the statement of claim, relating to memory loss and incapacity, which therefore remain unanswered.

10 Order 18, Rule 12 High Court Rules states:

***Admissions and denials** (O.18, r.12)*

***12**(1) Subject to paragraph (4), any allegation of fact made by a party in his pleading is deemed to be admitted by the opposite party unless it is traversed by that party in his pleading or a joinder of issue under rule 13 operates as a denial of it.*
(2) A traverse may be made either by a denial or by a statement of nonadmission and either expressly or by necessary implication.
(3) Subject to paragraph (4), every allegation of fact made in a statement of claim or counterclaim which the party on whom it is served does not intend to admit must be specifically traversed by him in his defence or defence to counterclaim, as the case may be; and a general denial of such allegations, or a general statement of non-admission of them, is not a sufficient traverse of them.

but no argument has been raised by the plaintiff that the defendant should be taken to have admitted the allegations in paragraph 20 of the claim, and it is perfectly obvious from the course of the hearing and the submissions that the parties are fully aware of what is and is not in issue.

11 It is therefore more useful in this case to rely, as defining the matters upon which I am called to decide, on the list of agreed issues set out in the minutes of the pre-trial

conference dated 1 March 2017 and signed by solicitors for both parties. These minutes show that the agreed issues to be determined are:

i. Whether the will dated 4th July 2012 was made fraudulently?

ii. Whether the testator Donald William Standring was in his right state of mind to give instructions and/or sign a will or anything else in that matter and whether he suffered from old age, memory loss and asthmatic chronic disease that induced the said testator to execute the will?

iii. Whether the signature on the Last Will and Testament of Donald William Standring dated 4th July 2012 was forged?

iv Whether the Last WILL dated 4th July 2012 is void and has no legal effect?

v. Whether the Last Will and Testament of the Deceased executed on 30th December 2006 of [should probably be 'or'] the last Will and Testament dated 4th July 2012 is the true last Will and Testament of Donald William Standring.

Background

12 The parties did not adduce much by way of evidence of the background history to this matter, and so what follows is by no means complete, and may be wrong in some respects. But in so far as the history is important to the outcome of this case, this is largely documented, and in any case there seems to be little about what actually happened that is in dispute, although there is much argument of course about the consequences of what happened.

13 The plaintiff Kelera Railoa, and the deceased Donald William Standring were married at the Registry Office at Nadi on the 1st December 2010. At the time of their marriage, Mr Standring was aged 80 years (born in Gisborne, New Zealand on 25 July 1930), and Ms Railoa was 59 years (born at CWM Hospital, Suva on 8 August 1951). They had then known one another for 25 years (since 1985, i.e. when Mr Standring would have been 55 years old, and the plaintiff 34) and had been living together in a de facto relationship since 1989. It appears that Mr Standring first came to live in Fiji in 1974.

14 They met when Mr Standring had owned and operated the Melanesian Hotel, at Nadi, and Ms Railoa helped him in that work until the business was sold in 1995. At around the same time he started and ran other businesses, including Melanesian Imports and Meat Cuisine, supplying meat, and vegetables to the hotel industry in Fiji. He apparently sold his interest in these businesses a short time (the year before) his death, but there is no evidence about the circumstances of these sales.

15 Mr Standring had an adopted daughter, Jacqueline Singh (the third defendant in this proceeding. Ms Singh gave her age as 56 when she gave evidence in this case in March 2020, so she is some 13 years younger than Ms Railoa, who said she first met Jacqueline at around the time she and Mr Standring first started living together in 1989. She said that Jacqueline called her 'Mum', and they had a close relationship.

16 In 2006 Ms Railoa became aware that Mr Standring had made a will, with the assistance of his solicitor Hari Ram Lawyers, at Nadi. Mr Standring told her about the will on the same day he made it, although she did not see a copy of it until sometime

later. Mr Standring told her that the will shared his property between her (Ms Railoa) and his daughter Jacqueline. He told her that the assets in Fiji were to come to her, other than the business, while the overseas assets (in New Zealand and Australia) were to go to Jacqueline. He kept the original of this will in his office, and only brought it home when the Melanesian Imports business was sold, at which time Mr Standring brought home all his papers and records. Ms Railoa saw the will when she retrieved it after the house was flooded. She said she dried it out and put it in Mr Standring's briefcase. It was still there when he left for New Zealand in April 2012.

17 Ms Railoa was shown a copy of this 2006 will, and identified and produced it in evidence. The will is dated 30th December 2006. It was prepared by Hari Ram & Associates, Barristers and Solicitors, of Suva. The will (into which Mr Standring had clearly put in some thought) includes the following directions:

APPOINTMENT OF EXECUTORS

2.a) I appoint my nephew DENNIS STANDRING of Wairoa, New Zealand Businessman the executor and trustee of this will to act together with the person to be appointed an executor and trustee of this Will after my death by solicitor HARI RAM the legal firm now known as HARI RAM & ASSOCIATES solicitors of Suva or the firm of solicitor (s) which at the date of my death has succeeded and carries on the practice of the firm ("the appointor").

GUARDIAN

3. If my de facto spouse KELERA RAILOA of 47 Mountain View, Martintar, Nadi does not survive me or dies before BULOU LITIA LAVENAVESI VULAIDAUSIGA reaches the age of eighteen (18) and does not make any other appointment of guardian I appoint SALOTE KORONUKU RAILOA of Nadi the natural mother of BULOU LITIA LAVENAVESI VULAIDAUSIGA to be the guardian of BULOU VULAIDAUSIGA.

FUNERAL DIRECTIONS

4. I wish to be buried in accordance with any directions which I leave with my papers and in the event that I do not leave any funeral directions then in the burial grounds at Enamanu Nadi.

4.1 I direct my executors and trustees to pay all my just debts and funeral expenses from my cheque account No. 95-3671737 or savings account No. 95-3671748 at ANZ Group Limited, Nadi Branch.

CASH LEGACIES

5. I give the following legacies and declare that such legacy shall bear its own inheritance tax (if applicable):

- *5.1 All my remaining monies after payment of expenses mentioned in paragraph 4.1 at ANZ Banking Group Limited, Nadi branch savings account No. 95-3671748 to my trustees upon trust to release to my defacto spouse KELERA RAILOA at a rate of $500.00 (Five Hundred Dollars) per month until all the monies in this account are released to her.*
- *5.2 All my remaining monies after payment of expenses mentioned in paragraph 4.1 at ANZ Banking Group Limited, Nadi Branch cheque account No. 95-3671737 to my de facto spouse KELERA RAILOA.*
- *5.3 All my monies at the Westpac Bank Corporation account No. 852452-00 at Nadi Branch to my de facto spouse KELERA RAILOA.*
- *5.4 All my monies at the Westbank Banking Corporation cheque account No. 3870026-00 at Lautoka Branch to my de facto wife KELERA RAILOA.*
- *5.5 All my monies at the Westpac Banking Corporation cheque account No. 032-000-86-8439 at Sydney Branch, Australia to my daughter JACQUILINE GIBBONS of 1248 Paramount Parade, Tiki Punga, Whangarei, New Zealand.*
- *5.6 All my monies at the Westpac Banking Corporation cheque account No. 0036949 at Wanganui Branch Auckland New Zealand to JACQUILINE GIBBONS.*
- *5.7 All my monies at the Westpac Banking Corporation cheque account No. 01-532915-01 at Kiribati to JACQUILINE GIBBONS;*
- *5.8 All my monies at Visa Card Fiji account No. 4937 5510 0002 5835 to JACQUILINE GIBBONS;*
- *5.9 All monies at Bank Card New Zealand account No. 5402 2310 0875 9842 to JACQUILINE GIBBONS, and*

5.10 All my monies at Master Card Fiji account No. 54719000 6600 8905 to JACQUILINE GIBBONS.

SPECIFIC LEGACIES

6. I make the following gifts and declare that each gift shall bear its own inheritance tax (if applicable):

6.1 All my New Zealand Government Bonus Bonds to JACQUILINE GIBBONS

6.2 The motor vehicle registration number EF415 being Nissan to KELERA RAILOA;

6.3 All my shares, debentures and any other capital holding in Meat Cuisine (Fiji) Limited a duly incorporated limited liability company having its registered office at Nadi and of Nadi and Lautoka and trading as MIL to JACQUILINE GIBBONS;

6.4 All my shares, debentures and any other capital holding in Real Timber Floors Property Holdings Pty Ltd a duly incorporated limited liability company having its registered office at Royal Park, South Australia 5014 to JACQUILINE GIBBONS;

6.5 All my shares, debentures and any other capital holding in AUSFURN FIJI LIMITED a duly incorporated limited liability company having its registered office at Nadi to KELERA RAILOA;

6.6 I give the following three properties together with all the household furniture and furnishings therein to KELERA RAILOA:

- *All that piece and parcel of land comprised in Certificate of Title No. 19128 described as Lot 47 on DP 4509 known as "Waqadra" (part of) in the district of Nadi having an area of 27.4p together with all the improvements thereon; and*
- *All that piece and parcel of land described in Housing Authority Lease reference No. SO 2857 being Lot 20 situated at Matavolivoli Subdivision in the district of Nadi having together with all the improvements thereon; and*
- *All that piece and parcel of Native land situated at Delaisaweni Subdivision being Lot 58 (NL Ref 7032528) in the district of Nadi together with all the improvements thereon; and*

6.7 I give all my interest in the Life Policy with Tyndall Life New Zealand to JACQUILINE GIBBONS absolutely.

TRUST

7. I give the motor vehicle registration No. E1730 being a Mazda and vehicle registration No. C0530 being a Mercedes to my trustees on trust to sell them and the net income from the proceeds of sale in trust for KELERA RAILOA so that she can obtain the sum of $200.00 per month for BULOU LITIA LAVENAVESI VUSAIDAUSIGA's educational and other personal needs and if KELERA RAILOA dies than the proceeds of the sale of these vehicles shall be paid out to BULOU LITIA LAVENAVESI VUSAIDAUSIGA when she attains the age of 25.

GIFT OF RESIDUE

8. I give the residue of my property after payment out of it all legacies given by me and my debts and funeral and testamentary expenses:

- *to JACQUILINE GIBBONS but if she does not survive me by thirty days or the gift to her children lapses or fails for any reason*
- *to the child or children of JACQUILINE GIBBONS if any at the date of my death.*

18 The will was witnessed by Hari Ram, of Suva, Solicitor, and by Rakesh Kumar who was called to give evidence, and confirmed that he had witnessed Mr Standring signing the will in the offices of Hari Ram in December 2006. Mr Kumar gave evidence that he had known and worked for Mr Standring for 25 years.

19 Mr Standring was in the habit of returning to New Zealand twice a year, in around March/April (if possible he liked to be in New Zealand at Anzac Day on 25 April each year) and October. Occasionally Ms Railoa went with him. The purpose of the trips was partly to have regular medical checkups (as an ex-serviceman Mr Standring was entitled to free medical examination), and to catch up with friends and family. It may also have been necessary for him to return to New Zealand to continue to qualify for his pension. In April 2012 Mr Standring returned to New Zealand on his own. The reason that Ms Railoa gave for not going with him on this occasion was that they had recently had floods in Nadi, and the basement of their home at Mountain View, Martintar had been flooded. Ms Railoa stayed behind to help clear

up after the flood. Nevertheless she and her daughter Bulou (referred to in the 2006 will) accompanied Mr Standring to the airport. He took with him his briefcase, and a suitcase (which certainly did not include all his belongings). Ms Railoa was expecting him back in Fiji in October. This was a much longer stay than the apparently usual trip of a few weeks; Ms Railoa said that the reason for the longer absence was to give her and the family at home in Fiji time to clean up and repair their home of which the whole ground floor had been recently damaged in floods, and was smelly and damp.

20 At the time he left Fiji in April 2012 Ms Railoa said her husband could not drive, he couldn't walk properly and needed assistance from airport/airline staff to get on and off the aeroplane (which she arranged beforehand), and had started to become forgetful. She said that he would forget things like his keys, and tried to unpack his suitcase after she had packed it. Even the workers at the office had noticed, Ms Railoa said, that Mr Standring was forgetting things. She said he was anxious about money, and at times they made several trips to his bank in a day, checking on the amount he had in his bank accounts.

21 A friend of his, Mr Simon Leggett who also gave evidence, saw Mr Standring the day before he left for New Zealand, said he was quite frail, his mental capacity was not as it was, and his hearing (which had been damaged when serving in the Korean War) was giving him difficulty. He was 'quite forgetful' about a number of things. Mr Standring had told Mr Leggett that he had given his daughter Jacqueline access to the bank account into which his pension was paid, and it seemed that either Mr Standring was unsure of what should be in the account, or he had become unhappy about Jacqueline having the right to withdraw money from the account (or both). He told Mr Leggett that he intended to 'put a stop' to this access to his account, because whenever he tried to withdraw money from the account there was nothing there. Mr Standring had had to collect money he was owed for the sale of his business to pay for the airfare to New Zealand.

22 Ms Railoa, Mr Kumar and Mr Leggett all said that at the time Mr Standring left Fiji for New Zealand in April 2012 his relationship with Ms Railoa was continuing. Ms Railoa said – and I accept her evidence on this – that as far as she knew, and expected, Mr Standring would be returning from New Zealand as he usually did, after his trip, and that there was no hint from him that he intended to stay in New Zealand and separate from her, or that he was in any way unhappy with the relationship. Mr Leggett had arranged for a private Holy Communion service with the local Anglican priest, and – having made arrangements for this through Ms Railoa - he had collected Mr Standring and taken him to this ceremony the day before he left for New Zealand. He did this because he wanted to make sure that Mr Standring 'went with God' when he left for New Zealand the next day. He and Mr Standring were members of the same church, and were also both Freemasons, and ex-servicemen. Mr Leggett said that they were close, Mr Standring was his friend, and he confided in Mr Leggett. Mr Standring said nothing to Mr Leggett about not returning from New Zealand, and nothing about his behaviour indicated to Mr Leggett that he did not

intend to return. Mr Leggett's evidence was that Mr Standring did intend to return, but it is not suggested that he expressly said so.

23 However Mr Standring did not return to Fiji, and – it seems – did not communicate in any way with his wife or family after getting to New Zealand in April 2012. Evidence of what happened after he arrived in New Zealand was given by his daughter Jacqueline, and her husband Ronald Singh. Their evidence is that they received an email from Ms Railoa's daughter Frances the day before Mr Standring was due to arrive, saying that he was coming. They collected him from the airport, and took him to their home in Te Atatu, Auckland, where they lived with Jacqueline's two sons from an earlier relationship.

24 Jacqueline's evidence was that when he arrived in New Zealand Mr Standring was 'old and frail', and they took him to the doctor the following day. There was no evidence of what resulted from this examination, but Jacqueline said that he started to regain weight, and had put on 10kgs by the time he died (he was particularly fond of pies). In response to a question about her father's mental state she confirmed that he forgot things, but said that he was 'not forgetful in the sense that he didn't know what he was doing'. Her husband took him the Returned Servicemen's Association (RSA) every day in the evening for a drink and sometimes the whole family would go along.

25 Soon after he arrived, Jacqueline said, Mr Standring told them that he didn't want to return to Fiji. He told them, she said, that he felt that he had lost everything in Fiji, and had been 'ripped off'. She said that he was getting his war pension, and that although she had signing rights on the account, she regarded the money as his (although her father used to tell her she could have money from the account), and she never used the bank authority (she said that she would have had to go into the bank to do so). It is not completely clear how the question of his will arose. Jacqueline said that her father showed her his previous will, which was in his briefcase, and they went through the will in detail together. At some point he spoke to his solicitor in Fiji, Hari Ram & Associates, and the firm prepared a new will and a Power of Attorney. It seems that most of the communication was via email through Jacqueline, that a draft will was sent and there was an exchange of emails about what the new will should provide. When asked about the email correspondence, Jacqueline said that she gave copies of all emails to her father. She no longer has copies of these communications. The emails with the solicitor about the will are 'not in the emails I have from back then'. She also said that 'a lot of my documentation was damaged, I lost a lot of stuff' but she did not explain how or why this had happened. It seems that no attempt has been made to enquire with the solicitors what records they have of these communications, or what their instructions from Mr Standring were, and how those instructions were communicated to them. Although a list of documents dated 20 January 2017 has been filed (in the prescribed form) on behalf of the defendants this does not include reference to any correspondence with Hari Ram & Associates about the new will, or any documentation relating to the signing of the will, or details of texts and telephone communications. It is clear that such documentation did exist, is very relevant and should have been discovered.

The fact that it was not means that the court does not have the benefit of documents that would have shown Mr Standring's instructions to his solicitors, and may have shed light on his capacity and any input from Jacqueline, bearing in mind that on the basis of her own evidence, all emails were made by and to her (Mr Standring did not apparently have a computer or use hers), and any phone calls, texts etc were made via her telephone (Jacqueline confirms that Mr Standring did not have a phone).

26 It also seems that over this period there were repeated attempts by Mr Standring's family in Fiji to contact him. He did not have a cellphone, so any communication was via Jacqueline's cellphone, or by email. Jacqueline said that she asked her father whether he wanted to respond to these communications, but he didn't want to do so, and so she did not. She said – rather resentfully it seemed - that this reached the point where 'she was being bombarded with threats' from Fiji, by text, telephone calls and emails, in their attempts to contact Mr Standring. Given the circumstances this is hardly a surprise. Mr Standring's family in Fiji must have been desperately anxious about him. Even Mr Leggett said he tried to make contact with Mr Standring, but could not do so. The concern from Fiji reached the point where Mr Standring was reported as a missing person to the New Zealand Police. Jacqueline said that she and her husband took Mr Standring to the police station to show them that he was safe, but it is not clear when this happened, or exactly what the outcome of this police complaint was (except that it clearly did not result in Mr Standring returning to Fiji, or contacting his family there).

27 In cross-examination, counsel for the defendants put questions to both Ms Railoa and Mr Leggett that seemed directed to establish that there was some disharmony between Mr Standring and Ms Railoa, possibly amounting to a separation, that led to him not returning to Fiji, and changing his will. They both denied that there was any such estrangement, and the evidence certainly does not point in that direction. As will be seen, even the third defendant Ms Singh goes no further than to say that Mr Standring did not wish to return to Fiji, and she denies saying to the funeral director, following Mr Standring's death, that he and Ms Railoa were separated. But whatever his thoughts about his future, Mr Standring certainly does not seem to have communicated them to his wife, and it seems clear from his and his daughter's conduct, that Ms Railoa was being deliberately kept in the dark about his intentions. This would not have been necessary if the parties were already estranged. Ms Singh confirms that Mr Standring refused to communicate with the family in Fiji. She says that she did not press him to do so, and apparently made no attempt to do so herself.

28 However it was arrived at, Mr Standring signed the new will on 4th July 2012. His signature was witnessed by a solicitor at Henderson, in Auckland. It seems that a Power of Attorney was signed by Mr Standring at the same time, appointing Jacqueline as his attorney. This too was apparently prepared by 'Rams Law' of Nadi, apparently the successor to Hari Ram & Associates who had prepared the 2006 will referred to previously. The power of attorney was notarized, by the same person who witnessed the will. Unfortunately neither the will nor the power of attorney

state the name of the solicitor/notary who took Mr Standring's signature. Jacqueline says she does not know who he was, they simply did what they were told by Ram's Law, which was to find a Notary Public in Auckland who could witness the Power of Attorney.

29 The evidence of both Jacqueline and Ronald Singh was that the lawyer spoke to Mr Standring alone for a period, while they waited outside. Eventually they were called in, the solicitor asked Mr Standring to identify who they were, which he did. The solicitor also asked Mr Standring (in their presence) to identify them and to confirm that they weren't forcing him to sign the will, then Mr Standring signed the will, and the solicitor and another person from the office witnessed Mr Standring's signature on the will. No evidence was given of what happened during the meeting between Mr Standring and the solicitor/notary prior to the will being signed. It is not clear whether or what the solicitor knew of Mr Standring's marital status, or of his previous will, and we do not know what Mr Standring told the solicitor about his personal circumstances, assets and liabilities, dependants etc., or how he established his identity to the satisfaction of the solicitor (bearing in mind that the approach to such matters as identification in 2012 was much more relaxed than it is now). Presumably the solicitor noticed that both documents were prepared by solicitors in Fiji, and that the Power of Attorney was for use in Fiji (otherwise there was no reason for it to be notarised), but what conversation was had about these matters is not clear.

30 It was suggested to both Jacqueline and Ronald Singh that Mr Standring's signature in July 2012 was forged. They both denied that this was the case, and there is no evidence for it apart from the assertions of plaintiff's counsel. A (non-expert) comparison of Mr Standring's 2006 (which of course the plaintiff is happy to accept is genuine) and 2012 signatures shows that they are not identical, but nor are they markedly different. It is certainly possible, in the absence of expert opinion evidence, either that the differences are explicable by the six year gap between them, or because they are in fact signed by different people. Given the rest of their evidence about what led up to its signing, I find it much more plausible that Mr Standring signed the will, than that the defendants found someone to sign in his place, pretending to be Mr Standring. In any event, given the decision I have reached on the issue of Mr Standring's capacity, whether he signed or not does not make any difference to the outcome of this case.

31 The 2012 will is clearly based closely on the earlier 2006 will. It is in fact identical in its structure, drafting style (including use of highlighting around the title) and contents, except to the extent that these have been changed to omit references to the plaintiff, and substitute Jacqueline's name for that of Ms Railoa. Clause 3 of the 2006 will (relating to guardianship) has been removed, clause 4 (funeral directions) has been altered to refer to burial at Auckland rather than Nadi, and the bank account reference in clause 3.1 has been changed to that of a New Zealand bank account (at Westpac, Whanganui) rather than to the ANZ Nadi branch accounts.

32 However, the only changes to clause 5 (Cash legacies) are to replace the phrase 'my de facto spouse KELERA RAILOA' with 'my daughter JACQUELINE JANE SINGH' (noting that 'Jacqueline' is spelt differently in 2012 from the 'Jacquiline' of the earlier will, which perhaps points to at least some input from the third defendant). Thus, even though the change to the bank account details in clause 3.1 of the new will mean that it no longer makes sense, clauses 4.1 and 4.2 of the 2012 will (corresponding to clauses 5.1 and 5.2 of the earlier will) still refer to the ANZ Banking Group Limited, Nadi branch account, and clause 4.1 still makes a gift to the trustees, even though the direction for payment of $500.00 per month has been deleted.

33 Clause 6 of the 2006 will is similarly unchanged when it becomes clause 5 of the 2012 will. Again, references to Kelera Railoa are replaced by references to Jacqueline Singh, including the gift of the relationship home at Mountain View, in which Ms Railoa was living. The only item that was still left to Ms Railoa, by clause 5.2 (identical to 6.2 in the 2006 will) was the Nissan car registered number EF415. Relevant to the question of Mr Standring's capacity when he made the new will is the fact that by 2012 he had apparently sold his shares in the company Meat Cuisine (Fiji) Limited trading as 'MIL'. Nevertheless, clause 5.3 of the 2012 will is identical to clause 6.3 of the earlier will (except for the change to Jacqueline's name) and still leaves his (now non-existent) shares in this company to Jacqueline.

34 Also deleted are the trust for Bulou Vusaidausiga contained in clause 7 of the 2006 will, but the Gift of Residue (clause 8), and Trustees Powers (clause 9) are identical except that the clause numbers are changed to accommodate the clauses omitted from the earlier will.

35 Having made a new will as stated in July 2012 Mr Standring did not ever return to Fiji. Nor it seems did he ever communicate with his wife and family in Fiji. He died on 25 October 2012 at North Shore Hospital, and his widow found out about his death, and burial, some three weeks after he died, but not from any of the defendants, who hadn't bothered to tell his wife. When she learned of his death Ms Railoa approached Hari Ram at Nadi to find out about his will. She was told he had made a new will, under which she was to receive nothing. She was eventually able to obtain a copy of the new will from the High Court Registry in Suva, and so discovered that she had been left nothing but the car.

36 When Ms Railoa obtained a copy of Mr Standring's death certificate, she noted that his relationship status is recorded in the death certificate as '*Permanently separated from Marriage or Civil Union*' and records details of Ms Railoa. This was of courses news to Ms Railoa, who had not received any communication from Mr Standring or his family since he had come to New Zealand in April, let alone an indication that he wanted/intended to separate. When questioned in cross-examination about this entry in the death certificate Jacqueline said that she had not told the funeral director that Mr Standring and Ms Railoa were separated, only that Ms Railoa was living in Fiji, and that they were not living together at the time of Mr Standring's death. Whatever was said to the funeral director (and it can only have been one the

defendants who said it), the impression he/she obviously gained is reflected in the entry in the death certificate.

37 Not much evidence has been given by either party about the position of the estate. Copies of titles for two of the three properties referred to in clause 5.6 of the 2012 will (identical to 6.6 of the 2006 will set out in paragraph 17 above, except for the change of beneficiary) have been produced. These show that one of the properties (the second one mentioned in clause 5.6) is in the names of Ms Railoa and Mr Standring, (deemed to be as tenants in common in equal shares in terms of section 34 Land Transfer Act 1972). The Mountain View property (the first of the properties listed in the will) is in Mr Standing's sole name, and is therefore part of his estate, although Ms Railoa said that it was purchased from the proceeds of sale of cane farm in which she had a share. There is no evidence about the status of the third property, except that it is a property at Saweni, with a house on it that is currently unoccupied. The court has not been told in whose name this property is held.

38 Nor is there any evidence about the bank accounts, company shares or other assets in the estate, other than the evidence from Ms Railoa, that Mr Standring had sold his shares in the Melanesian Imports the year before he made the will in 2012. Whether the bank accounts still exist, or are worth anything is not known. It would have been useful evidence to have, since whether they still existed may indicate the extent to which Mr Standring was still in 2012 sufficiently aware of the true extent of his estate to have capacity to make a will disposing of it.

The Law

39 Sections 4-6 of the Wills Act 1972 set out the mandatory formal requirements for a valid will. The sections provide:

> ***Capacity generally***
> ***4.*** *Subject to the provisions of Part V, every person not less than eighteen years of age has capacity to make a will.*
>
> ***Property may be disposed of by will***
> ***5.*** *Every person having by this Act capacity to make a will may by a will executed or made in manner required by this Act dispose of all his property and of all property which in exercise of a power of appointment he is entitled or able to dispose of by his will and may also by his will appoint a guardian of his infant children.*
>
> ***PART III-THE EXECUTION AND MAKING OF WILLS***
> ***Execution generally***
> ***6.*** *Subject to the provisions of Part V, a will is not valid unless it is in writing and executed in the following manner:-*
> *(a) it is signed by the testator or by some person in his presence and by his direction in such place on the document as to be apparent on the face of the will that the testator intended by such signature to give effect to the writing as his will;*
> *(b) such signature is made or acknowledged by the testator in the presence of at least two witnesses present at the same time; and*
> *(c) the witnesses attest and subscribe the will in the presence of the testator, but no form of attestation is necessary.*

40 Where doubt is properly raised (i.e. in circumstances where the uncertainty is something more than speculation) whether a will has been signed by the testator, and witnessed in accordance with these requirements, the normal method of establishing the facts is for one or both of the witnesses to the will to give evidence. This may not be the only way proper execution can be proved, but it is so obviously the best way, that adoption of some other method is likely to have to be justified and explained. See **Bowman v Hodgson** (1867) 1 LRP & D 362 relied on by Calancini J in **Chandra v Chandra** [2012] FJHC 1080.

41 But the formal requirements for signing set out in the Wills Act are not the only requirements for a valid will. In **Banks v Goodfellow** (1870) LR 5 QB 549 at page 565 Cockburn CJ delivering the judgment of the Court said:

> *It is essential to the exercise of such a power [i.e. testamentary power] that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, and prevent the exercise of his natural faculties - that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.*

So on any application for probate of a will, these are the matters as to which the court must be satisfied.

42 Whether on an application for an initial grant of probate, or in a proceeding such as this for revocation of the grant of probate, the requirements are the same. In the decision of the Fiji Court of Appeal in **Ho v Ho** [1997] FJCA 53 the court set out the principles for both testing the validity of a will, and determining who has the onus of proof, as follows:

> *The law in this area is well settled. Out of the numerous formulations, we pick that of O'Leary CJ in the New Zealand Court of Appeal in **Re White** [1951] NZLR 393, 409 –*
>
> > *If a will rational on the face of it is shown to have been executed and attested in the normal manner prescribed by law, it is presumed, in the absence of any evidence to the contrary, that it was made by a person of competent understanding. But, if there are circumstances in evidence which counter-balance that presumption, the decree of the Court must be against its validity unless the evidence on the whole is sufficient to establish affirmatively that the testator was of sound mind when he executed it: (per Cresswell, J in **Symes v Green** (1859) 1 Sw & Tr 401; 164 ER 785). In the end the tribunal must be able affirmatively, on a review of the whole evidence, to declare itself satisfied of the testator's competence at the time of the execution of the will: (**Smith v Tebitt** [1867] LR 1 P & D 398, 436 and **Sutton v Sadler** (1857) 3 CB (NS) 87, 97;[1857] EngR 738; 140 ER 671, 675).*
>
> *The question of onus was also referred to in a passage from the judgment of the High Court of Australia in **Worth v Clasohm** [1952] HCA 67; (1953) 86 CLR 439, 453 as follows –*
>
> > *A doubt being raised as to the existence of testamentary capacity at the relevant time, there undoubtedly rested upon the plaintiff the burden of satisfying the conscience of the Court that the testatrix retained her mental powers to the requisite*

extent. But that is not to say that he was required to answer the doubt of proof to the point of complete demonstration, or by proof beyond a reasonable doubt. The criminal standard of proof has no place in the trial of an issue as to testamentary capacity in a probate action. The effect of a doubt initially is to require a vigilant examination of the whole of the evidence which the parties place before the Court; but, that examination having been made, a residual doubt is not enough to defeat the plaintiff's claim for probate unless it is felt by the Court to be substantial enough to preclude a belief that the document propounded is the will of a testatrix who possessed sound mind, memory and understanding at the time of its execution.

The Court of Appeal in **Ho** went on to say, in application of these tests:

The approach adopted to the question of proof in all the cases is the same - i.e. that before a will can be admitted to probate, it must be shown that:

- *the testator was a person of sufficient mental capacity;*
- *that in the absence of any evidence to the contrary it will be presumed that the document has been made by a person of competent understanding;*
- *that once a doubt is raised as to the existence of testamentary capacity, an onus rests on the person propounding the will to satisfy the Court that the testator retained his mental powers to the requisite extent;*
- *that in the end, the tribunal must be able to declare that it is satisfied of the testator's competence at the relevant time, but that a will not be defeated merely because a residual doubt remains as to that matter.*

*The matter has been put in different ways with varying degrees of emphasis according to the circumstances of each case but we do not detect any difference of judicial opinion, significant for the purposes of the present state, in the passages cited. (See also **Peters v Morris** (New Zealand Court of Appeal, 19 May 1987, unreported CA99/83).*

(I have taken the liberty of reformatting – using bullet points - this paragraph to emphasize the different elements of the test to be applied). It should be remembered that in **Ho** the Court ultimately decided that there was sufficient evidence of capacity, so the will stood. That outcome is reflected – as the final sentence quoted makes clear - in the way the Court chose to express the principles on which it relied.

43 On the issue of 'sufficient mental capacity' the principles established by **Banks v Goodfellow** were recently restated and affirmed in the New Zealand Court of Appeal in **Loosely v Powell** [2018] NZCA 3 as follows:

1. Because it involves moral responsibility, the possession of the intellectual and moral faculties common to our nature is essential to the validity of a will.

2. It is essential to the exercise of such a power that a testator:

(i) understands the nature of the act and its effects; and also the extent of the property of which he is disposing;

(ii) is able to comprehend and appreciate the claims to which he ought to give effect;

(iii) be free of any disorder of the mind which would poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties; that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

3. *In deciding upon the capacity of the testator to make his will, it is the soundness of the mind, and not the particular state of the bodily health, that is to be attended to. The latter may be in a state of extreme weakness, feebleness or debility and yet he may have enough understanding to direct how his property shall be disposed of; his capacity may be perfect to dispose of his property by will, and yet very inadequate to the management of other business, as, for instance, to make contracts for the purchase or sale of property.*
4. *A testator who has reflected over the years on how his property should be disposed of by will is likely to find it less difficult to express his testamentary intentions than to understand some new business.*
5. *Testamentary capacity does not require a sound and disposing mind and memory in the highest degree; otherwise, very few could make testaments at all.*
6. *Nor must the testator possess such capacity to the same extent as previously. His mind may have been in some degree weakened, his memory may have become in some degree enfeebled; and yet there may be enough left clearly to understand and make a sound assessment of all those things, and all those circumstances, which enter into the nature of a rational, fair and just testament.*
7. *But if that standard is not met, he will lack capacity.*

44 Dealing more specifically with the issue of where the onus of proof lies the New Zealand Court of Appeal has also re-stated these principles in **Bishop v O'Dea** (1999) 18 FRNZ 492:

1. *In probate proceedings those propounding the will do not have to establish that the maker of the will had testamentary capacity, unless there is some evidence raising lack of capacity as a tenable issue. In the absence of such evidence, the maker of a will apparently rational on its face, will be presumed to have testamentary capacity.*
2. *If there is evidence which raises lack of capacity as a tenable issue, the onus of satisfying the Court that the maker of the will did have testamentary capacity rests on those who seek probate of the will.*
3. *That onus must be discharged on the balance of probabilities. Whether the onus has been discharged will depend, amongst other things, upon the strength of the evidence suggesting lack of capacity*

These principles are well recognised. They are essentially the same as those set out by the authors of Williams, Mortimer & Sunnucks **Executors, Administrators and Probate** 21st Ed (2018) Sweet & Maxwell at paragraph 10-26.

45 The case of **Loosley v Powell** was, like this case, an application for the recall of probate that had been granted in the first instance in common form (uncontested). It is clear from the cases referred to above, that once evidence is presented of circumstances putting capacity of the testator in issue, the onus then falls upon those seeking to obtain or maintain probate (i.e. to propound the will) to show, on the balance of probabilities, that all the requirements for a valid will have been met. This includes both compliance with the requirements of the Wills Act as to execution, and issues such as capacity, as spelled out by Cockburn CJ in **Banks v Goodfellow** and in the cases which follow it. In **Loosley** the particular circumstances raising a doubt about the testatrix' capacity was a major change in her last will (made within days before she succumbed to cancer, and when she was taking powerful medication for her condition) from previous wills, accompanied by conflicting medical evidence about the impact of her condition and of the medication she was taking on her capacity to understand the full effect and

implications of changing her will in so drastic a manner. The case is an illustration of how the issue of who has the onus of proof can affect the outcome. In the end, the judge at first instance (with whom the Court of Appeal agreed) was not satisfied that those seeking to uphold the grant of probate had met the standard of proof required to show that the testator had the requisite capacity/understanding when she made her last will; hence probate of that will was set aside, and an earlier will was re-instated.

46 In **Loosley** the issue of lack of capacity arose because of an important change to a will in the context explained in the previous paragraph. In **Ho** the defendant (one of the deceased's sons, who was contesting the application for probate of the last will) argued that there was an unnatural and unwarranted antipathy of the deceased towards him, which meant that the testator lacked capacity. In that case the Court was satisfied, on the evidence presented (which unlike the present case included extensive evidence about how the will instructions were given, and about the process of signing the will), that any antipathy that the deceased had was not such as to affect his capacity.

47 In **Fong v Marlow** [1985] FJHC (FJSC) 22 Kermode J was satisfied in spite of the deceased's great age (95 when he changed his will six months before he died) that he had received proper advice and had capacity at the time of signing. The will was not markedly different from earlier wills, and again there was evidence about the process for preparing and executing the will that satisfied the court that the testator understood what he was doing. In a recent decision of the High Court at Lautoka **Devi v Mani** [2019] FJHC 1127 Nanayakkara J declined to revoke probate where the deceased changed his will in favour of his de facto partner (disinheriting his wife) while in intensive care in hospital; he died shortly afterwards. The court was satisfied on the evidence that the testator understood what he was doing, and that the will reflected his intention.

48 Another circumstance that can put into doubt the capacity and intentions of the testator is when the will instructions are conveyed by an intermediary. This is particularly likely to be an issue where the testator is otherwise unable to communicate, even if he does understand what he is told, and so cannot or does not himself express his intentions to the person preparing the will. Lord Normand in ***Batan Singh v Amirchan*** [1948] AC 161 at 169, commenting on the dangers inherent in conveying instructions for a will through an intermediary, said:

> *The opportunities for error in transmission and of misunderstanding and of deception in such a situation are obvious, and the court ought to be strictly satisfied that there is no ground for suspicion, and that the instructions given to the intermediary were unambiguous and clearly understood, faithfully reported by him and rightly apprehended by the solicitor, before making any presumption in favour of validity.*

49 On the subject of revocation of a will by subsequent marriage section 13 Wills Act 1972 provides:

> ***PART IV-REVOCATION OF WILLS***

Subsequent marriage

13*(1)* *Every will shall be revoked by the subsequent marriage of the testator (except a will made in exercise of a power of appointment when the real or personal estate thereby appointed would not, in default of such appointment, pass to the executor or administrator of the testator or the person entitled in the case of intestacy).*

(2) *A will made in contemplation of a marriage, whether or not that contemplation is expressed in the will, is not revoked by the solemnisation of the marriage contemplated.*

(3) *A will made which is expressed to be made in contemplation of marriage generally is not revoked by the solemnisation of the marriage of the testator.*

50 In his decision in **Hakim v Bi** [2007] FJR 318 Jitoko J undertook a comprehensive analysis of the case law relating to the application of this section. The judge referred in his decision to the differences between:

i. the approach taken by Mahon J in **Public Trustee v Crawley and Ors** [1973] 1 NZLR 695, which is reflected in the following extracts:

ii.

> *In my opinion F B Adams J [in **Burton v McGregor** [1953] NZLR 487] correctly identified the controlling requirement of the section which is not that a Will be made in contemplation of marriage but that it be expressed to be made in contemplation of marriage. I also respectfully agree with F B Adams J that the testamentary expression must convey the intention or contemplation of the testator that his Will shall operate after marriage. This may be done using the phraseology of the section itself of by using other words which unmistakably convey the same intention.*

Applying **Burton** to the case, Mahon J concluded that: …

> *a disposition in favour of "my fiancée" only establishes that a marriage is contemplated. It does not necessarily represent that the Will is being made in contemplation of that marriage, with the concurrent intention that the Will is to survive the marriage.*

iii. The approach of the New South Wales Court of Appeal in **Layer v Burns Philp Trustee Co Ltd** (1986) 6 NSWLR 60 at 67 as follows:

> *"expressed" does not require that the Will state in terms that the deceased had the relevant contemplating. The provision requires only that … the deceased have the marriage in mind at the time when the Will was made and that this appears from the terms of the Will.*

This approach is more akin to that taken in the English cases of **Pilot v Gainfort** [1931] P 103, and **Re Langston** [1953] P 100 in which references to 'my wife' (where the persons referred to were not yet married to the testator) were held to be sufficient expression of the intention to marry, and of the intention for the will to survive that event.

51 It is important to note that the cases referred to above were all decided on a version of section 13 of the Wills Act that is not now in force in Fiji. By the Wills Amendment Act 2004 the law in this country was amended to the form set out above, which does not now require (as it did) that the intention to marry, and that the will should survive that marriage, must be expressed in the will, as long as it is apparent from

the evidence. In coming to the conclusion he did in **Hakim v Bi** referred to above (a decision that, while it was given after the amendment to the Wills Act in 2004, was based on the un-amended form of section 13, because the deceased had died before 2004), Jitoko J expressed himself satisfied on the facts of that case that:

> *the terms of the will amounts to an unequivocal declaration by the testator of his intention that the will should survive the marriage.*

and this, I think, expresses the essence of the test he applied to the facts before him. In this area every case will be different, and in every instance the court will be striving to arrive at a just outcome, dependent on the facts of the particular case before it. It is illustrative of the dilemma that these cases pose that the current Wills Act in New Zealand (passed in 2007, after the amendment of the Fiji act) opts for an even more complete coverage of the likely options. Under section 18(3) of the New Zealand Act of 2007 a will is not revoked by subsequent marriage if:

> *(a) either -*
> *(i) the will expressly says that it is made in contemplation of a particular marriage or civil union; or*
> *(ii) the will does not expressly say that it is made in contemplation of a particular marriage or civil union but the circumstances existing when it was made show clearly that it was made in contemplation of a particular marriage or civil union; and*
> *(b) the marriage or civil union that occurs is the contemplated one.*

Thus the current test in Fiji and in New Zealand seems to encompass both the approaches referred to in paragraph 50 above and mitigate the harshness of the outcome if the more purist approach of Mahon J in following the **Burton** decision is taken.

Analysis – validity of 'will' of 4 July 2012

52 In the circumstances of this case I am satisfied that probate issued In favour of the second defendants should be recalled. The defendant's, as propounders of the will dated 4 July 2012, have not satisfied me that when he signed that document Mr Standring, to adopt the wording of the passage from **Banks v Goodfellow** quoted above, understood:

> *the nature of the act and its effects; … the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, and prevent the exercise of his natural faculties - that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.*

53 The evidence shows that when he signed the 'will' Mr Standring had recently arrived back in New Zealand after living for 38 years in Fiji. He either left Fiji with the intention of not returning, or he came to that decision after he arrived. If the first was true, he deceived his wife (of 23 years) and his friends about his intentions, and – if that was his plan - it is surprising that he didn't attempt to change his will before

he left, and didn't take more of his belongings. If the alternative is true, he made a major decision about his future (with widespread consequences for others, as these proceedings demonstrate) in circumstances where there is no evidence that he had counselling or independent advice, or a proper understanding of what he was doing.

54 Other factors that raise flags about issues of capacity are his age, state of mental and physical health and his dependence on others (both for his day to day needs, and to convey instructions for and to make arrangements for the preparation and signing of the new will). Also relevant are his apparent anxiety over money issues, and perhaps the recent sale of his business (a change of lifestyle and status that may have an impact on his mental well-being), and the recent floods damaging his home to the extent that he expected to be away for six months while it was being repaired.

55 Furthermore, because Mr Standring did not have a phone, or use a computer, we know that any communications he had with his solicitor were made through his daughter Jacqueline, who was the only beneficiary of the changes that were made, and is the only witness for what she says was her father's intention not to return to Fiji, and to leave his wife and family there, and to refuse to communicate his intentions to them (which on its own suggests an absence of rational thought). Jacqueline also arranged for the solicitor/notary to witness the will, and the Power of Attorney in her favour, but there is no evidence about what advice the solicitor/notary gave to Mr Standring, or indeed, what explanation the solicitor was given about the background to the documents he was asked to assist with. Given that only Jacqueline had a phone and an email address, it seems that she was also the main conduit for any communications from Mr Standring's wife and family in Fiji. She says he didn't want to talk to them, but she said nothing about whether she attempted to persuade him to do so, and of course, because no records or copies of emails or texts were produced in evidence, we know nothing about what she actually said to Mr Standring's solicitor in Fiji, to enable the court to judge whether the will that was eventually signed corresponded with those instructions. We do not even know whether the document signed by Mr Standring was the same as the will prepared by his solicitors, and – presumably (we really don't know) - sent by the solicitors to be printed out, by Jacqueline, for signing in New Zealand.

56 It is obvious how radically different the 2012 will was from the will Mr Standring had made in 2006. Instead of leaving most of his estate to his wife, the new will leaves everything but the car (which Mr Standring did not have, and no longer drove) to his daughter. This major change would be understandable if the Mr Standring and Ms Railoa had already separated and there was clear evidence of the fact. The fact that there was no evidence of separation means that the changes are incompatible with rational judgment. In the absence of evidence I am simply not persuaded that in making his new will in 2012 Mr Standring could have properly understood the significance and enormity of what he was doing. Perhaps even more telling than the substitution of his daughter for his wife, is the removal of any provision for the child Balou, who in 2006 he apparently had sufficient interest in to make an appointment for her care on his death (see paragraph 3 of the 2006 will). However estranged he may have felt from his wife (remembering that there is absolutely no evidence of

this), it is hard to understand how he could rationally disregard someone he apparently saw as one for whom he was responsible.

57 Collectively these issues are more than sufficient to raise a tenable question about Mr Standring's capacity to make the will he did on 4th July 2012, and to require the defendants as propounders of that will to prove that all the elements of the **Banks v Goodfellow** test of the will's validity were satisfied.

58 Proof that the **Banks v Goodfellow** test was satisfied might have been provided by:

i. medical evidence (we know that he attended a medical examination soon after he arrived from Fiji) to show that Mr Standring was not in fact prevented by factors such as his age, frailty, forgetfulness or otherwise from having sufficient understanding of what he was doing,
ii. evidence from his solicitors in Fiji who prepared the will showing that what they prepared corresponded with his instructions, that he knew what property he was disposing of, and – hopefully – that they had advised him of any obligations he had to his wife and family, and whether the proposed new will met those obligations. I would have expected also some evidence of a discussion about the reasons for the changes proposed in the new will, including some reference to, and explanation of, Mr Standring's alleged intention to separate, and to remain in New Zealand. Evidence of the reasons for and advice related to the Power of Attorney may also have shed some insight into Mr Standring's understanding of what he was doing.
iii. evidence from the solicitor/notary (assuming he knew nothing of the background before Mr Standring and his family came in to the office on the day the will was signed – if this assumption is wrong, evidence of how, when, who by and what he was told) of how he identified the person who signed the will as Mr Standring, how Mr Standring explained the situation to him, whether he mentioned his wife or his previous will, and if so how he explained the changes, what discussion was held about the property disposed of in the will, and questions he should have asked Mr Standring about who prepared the will and the involvement of Jacqueline (as principal beneficiary) in the whole process.
iv. copies of texts and emails (we know they exist – they should have been produced) that show Mr Standring's active involvement in, understanding of and agreement with the process of giving instructions for, redrafting and signing the will and Power of Attorney.

59 Such evidence, had it been presented, may have shown that Mr Standring had the knowledge, capacity and understanding required, and that the directions contained in the will corresponded with his independent wishes. If so I would have been happy to uphold the will. However, there was no evidence on any of these issues, except perhaps the evidence (albeit from the beneficiaries rather than those who witnessed the will) that it was Mr Standring who signed the document at the solicitor's office in Henderson, Auckland. There was no medical evidence of Mr Standring's health and understanding at the time, nor was there any evidence from his solicitors in Fiji to

show that the will that he signed reflected his instructions, or of advice that they should have given him about the nature of the change, the rights that Ms Railoa undoubtedly had to some support from him (whether or not they were separated – something I am quite sure that Ms Railoa knew nothing about), and to a share of the property he was giving away.

60 Such evidence as there is about the estate assets suggests – when compared with what is provided for in the will - that Mr Standring did not have a full appreciation of what comprised his estate (i.e. that assets referred to in the will no longer existed), and there is certainly no evidence to show that he was advised about the calls on his estate that his wife would likely have under the Family Law Act 2003 or the Inheritance (Family Provision) Act 2004 or otherwise. The provisions of the 'will' suggest that no such advice was given, even though the will was apparently prepared by a solicitor. It seems unlikely that the solicitor in New Zealand who witnessed the will would have given him advice on these matters, and any advice Mr Standring was given should therefore have come from the Fiji solicitors, and would appear in emails (the only means of communication known to have been used).

61 Numerous other cases show that impediments such as those that Mr Standring suffered from when he came to make a new will in 2012 do not necessarily mean that he could not have made a valid new will at the time that he did. The Fiji cases of **Ho** and **Fong** referred to above are illustrations of how this might have been done. But for the court to be satisfied that those impediments did not affect the validity of the will, the defendants needed to call evidence to satisfy the various aspects of the tests suggested by **Banks v Goodfellow** and all those cases that have followed it. No evidence of that nature was called, although all that evidence was in the control of the defendants, and so the concerns that I have outlined above remain. In these circumstances I cannot be satisfied that Mr Standring made a valid will on 4th July 2012, and the grant of probate made by the Court on 3 December 2014 is set aside.

Analysis – validity of will dated 30 December 2006

62 I am not persuaded by the evidence or arguments presented by and for the plaintiff that the will made by Mr Standring on 30 December 2006 was a will *made in contemplation of marriage* as set out in section 13(2) Wills Act 1972. Accordingly the marriage between Ms Railoa and Mr Standring that took place in 2010 means that the will is revoked.

63 While the current social climate puts into question the need for the long-standing legal principle that a will (other than one made in contemplation of marriage) is invalidated by a subsequent marriage of the will-maker, it should be remembered that the principle was itself originally remedial in its application. At a time when marriage and inheritance rights were much more important social and economic institutions than they are now, and when property was almost invariably owned by males, it was inconceivable that the rights of surviving spouses and particularly family might be jeopardised by a will made prior to marriage by the property owner. Getting married meant – and still means - that new obligations arose, and the law

dictated that previous testamentary dispositions were therefore to be vacated, unless they were made (and expressed to be made) in contemplation of the marriage.

64 These laws have arguably become anomalous in the present climate, where parties often live together and have children in de facto relationships before eventually marrying, or without ever marrying, and where property and other rights arising from that are preserved by other legislation. But the ancient law remains in place except to the extent that amendments mitigate the harsh effect (as reflected in the 2004 amendments to section 13 referred to above). But even applying the more pragmatic provisions that now apply, I am satisfied that Mr Standring's 2006 will cannot survive the 2010 marriage.

65 In those cases where the courts have found that wills were made in contemplation of marriage either the wills themselves included some terminology referring to the possibility or likelihood of a future change in the status of the relationship, or there was other evidence of the intention to marry concurrent with the making of the will. Thus a reference in the will to 'my fiancee' might be taken as an indication of an intention to marry (i.e. that a proposal of marriage has been made and accepted), and a reference to 'my wife' in **Re Langston** is taken as an indication of an intention that the will should continue to apply after the person named acquires that status. In **Hakim v Bi**, even though the reference was to 'my common law wife', the will also included a clause (supported by other evidence) that satisfied the court that the testator had intended to exclude his former wife and children from his estate. Together these factors were sufficient, in that case and given the circumstances in which the will had been signed (which would certainly have met the requirements of the amended s.13 for the will to survive), for the court to be satisfied that the will was an *unequivocal declaration by the testator of his intention that the will should survive the marriage.*

66 In the present case there is neither language in the will that denotes an intention to marry (the will refers to Ms Railoa as 'my de facto spouse' which simply describes her then current status without suggesting that there is any intention to change it), nor – unlike **Hakim v Bi** - any evidence that, in 2006 when the will was made, Ms Railoa and Mr Standring had any plans to marry in the future (they had been living together for nearly 20 years at that stage), and that the will was being made in anticipation of that event. It may be that the circumstances in which the 2006 will was made, together with the terms of the will, make clear Mr Standring's intention to marry and that the will should survive the marriage, but no evidence of those circumstances was given to the court. There is therefore no basis upon which the court can find, however anxious it might be to do so, that the situation meets the requirements of section 13(2) of the Wills Act 1972 that the will must be *made in contemplation of a marriage.*

67 In the present case, this finding means that there is no valid will (any earlier will than 2006 would also have been revoked by the 2010 marriage). This in turn means that the provisions of section 6 of the Succession, Probate and Administration Act 1970

apply, i.e. that Ms Railoa will receive the prescribed amount under that Act (currently $20,000) plus all the personal chattels (as defined in the Act) and one third of the residue, while the balance of the estate will go to Ms Singh as his only child. Of course the estate does not include any jointly owned property, which passes by survivorship, and may also be subject to:

i. any rights Ms Railoa chooses to exercise to buy the estate's portion of the matrimonial home, in terms of section 6A of the Succession, Probate and Administration Act.
ii. any claims that Ms Railoa may have under the Family Law Act 2003 (to a share of property)
iii. any claims that Ms Railoa may have under the Inheritance (Family Provision) Act 2004 to 'adequate provision' from the estate of Mr Standring.

These are matters on which Ms Railoa will need to take advice.

68 In terms of section 7 of the Succession, Probate and Administration Act the court may grant administration of the estate of a person dying intestate, separately or conjointly to the persons named in the section. An application needs to be made for administration in terms of the High Court Rules by Ms Railoa in the first instance, although given the different interests of Ms Railoa as widow, and Ms Singh as Mr Standring's child, it might be sensible for consideration to be given to the appointment of an independent administrator who will ensure that the estate is administered promptly for the benefit of all those entitled. I strongly suggest that local administrators be appointed, rather than incur the expense and delays in having someone based overseas act in the role. However these are merely my suggestions, not orders of the Court, and the parties will need to take advice on them. Any orders will need to await a formal application for administration, accompanied by submissions from Counsel. I would expect this to be on Notice rather than *ex parte*, and for the parties to co-operate in the process. It serves no-ones' interests for the current stalemate to continue.

69 At this stage, given the uncertainty about the final outcome for Mr Standring's estate, I do not intend to make an award of costs. Leave is reserved to any party to make a formal application for costs. When and if that application is made I will be interested to know what has happened with the administration and distribution of the estate. It may well be that an appropriate outcome is for the estate to bear the costs of both parties in these proceedings as an estate expense. But an order to that effect will need to take into account how the estate has been distributed, and how the parties have conducted themselves in achieving that outcome.

70 Addressing the matters sought in the prayer for relief in the statement of claim the result of this decision is as follows:

1. An order for declaration that the last Wil and Testament executed by the testator on 4th July 2012 is void and of no legal effect.

For the reasons stated the defendants have failed to show that Mr Strandring had the necessary capacity to make a valid will in July 2012, and the grant of probate is therefore revoked.

2. ***An order that the grant of Probate Number 55825 to appoint Denis Standring and Ronald Ritesh Singh as Executors and Trustees of the Estate of Donald William Standring be revoked forthwith.***

See above.

3. ***An order for declaration that Ronald Ritesh Singh was never appointed by Messrs Hari Ram Lawyers as one of the Executor and Trustee of the Estate of Donald Standring after the testator's death.***

As a result of the decisions referred to above, there is no need for this order. In any case the issue was not addressed in either evidence or submissions.

4. ***An order for declaration that the property situates at Lot 47 Mountain View Estate, Martintar being Certificate of Title No. 19128 describe as Lot 47 DP 4509 is a matrimonial property pursuant to Family Law Act wherein the Plaintiff has 50% share therein.***

I agree with the defendants' counsel's submissions that I have no jurisdiction in these proceedings to make an order to this effect. This is not a proceeding under the Family Law Act 2003, but even if it were it would not be appropriate to make an order of this sort in respect of only one item of property. If an application is made by Ms Railoa under the Family Law Act against the estate of Mr Standring (noting that such an application would put Ms Railoa in a position of conflict if she was the sole administrator) it should deal with all issues of matrimonial property, not just the ownership of the home. Furthermore no evidence was given that would have enabled me to reach any conclusion about what might be a fair and equitable division of property following the end of the relationship, and no submissions were made by counsel for the plaintiff covering the issues that arise under this cause of action.

5. ***An order that the true and last Will and Testament of Donald Standring is the Will executed on 30th December 2006.***

For the reasons given previously I am satisfied that the 2006 will of Mr Standring was revoked by his subsequent marriage to the plaintiff, and accordingly I am not prepared to make this order.

6. ***An order that Messrs Hari Ram of Ram's Law, solicitors of Nadi do appoint the second executor and trustee in accordance with the last Will and Testament dated 30th December 2006.***

In view of my finding that neither the 2006 or the 2012 wills are valid there is no need for this order. An application for administration will need to be made by someone (see my comments above), and there is no basis for Rams Law to have any

involvement in that process, unless the firm is instructed by one of the parties to act in the normal way in the application for administration.

7. An order that the Executors and Trustees of the estate of the late Mr Standring distributed his estates in accordance to his last Will and Testament dated 30th December 2006.

Since I have found, for the reasons given, that the 2006 will has been revoked, the estate clearly cannot be distributed on the basis set out in that will.

8. Costs

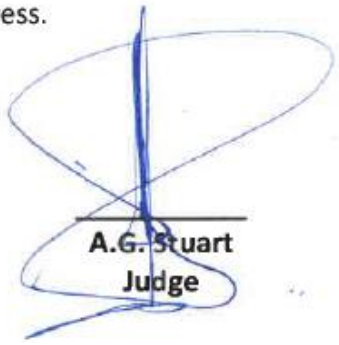
See paragraph 69 above.

9. Further or any other relief this Honourable Court deems just.

See paragraph 70 for the orders that follow from this decision.

71 I therefore make the following orders:

i. The grant of probate made by the Court on 3 December 2014 giving administration of the estate of Donald William Standring to the second defendants is recalled and revoked.
ii. Costs are reserved, with leave to any party to make a formal application for costs.
iii. The matter is adjourned for mention at 10.30am on Friday 4 December 2020 for review of progress.



At Lautoka this 12th day of June, 2020

SOLICITORS:
Babu Singh & Associates, Nadi for the plaintiff
Kohli & Singh, Suva for the First, Second and Third Defendants.