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

CONSOLIDATED ACTIONS NOS.
HBJ 4 /2020 & HBJ 5/2020

IN THE MATTER of the **CIVIL AVIATION AUTHORITY OF FIJI**

AND IN THE MATTER of applications by **DAVID LEO JOHN SIRIANNI, TIMOTHY JOHN JOYCE, SUNFLOWER AVIATION PTE LIMITED & JOYCE AVIATION (FIJI) PTE LIMITED** for judicial review to quash decisions of the Acting Chief Executive and the Enforcement Compliance Committee of the Civil Aviation Authority

BETWEEN **DAVID LEO JOHN SIRIANNI, TIMOTHY JOHN JOYCE, SUNFLOWER AVIATION PTE LMITED & JOYCE AVIATION (FIJI) PTE LIMITED (t/a Heli Tours Fiji)**

APPLICANTS

AND **CIVIL AVIATION AUTHORITY OF FIJI** situated at CAAF compound, Nadi Airport, Nadi

FIRST RESPONDENT

AND **THERESA O'BOYLE-LEVESTAM** Acting Chief Executive of the Civil Aviation Authority of Fiji, CAAF compound, Nadi Airport, Nadi.

SECOND RESPONDENT

APPEARANCES : Mr A Narayan for the Applicants
Mr R Singh for the First & Second Respondents

DATE OF HEARING : 24 November 2020

DATE OF JUDGMENT : 17 March 2021

DECISION

1. These are applications filed in the High Court at Lautoka on 16 October 2020 (consolidated by consent on 21 October 2020) under O.53, r.3 of the High Court Rules for leave to apply for judicial review. The applicants are two pilots, and the organisations for which they work (and of which the applicant Mr Joyce is a shareholder and director), who/which are affected by decisions of,

   i. in the first instance the first respondent, the Civil Aviation Authority of Fiji (*CAA*), and following an appeal against that decision, by the second

respondent, the Acting Chief Executive of the CAA, to suspend with effect from 5 August 2020 pending investigation, and in the case of the second defendant to uphold that suspension, of:

(a) the commercial pilot licences of the two pilots
(b) the airworthiness certificates of aircraft DQ-HTM (Airbus Helicopters AS 355 Twin Squirrel) and DQ-HTJ (Robinson 44 Raven II), being two helicopters operated by Joyce Aviation (Fiji) Pte Ltd (JAF).

ii. the Enforcement Compliance Committee (*ECC*) of the CAA on 1 October 2020, to:

(a) In relation to Mr Joyce:
- To suspend his commercial pilot's licence for 6 months (less two months for the suspension pending investigation and the impact it has had on his livelihood) with effect from 1 October 2020 (i.e. until 31 January 2021)
- To revoke his authority/approval to act as chief pilot, check and training pilot, line pilot and Certificate of Airworthiness check pilot for JAF
- To revoke the Certificate of Airworthiness (CoA) and re-do the tests for DQ-HTM

(b) In relation to Mr Sirianni:
- To suspend his commercial pilot's licence for 6 months (less three months for the suspension pending investigation and the effect on his livelihood, and because this was a first offence) with effect from 1 October 2020 (i.e. until 31 December 2020)
- To revoke his authority/approval to act as chief pilot and operations manager for Sunflower Aviation Ltd and Heli-Tours Fiji.
- To revoke the Certificate of Airworthiness and re-do the tests for DQ-HTJ.

2. These decisions by CAA were based on conclusions drawn by its officers following inquiry, that the two pilots had separately completed and lodged with CAA aircraft radio test reports (for DQ-HTM by Mr Joyce, and for DQ-HTJ by Mr Sirianni) that falsely certified that they had completed prescribed radio tests for the two aircraft, when they knew that the radio tests did not meet the prescribed criteria in that they were not carried out from the distances required. Mr Joyce faced an additional charge that he had falsely certified that he had carried out prescribed engine testing on DQ-HTM when he knew that the prescribed tests had not been completed. These certificates, CAA say, constituted a breach of s128(2)(c) Air Navigation Regulations, which provides:

128(2) A person shall not

(c) provide false or misleading information to the Authority for the purposes of obtaining any aviation document:

3. There is no dispute about what tests were actually carried out by Mr Joyce and Mr Sirianni, or what certificates/forms they signed. The argument that they have with CAA, the conclusions it has come to and the penalties it has imposed, relate to who was responsible for certifying the tests, what they were actually certifying for when they signed certain documentation (i.e. were they certifying what CAA understood/says they were certifying, or something else), whether the tests that CAA say should have been carried out were necessary, or could be substituted for other tests, and – if they were guilty of the charges – what was the appropriate penalty/sanction. The applicants also have concerns about the process followed by CAA, including how the investigation was conducted, who conducted the investigation, what the applicants were told was the purpose of a meeting conducted by CAA at which they were questioned on aspects of their testing and documentation, the absence of any warning given to them prior to interview, and the independence (or lack of it) of the second defendant in reviewing the decisions of the investigators as required by section 12F Civil Aviation Authority of Fiji Act 1979, which states:

12F Any person who is aggrieved by the Authority's decision on the refusal, withdrawal, revocation, variation or suspension of an aviation document may appeal to the Chief Executive for the review of the Authority's decision.

4. After these applications were filed the parties sensibly agreed to the court making interim orders by consent in part suspending the effect of the decisions made by CAA pending the hearing of the application for leave to apply for judicial review. Following the hearing of the applications on 19 November 2020 I made, on 24 November, further interim orders suspending the effect of all the decisions of the respondents pending the issue of this decision.

5. The applications by Mr Sirianni and Mr Joyce seek the following orders:

   i. Leave to apply for judicial review of the decisions referred to in paragraph 1 above.
   ii. a stay of implementation of the decisions of 1 October 2020 (paragraph 1(ii) above)
   iii. a stay of any action or further contemplated action, or withholding the processing of or refusal to issue any aviation documents or renewals thereof and/or revoking cancelling and/or suspending the Air Operators Certificate for any of the applicants based on the findings and decisions referred to in paragraph 1(ii) above.
   iv. alternatively an order restraining the respondents from any conduct described in subparagraph (iii) above.
   v. Certiorari and Prohibition to maintain the status quo prevailing prior to 5 August 2020.

vi. an order to uplift the suspension imposed on 5 August 2020 and 1 October 2020 until determination of the application for judicial review.

6. Affidavits in support of these applications, and in reply to the respondents affidavits, were made by the two applicants, Mr Joyce and Mr Sirianni, and by Susan Robyn Joyce. In response to the applications the respondents have filed affidavits by Mr Rigimoto Aisake, the Controller of Aviation Security and Facilitation of Fiji. I have read all the affidavits.

The law

7. Order 53, rule 3 provides:

> *3(1) No application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule.*
> *(2) An application for leave must be made upon filing in the Registry:*
> *(a) a notice in Form 32 in the Appendix hereunder containing a statement of-*
> *(i) the particulars of the judgment order, decision or other proceeding in respect of which judicial review is being sought;*
> *(ii) the relief sought and the grounds upon which it is sought;*
> *(iii) the name and description of the applicant;*
> *(iv) the name and address of the applicant's Solicitors (if any); and*
> *(v) the applicant's address for service;*
> *(b) an affidavit which verifies the facts relied on.*
> *(3) (i) Copies of the application for leave and the affidavit in support must be served on all persons directly affected by the application.*
> *(ii) The Court may determine the application without a hearing and where a hearing is considered necessary the Court shall hear and determine the application inter partes.*
> *(iii) Notice of hearing of the application shall be notified in writing to the parties by the Registrar.*
> *(iv) Where the Court determines the application without a hearing, the Registrar shall serve a copy of the order of the Court on the applicant.*
> *(4) Without prejudice to its powers under Order 20, rule 8, the Court hearing an application for leave may allow the relief sought and the grounds thereof to be amended, whether by specifying different or additional grounds or relief or otherwise, on such terms, if any, as it thinks fit.*
> *(5) The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates.*
> *(6) Where leave is sought to apply for an order of certiorari to remove for the purpose of its being quashed any judgment, order, conviction or other proceedings which is subject to appeal and a time is limited for the bringing of the appeal, the Court may adjourn the application for leave until the appeal is determined or the time for appealing has expired.*
> *(7) If the Court grants leave, it may impose such terms as to costs and as to giving security as it thinks fit.*
> *(8) Where leave to apply for judicial review is granted, then:*
> *(a) if the relief sought is an order of prohibition or certiorari and the Court so directs, the grant shall operate as a stay of the proceedings to which the application relates until the determination of the application or until the Court otherwise orders;*
> *(b) if any other relief is sought, the Court may at any time grant in the proceedings such interim relief as could be granted in an action begun by writ.*
> *(9) Upon granting leave the Court may, if satisfied that such a course is justified, direct that the grant shall operate either forthwith or conditionally as an entry of motion*

under rule 5(4) and may then proceed to Judgment on the application for judicial review or may give such further directions as may be warranted in the circumstances.

The commentary to this rule begins with the following advice on how the court should normally deal with applications for leave to apply for review:

> *Opposed determination inter partes should be the exception rather than the rule. Normally, application for leave should be dealt with on papers. Otherwise [there is a] risk that in effect there will be 2 hearings, a process which will delay the final resolution, increase the costs or occupy additional court time. Amendment to rules by deleting reference to application being made ex parte means court may determine application without hearing. Also, understandable temptation for Judge to determine the central issue when all evidence may not be before the court and that issue may not have been fully argued: per Thompson, Ward & Tompkins, JJA in* ***Richard Krishnan Naidu v Attorney-General*** *(2019) 1 FLR 541 (1999) FCA Reps 99/331 ABU 39/98.*

See also the comment by Thompson JA in **Padua v Public Service Commission** [1998] FJCA 60:

> *The purpose of requiring leave to be obtained before an application of any type can be made to a court is to ensure that there is a proper basis for the application and that the application is a proper way of proceeding. The requirement in O.53 r.3 of the High Court Rules that leave be obtained before application for judicial review is made is intended to eliminate frivolous, vexatious, hopeless or unduly delayed applications. .... Upon an application for leave the judge's function is not to determine the merits of the intended application; however, it is necessary for him to examine the evidence set out in the papers before him in order to decide whether, if leave is granted and the facts alleged are established, there will be an arguable case that the applicant is entitled to a public law remedy. It may sometimes be necessary for him to conduct a brief hearing to enable him to come to that decision (****Fiji Airline Pilots Association v. The Permanent Secretary for Labour and Industrial Relations*** *(Civil Appeal No. ABU0059U of 1997S)).*

In **State v Civil Aviation Authority of Fiji (ex. P. Joyce)** [2018] FJHC 588 – another dispute between Mr Joyce and the CAA – Ajmeer J concluded that the assessment of whether or not there is an arguable case for review should normally be made on a *quick perusal of the papers.*

While in the present case it hardly seems possible that there could be more evidence submitted by the parties (the affidavits and exhibits already stretch to hundreds of pages), I know from experience the capacity of lawyers and parties to surprise the courts with the sheer volume of material that they can find to file. But more importantly, there has certainly not been time to hear full argument on the substance of the application for judicial review should leave be given, and the focus of the hearing held to deal with the leave application was very much on the leave aspect of the application rather than a full exploration of the substantive arguments.

8. As established in a number of cases, the criteria for granting leave to apply for judicial review are:

i. Is the decision susceptible to review (i.e. is the decision sought to be reviewed of a public nature)?
ii. Does the applicant have a sufficient interest?
iii. Does the applicant have an arguable case?
iv. Is review precluded for any reason (e.g. privative clauses excluding review, unreasonable delay, the availability of alternative remedies that should be pursued before applying for review)?

(see **Nair v Permanent Secretary for Education** [2008] FJHC 140. Although this decision was overruled on appeal, there is no suggestion that this list of criteria was incorrect).

9. In relation to the availability of alternative remedies the following was said by the Court of Appeal in **Deo Dutt Sharma v Fiji Medical Association** (1986) FCA Reps 86/217 ABU 28/86 18 July 1986, commenting on the failure of the applicant to exercise rights of appeal before applying to the Court for orders declaring the decision of the Fiji Medical Association to suspend him void for breach of the rules of natural justice:

> *There is no rule requiring what is sometimes called the exhaustion of administrative remedies. An appeal on the merits, and judicial review of the legality of the whole proceeding, are two different things and failure to resort to a right of appeal is no bar to obtaining a declaration from the Court.*

which reflects the view of the Court of Appeal in **Reid v Rowley** [1977] 2 NZLR 472, which was summarised and approved by the Privy Council in **Calvin v Carr** [1979] 2 All ER 440 (at p.450) as follows:

> *The decision was that an appeal to a domestic or administrative tribunal does not normally cure a breach of natural justice by a tribunal of the first instance so as to oust the jurisdiction of the courts to redress such breaches, but the exercise of such a right of appeal is a matter that may be taken into account by the courts in considering the grant of discretionary remedies.*

In the case of **R v Hull Prison Board of Visitors, ex.p St.Germain** [1978] 2 All ER 198 Lord Shaw said, in the context of prison discipline:

> *The opportunity for a prisoner to seek from the Secretary of State redress for a grievance ... does not amount to a right of appeal for review of an unwarranted decision by a board of visitors or a prison governor. The fact that such means of possible redress has not been pursued before application is made to the court may in some cases be regarded as a discretionary obstacle to the grant of relief by the courts; but it cannot be an absolute bar.*

It may be that the availability of alternative remedies (a right to apply for review by the Chief Executive in the present case) is a factor when it comes to the exercise of the Court's discretion, at the substantive stage, whether or not to grant a remedy, but it will not often be the case that this choice is so obvious that it could be a reason to refuse leave to apply for review.

10. The applicants also rely on section 16(1)(a)-(c) of the Constitution of the Republic of Fiji, which states that subject to the provisions of the Constitution, and such other limitations as are prescribed by law:

(a) Every person has the right to executive or administrative action that is lawful, rational, proportionate, procedurally fair and prompt

(b) every person who has been adversely affected by any executive or administrative action has the right to be given written reasons for the action; and

(c) any executive or administrative action may be reviewed by a court, or if appropriate, another independent and impartial tribunal, in accordance with law.

Grounds for review and opposition

11. The applicants' grounds for review of the CAA decisions, as set out in the application for leave dated 15 October 2020, are as follows:

(a) The decision of the second defendant on the appeal by the applicants pursuant to section 12F Civil Aviation Authority of Fiji Act 1979 (see above) against the decision of CAA on 5 August to suspend the licences and air-worthiness certificates pending investigation was

i. made in breach of the rules of natural justice and the Constitution of the Republic of Fiji in that no reasons were given for the decision

ii. biased, or made in circumstances where the second defendant pre-judged the issues, contrary to the rules of natural justice and section 16 of the Constitution (see above)

iii. ultra vires in that there is no authority for continuing the suspensions beyond the time required to investigate the alleged offences

(b) The first respondent acted in breach of the principles of natural justice and fairness in not affording a fair hearing when, among other things

i. it did not allow Mr Joyce and his representatives to cross-examine or question the witnesses

ii. it failed or refused to disclose documentary materials relied on by the CAA, including:

- An audio recording of the meeting between CAA investigators and the applicants on 28 July 2020
- Technical logs, Engine Log Books, Aircraft Log Books, Work Packs/Check Packs, Personal Flying Log Books and Flight Certificate Records
- Certificate of Airworthiness (renewal) form AW101H and supporting forms submitted for aircraft owned by a rival operator (the applicants believe that this information will disclose the CAA accepting the very practices that are the basis of the complaints against the applicants).
- Charge sheets including a statement of the offences alleged, and particulars of the offences
- The enforcement policy manual of the CAA, or the relevant extract from the CAAF Personal Policies Administration Manual that deals with the composition and processes of the

Enforcement Compliance Committee (noting that this does not appear to have any statutory or regulatory authority)

iii. it failed to give a right toa hearing during the investigative stage.

(c) The respondents failed to provide the applicant companies with an opportunity to be heard to prior to suspending the Certificates of Airworthiness of DQ-HTJ and DO-HTM

(d) The respondents dealt with the rights of the Applicant companies without laying any charges or allegations against them.

(e) The respondents failed to consider relevant factors and took into account irrelevant factors pertinent to the issues (listed in the application),

(f) In finding the alleged contraventions proved against the applicants, the respondents made errors of law in that they misconstrued the provisions and effect of Regulations 128(2)(c) and 151 of the Air Navigation Regulations

(g) The manner and conduct of the investigation and decision-making process of the respondents against the applicants was procedurally unfair, biased, pre-judged, unreasonable, delayed and flawed from inception.

(h) The respondents breached the applicants' right to a fair hearing by taking into account guidelines from the Sentencing and Penalties Act and in any event without affording them a right to a further hearing in mitigation after finding the charges were made out against them prior to imposing the sentences/penalties/suspensions.

(i) The respondents' decision was biased and/or predetermined and not made independently and/or after an independent enquiry (particulars set out in the application include reference to the lack of any warning to the applicants prior to interview, the participation of the Legal Enforcement Manager in the deliberations of the CAA at all levels both as an adviser and a decision-maker, a past history of antipathy between the applicants and certain members of the CAA investigative team who nevertheless participated in this investigation and decision-making processes, the failure of CAA to interview Mr Albert Murray (who the applicants say was the author of the infringing reports).

(j) The respondents' decisions were in breach of the applicants' constitutional rights and were arbitrary, disproportionate and improperly made.

(k) Section 12F of the Civil Aviation Authority of Fiji Act 1979 in providing an appeal to the second respondent is unconstitutional, being in breach of section 16(1)(a) – (c) of the Constitution.

(l) The decisions of the respondents to revoke the pilots licences and the airworthiness certificates was unreasonable, irrational and/or capricious.

12. In opposition to the application for leave the respondents say:

(a) In so far as the applicants seek to review the interim decisions of the CAA (the decision of 5 August 2020 to suspend the licences and certificates pending investigation, and the decision of the second respondent pursuant to section 12F of the Act to uphold that decision), those decisions have been superseded by the final decisions of the ECC/CAA of 1 October 2020, and there is no point in reviewing the earlier decisions.

(b) The applicants have a right under s12F of the Act (see above) to appeal the decisions of 1 October 2020 to the second respondent, and should be required to exhaust those appeal rights before applying for judicial review.

(c) For the same reason – availability of an alternative remedy – the applicants' argument that the s.12F is in breach of the Constitution, cannot be sustained.

(d) There were no legal, procedural or factual errors made by the respondent in coming to the conclusions, and imposing the penalties/sanctions it did.

Analysis

13. There is no dispute about whether the applicants have a sufficient interest in the proceedings as required by Rule 3(5) above. Clearly, they have, as the validity of the decisions made by CAA affect their livelihoods and - in the case of Mr Joyce – his business. Nor is there any issue of delay, or of prejudice resulting from any delay, such that O.53, r.4 has been raised as a factor in the possible grant of any relief.

14. I do not understand either the submission that section 12F of the Civil Aviation Authority of Fiji Act 1979 is unconstitutional, or the respondent's argument that, even if it is, there is an alternate remedy available such that section 44(4) of the Constitution applies to allow the Court to decline a constitutional redress remedy. First I do not see how it can be argued that by providing for a process to appeal against decisions of the CAA section 12F can be interpreted as excluding the right to apply for judicial review in breach of section 16 of the Constitution. The section says nothing about prohibiting judicial review, or about the decision of the Chief Executive being 'final' in the sense that it excludes the possibility of review. The law makes it clear that such privative clauses, if that is their objective, are to be strictly interpreted, and will not be construed expansively. Given the absence of any words in the section to the effect that any appeal is final and cannot be reviewed I take the view that the right of appeal under section 12F is intended to be additional to, not in lieu of judicial review, and is not therefore in breach of section 16 of the constitution.

15. If I am wrong on this, and section 12F is unconstitutional, I don't understand what alternative remedy would be available for the applicant that would preclude the grant of constitutional redress (noting however that this is not an application for such redress). The only alternative remedy that seems to be available to the applicant would be judicial review, but that is the very thing that the respondent is arguing against. Nevertheless, for the reasons stated in paragraph 14 I am not prepared to give leave to apply for judicial review on the basis of the argument that s.12F is unconstitutional.

16. I accept the respondents' submission on the futility of reviewing the interim decisions of the CAA (5 August 2020) and the Chief Executive (31 August 2020) to suspend the pilots licences and airworthiness certificates. Even if these decisions were challengeable by review, they are no longer the extant decisions of the CAA. They have been replaced by the decision of the ECC on 1 October 2020. To disallow the application for leave to review the earlier decisions does not in any way 'cure'

any earlier defaults, or curtail the applicants' right to rely on any of, and all the events of process, interpretation or otherwise, leading up to that decision.

17. It is not clear from the affidavits and submissions whether the airworthiness certificates for the two aircraft referred to in paragraph 1 are still an issue. Since it is not contested that the radio and engine tests that were certified for by Mr Joyce and Mr Sirianni were not carried out in the manner that the documentation suggested, I would have hoped that by now new tests had been carried out covering the areas of concern, and that airworthiness certificates have now been issued/renewed. Indeed, that may have become necessary simply because of the passage of time since the certification in mid-2020 that is the subject of these proceedings. If so there is, again, no need to review these aspects of the decisions, since they have become redundant by the subsequent recertification.

18. The other arguments relied on by the applicant for leave are more persuasive. While I accept that s.12F of the Act provides an alternative remedy that the applicants have chosen not to take, I think that in the circumstances of this case, and in view of the previous history of dealings between Mr Joyce and CAA, the concerns the applicants have about defects in process (failure to apply the principles of natural justice), bias and pre-judgment of any issues are sufficient basis for the applicants to prefer judicial review rather than an appeal. It is clear from the cases referred to above, that the presence of an untaken alternative remedy is a factor that the courts may take into account in declining a substantive remedy, and it may also, although less often, be taken into account at the application for leave stage. In a case such as this where the CAA's process is as much under fire as the final result, there is some justification for the applicants' concern that simply appealing to the Chief Executive will not give them an opportunity to fully challenge the decision, and how it was reached.

19. I am satisfied that the applicants have established an arguable case for judicial review of the final decision of the CAA (per the ECC) of 1 October 2020 to find the applicants guilty of the offences charged, and to impose the sanctions that it did. Concerns have been raised by the applicants about aspects of the process from beginning to end that warrant further examination, including an alleged lack of frankness by the investigating officers leading up to the initial interview with the applicants, and the lack of transparency about the status and role of the ECC to be making the decision that it did. It may be shown in due course that the dismissive tone of the respondents' affidavit in reply is justified. But at this stage, that approach indicates a reluctance to fully and frankly answer the applicant' assertions, and leaves the court wanting to know more. It is obvious from what has been said by both sides, and from a review of the public record of earlier court proceedings, that there is something of a history of litigation and disputes between Mr Joyce in particular and the CAA, and this climate can lead to preconceptions, and attitudes that are not helpful for the conduct of disciplinary proceedings. In saying this I do not want it to be thought that I have reached any conclusions on the matters raised. I have not. I readily accept that the respondents have a responsibility to act carefully and to maintain high standards of conduct and safety in the aviation industry in Fiji.

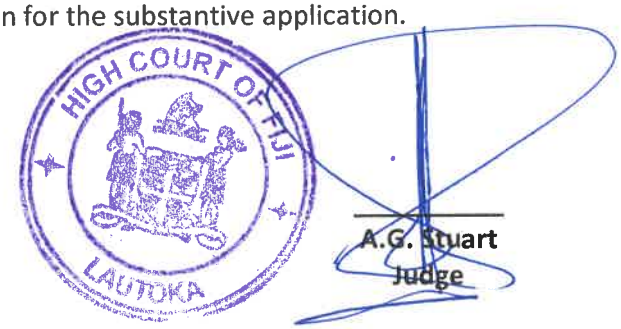
Their task is not helped when operators try to push boundaries, or are less than scrupulously careful with their compliance. But in my view enough has been shown to suggest that the issues bear examination on review to establish whether the CAA's conclusions and consequent decisions have been arrived at lawfully.

Orders

20. Leave is given to the applicants Mr Joyce and Mr Sirianni (and subject to what I have said in paragraph 16 above, to Sunflower Aviation Pte Ltd and Joyce Aviation (Fiji) Pte Ltd), to apply for judicial review of the decisions reached and the penalties imposed by the first respondent (via the Enforcement and Compliance Committee) dated 1 October 2020 as set out in paragraph 1(ii) above. The application for leave to apply for review of the decisions listed in paragraph 1(i) above is declined.

21. Costs are reserved pending the outcome of the substantive application.

22. The applicants are to make application for judicial review in terms of O.53, r.5 High Court Rules. These proceedings are adjourned for mention to the first mention date given for the substantive application.



A.G. Stuart
Judge

At Lautoka this 17th day of March, 2021

SOLICITORS:
AK Lawyers, Denerau for the applicants
Patel & Sharma, Barristers & Solicitors, Nadi for the first and second respondents