IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No: HBC 202 of 2022

IN THE MATTER of an Application for Committal under Order 52 of the High Court Rules.

BETWEEN: **THE ATTORNEY – GENERAL OF FIJI** of Level 4-8, Suvavou House, Victoria Parade, Suva.

APPLICANT

A N D: **RICHARD KRISHNAN NAIDU**, Legal Practitioner, Duncan Road, Domain in Suva C/- Munro Leys, Level Pacific House, Butt Street, Suva.

RESPONDENT

Appearance : Ms. Gul Fatima for the applicant
Mr. John Apted for the respondent
Mr. Adish Narayan with Mr. Romanu Vananalagi for Fiji Law Society

Hearing : Wednesday, 26th September 2022 at 2.30pm

Decision : Wednesday, 5th October, 2022 at 10.30am

DECISION

[A]. INTRODUCTION

[1]. The Fiji Law Society has applied for leave to intervene in Attorney-General's proceedings against the respondent for contempt of court for scandalizing the court.

[2]. The summons filed by the Fiji Law Society on 19.07.2022 seeks the following orders from the court:

1. Directing that the Fiji Law Society be granted leave to be joined as an intervener, and be permitted to file and serve written submissions and appear at the substantive hearing of the application for committal (oral submissions may be made only if leave granted at the hearing).

[3]. The paragraph two of the summons states as follows:

2. The grounds on which the orders are sought are:

(a) the issues raised by the application are of public and general importance, and concern professional standards, the rule of law and public confidence in the administration of justice in Fiji;

(b) the Fiji Law Society has statutory functions under the Legal Practitioners Act 2009 to maintain the professional standards of its members and to protect and assist the public in all matters incidental to the practice of the law;

(c) the Fiji Law Society will provide the court with material assistance on an independent and objective basis which is important given the inherent conflicts in proceedings of this type (the parties, and where the alleged 'contempt is scandalizing the court it is inevitable that the court has an interest' in the proceedings); and

(d) the Fiji Law Society's participation will focus on providing legal submission and relevant legal authorities and will have no material adverse effect on the efficient hearing and determination of the proceeding.

[4]. The Attorney-General opposes the application on the following grounds: (Verbatim)

- *In its Summons, the FLS relies on the inherent jurisdiction of the High Court. No specific Order or Rule from the High Court Rules has been cited.*

- *There is a clear High Court Rule that deals with joinder i.e Order 15. There is no need to invoke the inherent jurisdiction of the High Court if a clear and specific High Court Rule deals with joinder applications.*

- *It may well be that the FLS is of the view that it cannot satisfy the test under Order 15. The FLS must explain why it is directly affected by the committal proceedings.*

- *The mere fact that a member of the FLS has contempt proceedings brought against for him does not in our submission give rise to FLS being joined as a party in the proceedings.*

- *FLS does not explain what issues have been put in the contempt proceedings, between the parties, which necessitate its joinder as intervener. In fact, FLS in its summons deviates entirely from the contempt proceedings and refers to professional standards which is it statute bound to maintain.*

- *On a plain reading of the grounds contained in the Summons it appears that FLS has or is attempting to cast aspersions on the ability of the Court to make an independent and objective decision.*

- *Respectfully, we submit that it appears that FLS is essentially claiming that this Honorable Court will not be objective in adjudicating over these proceedings without FLS.*

- *FLS is claiming that by virtue of these being committal proceedings concerning allegations relating to scandalizing the Court and Judicial Officer presiding has some sort of vested interest and for that reason, the Court will not be impartial.*

- *We robustly take issue with and offend to such statement made by the FLS in its grounds.*

    i *FLS has not sought a joinder under Order 15 of the High Court Rules.*
    ii *FLS's presence is not required in these proceedings.*
    iii *Both sides are adequately represented by competent Counsel.*
    iv *The Respondent has multiple Counsel acting on his behalf.*
    v *FLS does not meet the test for joinder.*
    vi *FLS cannot be an independent party if it is seeking to protect the welfare of its member the Respondent.*

vii *Nothing prevents the FLS to assist the Respondent in its submissions and research and they do not need to be joined to achieve this objective.*

viii *FLS cannot be an amicus as they have not been invited by the Court to assist as amicus.*

ix *Neither party is under a disability which would require the Court to appoint an amicus.*

- *The Summons and supporting Affidavit raise a number of questions.*

- *On 6 September 2022, FLS filed a Supplementary Affidavit. This Affidavit is sworn by the FLS President William Wylie Clarke and annexes FLS Council Resolution.*

- *At paragraph 3, the Resolution states that the President of FLS is authorised to instruct and liaise with counsel to represent FLS and to give evidence by way of Affidavit. This Resolution does not set out why FLS seeks to be joined as intervener and what issues it exist in the contempt proceedings which necessitate it to intervene.*

- *In any event, the facts of this case do not concern a scenario where FLS can claim to be independent and seek to join merely to assist the Court in terms of providing case authorities. It would be different if the litigants in this case did not concern a legal practitioner whose welfare, integrity and status the FLS has a statutory duty to promote and look after (Section 13(b) of the LPA).*

[B]. **Is there jurisdiction or power in this court enabling it to grant leave to public interest intervention?**

[5]. The Fiji Law Society sought leave to intervene in the proceedings commenced by the Attorney-General on public interest grounds.

[6]. The jurisdiction to allow non-party intervention in these proceedings is challenged by the Attorney-General.

[7]. The form of non-party intervention known variously as *"public interest intervention,"* "perspective intervention" and "interest group intervention" is a way to achieve input from affected non-parties. This type of intervention allows

a non-party to participate in litigation in order to "influence the judicial process in a way the intervener considers to be in the public interest[1].

[8]. There are no provisions in the High Court Rules, 1988 enabling a person not a party to the proceedings to intervene.

[9]. The paragraph 2.1 of the written submissions filed on behalf of the Fiji Law Society estates:

> 2.1 *Applications for intervention are usually made under Order 15, rule 6(2). However, those provisions do not apply to applications made on public interest grounds, which are considered as a matter of inherent jurisdiction. The Fiji Law Society does not seek in its application to invoke the jurisdiction of the Court under Order 15 Rule 6(2). The application specifically has recourse to the Inherent Jurisdiction.*

[10]. Mr. Narayan, counsel for the Fiji Law Society referred to the following judicial decisions to convince this court that the wide ambit of the inherent jurisdiction has been recognized and applied by the courts and submitted that "*the inherent jurisdiction has been judicially recognized as reserve of all powers of the court notwithstanding the provisions may be covered by the Rules of court and notwithstanding statute"*.

- Hefferan v The Hon. John Edward Byrne & others[2]
- Vakalalabure v State[3]

[11]. Mr. Narayan, counsel for the Fiji Law Society contends that the inherent jurisdiction allow the court to appoint an amicus or allow public interest parties to be heard.

[12]. I accept the submissions of Mr. Narayan.

[13]. I wish to stress that the public interest intervention is distinct from party intervention under Order 15, Rule 6(2) of the High Court Rules, 1988.

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[1] See; Philip L Bryen - "Public Interest Intervention in the Courts" (1987) Can Bar Rec 490, 505;
See also; Andrea Loux –"Hearing a different voice"; Third Party intervention (2000) 53 CLP 449, 460.
[2] HBM 105 of 2007
[3] [2006] FJSC 3

[14]. There is no specific statutory authority allowing the High Court to hear amici curiae or interveners. The jurisdiction to do so is seen as part of the inherent jurisdiction[4]. According to Williams, "Whatever the source of jurisdiction, it is accepted that when, and by what means, submissions will be accepted from interveners are matters entirely within the discretion of the court[5].

[15]. There is an undoubted jurisdiction for this court to grant leave for a non-party to intervene in proceedings before this court. Exercise of the jurisdiction enables the court to obtain assistance from a non-party in order to improve the quality of information available to the court on wider issues than the parties may wish to address. In granting intervener status, the court must endeavor to ensure that the parties will not be prejudiced by the intervention.

[16]. I reject the submissions of Ms. Fatima, counsel for the Attorney-General that in the absence of statutory authority, the court has no jurisdiction or power to permit public interest intervention in the High Court.

[C] **LAW OF INTERVENING**

Case law

[17]. In a judicial review case, the court stated in ***Alpha Dairy NZ Ltd v Auckland Council***[6]*:*

The High Court has inherent jurisdiction to grant leave to an interested party to intervene in a proceeding by providing evidence, written submissions and/or oral submissions on specified terms but has no right of appeal. In summary, in deciding whether to grant leave to intervene, the Court weighs the likelihood the intervener will assist the Court against the risk of prejudice or unfairness to the parties[7]. The decision is guided by the overall interests of justice.

[18]. The principles for intervention is stated by Thomas J in ***Capital and Merchant Finance Ltd v Perpetual Trust Ltd*** [8], as follows;

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[4] George Williams "The Amici Curiae and Intervener in the High Court of Australia: a comparative Analysis" [2000] 28 FLR 365 at 377.
[5] Williams, above n. 4 at 377
[6] [2019] NZHC 2263
[7] DN v Family Court at Auckland [2019] NZHC 2028, [2019] NZFLR 150
[8] [2014] NZHC 3205, [2015] NZAR 228.

i *An applicant must show that its legal rights against or liabilities in relation to the subject matter will be directly affected. Commercial, financial, or reputational interests in the outcome will only be sufficient in exceptional circumstances.*

ii *If the intending intervener's presence before the Court will not improve the quality of information before the Court, that will count heavily against its addition to the proceedings.*

iii *A relevant consideration is the extent to which the proposed intervener can rely on one of the parties to protect its rights and obligations.*

iv *If either party would be prejudiced by the intervention, or if the intervention would create an impression of partiality, the application will not be granted.*

v *In cases where development of the law is likely, the application is more likely to be granted if the proposed intervener has special expertise to assist the Court on wider public policy issues.*

vi *The underlying issue is whether it would be unjust to adjudicate on the matter in dispute without the intervener being heard. Several of the factors mentioned above tie into this issue.*

vii *Where intervention is justified, the degree of participation granted to the intervener should be the minimum necessary to protect the intervener's interests.*

[19]. I refer to a paragraph in a judgment of a full court of the High Court in ***Taylor v Key (No 1)***[9]:

> *The jurisdiction may be exercised when the Court is satisfied that intervention is likely to improve the quality of information before the Court on issues wider than those that the parties may wish to address. Intervention has been allowed where the party seeking leave has an interest in the outcome of the case that will be directly or indirectly affected or even where that party has a distinctly arguable case that they will be affected. In such-cases, this Court has held it would be unjust to*

[9] [2014] NZHC 3306, [2015] NZAR 730

decide the issues in the absence of the party so affected, or potentially affected.

[20]. In ***Seales v Attorney-General***, Collins J identified and applied the following principles in granting three applications for intervention in a case seeking declarations regarding assisted dying:[10]

[45] First, the power to grant leave to intervene is discretionary and should be exercised with restraint to avoid the risk of expanding issues, elongating the hearing and increasing the costs of the litigation.

[46] Second, in a proceeding involving issues of general and wider public importance, leave to intervene may be granted when the Court is satisfied that it would be assisted by the intervener.

[47] Third, it may be appropriate to grant leave to intervene where the proceeding is likely to result in the development of the law.

[48] Fourth, leave should not be granted when the proceeding is essentially one that involves statutory interpretation and is unlikely to involve broad questions of policy.

[D] DETERMINATION

[21]. The principal thrust of Fiji Law Society's submission is that;

- The contempt alleged is scandalizing the court.
- There is judicial recognition that the court will have an interest in the proceedings.
- Fiji Law Society seeks to provide the court with material assistance on an independent and objective basis, which is especially important given the inherent conflicts in the proceedings.

[22]. Mr. Narayan, counsel for the Fiji Law Society alleged that as a judge and hence a member of the judiciary, I have an interest in the proceedings as do all the

[10] [2015] NZHC 828

judges of the court as members of the judiciary. Mr. Narayan's position is that in proceedings where the nature of the contempt is criminal contempt scandalizing the court it is inevitable that the judge to whom the application is assigned will have an interest, which may be described as personal, in the proceedings[11].

[23]. The Fiji Law Society's allegation presupposes that 'the court is not capable of presiding over these proceedings in an objective and impartial manner.'

[24]. I firmly reject that assumption. It is wrong to allege that "*in proceedings where the nature of the contempt is criminal contempt scandalizing the court, it is inevitable that the judge to whom the application is assigned will have a personal interest in the proceedings*". In cases such as the present, the respondent's right to a fair hearing based on the principles of natural justice are safeguarded by the procedural requirements that are prescribed by Order 52 and by the Common Law. The adversarial system is deeply rooted within the Common Law tradition. In the strict adversarial system which we have in Fiji, the litigation process is seen simply as a way to resolve disputes between the parties who enter into it. The courts play the role of neutral adjudicators who apply the law made by the Parliament and declare the pre-existing Common Law. This is the court's sole function. **That being so, it can properly be said that the court's decision in a particular case is nobody's business but the parties. The judge as a neutral arbiter weigh the arguments presented by counsel in order to arrive at the resolution of a dispute. The active participants in the process are counsel, who may choose to advance or refrain from advancing such arguments as they see fit.**

[25]. Moving on to the merits of the application, a court's assessment of an application to intervene involves weighing the likelihood the intervener will assist the court against the risk of prejudice or unfairness to the parties. If either party would be prejudiced by the intervention or if the intervention would create an impression of partiality, the application will not be granted.

[26]. The Fiji Law Society was established under Section 12 of the Legal Practitioners Act 1997. The objects of the Fiji Law Society are set out in Section 12 of the Legal Practitioners Act 2009. These include:

- to promote the welfare and to preserve and maintain the integrity and status of its members.

[11] Citing paragraph (39) of the High Court decision in R v Citizens Constitutional Forum Limited [HBC 195of 2012]

- to represent, protect and assist its members as regards conditions of practice and otherwise.

[27]. The Fiji Law Society has a statutory duty to; (1) promote the welfare of its members (2) to represent, protect and assist its members. The Fiji Law Society has a statutory duty to protect and assist its members including its distinguished member the respondent in the matter before me. The Fiji Law Society represents the interest of its members including the respondent. In the interest of its distinguished member, the respondent, the Fiji Law Society, is concerned about any adverse outcome of the proceedings, because a member of whose conduct is the subject of the litigation.

[28]. Therefore, the Fiji Law Society is not neutral and will not remain neutral in these proceedings. That being so, the Fiji Law Society cannot provide material assistance to court on an independent and objective basis. Here the Fiji Law Society has a material interest at the legal issue at stake through its member. I am **not** satisfied that the submissions to be made on behalf of the Fiji Law Society would be made independently of the parties and would provide a different perspective for the court to consider when making its decision. Because the Fiji Law Society is not impartial and has no special relevant expertise at the issues at stake. This court cannot grant permission to the Fiji Law Society to enter the arena upon the purported sense of responsibility for the public interest because the Fiji Law Society might move from that of purported neutral to one of partisanship and will inject arguments in the interest of its distinguished member the respondent and advance the defence of its distinguished member than to assist court on an objective and neutral basis. A material prejudice will be caused to the Attorney–General. The intervention would create an impression of partialities. **Therefore, the application will not be granted**. This is guided by overall interest of Justice. The overall assessment by the court involves weighing the likelihood the interveners assist the court against the risk of prejudice and unfairness to the parties. **It would be just to adjudicate on the matter in dispute without the intervener being heard**. The basic test for intervention involves the court balancing the assistance to be provided with the potential prejudice caused by the intervener[12]. Because the Fiji Law Society may not be impartial, its involvement in the proceedings is unnecessary and would be prejudicial to the Attorney-General. There is the possibility that Fiji Law Society's

[12] This principle is identified in; (1) Capital and Merchant Finance Ltd [in rea and in liq] v Perpetual Trust 20 14 NZHC 3205 (2) Taylor v Key [No.1] (2014) NZHC 3306 (3) Seales v Attorney-General [2015]NZHC 828.

eventual position would be supportive or substantially supportive of the respondent's defence. The purpose of permitting an intervention is not to assist one party in presenting its case. **This remains the focus of the court when assessing the application to intervene**.

[29]. The Fiji Law Society has **not** shown to this court that in the past, upon a sense of responsibility for the public interest and in the pursuit of its objectives, it has applied to intervene in proceedings concerning other legal practitioners who were also charged with contempt of court[13]. **Accordingly, I have not been convinced of the need to expand the representation before the court in this matter**.

[30]. The respondent's counsel of choice is Martin Daubuey K.C. I consider that any points which the Fiji Law Society may wish to advance before the court in the pursuit of its objectives can be presented through counsel for the respondent.

[31]. There is no suggestion that any points (undisclosed to court) which the Fiji Law Society may wish to advance before the court which will not be fully and completely advanced by counsel for the respective parties. On any view, the submissions the Fiji Law Society proposes to make at the hearing could only support the position to be taken by the respondent because the Fiji Law Society will not be impartial and the Attorney General will be prejudiced by the intervention. In granting intervener status, the court must endeavor to ensure that the parties will not be prejudiced by the intervention[14].

[32]. I have not been convinced that the Fiji Law Society has unique expertise or ability to offer a different perspective from the parties.

[33]. In paragraph 3.6 of the written submission filed on behalf of the Fiji Law Society states "*In this case, the question is whether the legal practitioner overstepped*

[13] Recently, there have been two decisions of the High Court given in relation to proceedings concerning Legal practitioners who were charged with contempt – **Chaudhary Re** [2019] FJHC 488, **Josaia Voreqre Bainimarama and Attorney General v Aman Ravindra Singh,** High Court, Case No. HBC 59 of 2018, Decision 16.08.2022.

[14] In cases where one particular intervener might not have been seen to be impartial by one of the parties, the courts have taken trouble to appoint either an amicus curiae who can make submissions to the court independently, or at least, to appoint an intervener with a contradictory policy perspective. Both Z v Z (No.2) [1997] 2 NZLR 258 and Bryson v Three Foot Six Ltd [SC, Civ 24/04, 14 AND 16.03.2005, Blanchan J] can be seen as examples of that type of approach. On that issue, the Court of Appeal's decision in D v C [Intervention] (2001) 15 PRNZ 474 **IS INSTRUCTIVE**; **THE GROUNDS ON WHICH THE** Court of Appeal declined leave in that case included the fact that the submissions of the intervener turned partly on the perception that intervention might be perceived as favouring one party. [See paras (4) and (9).

'the fine line between the tolerable and intolerable'[15]*.* It is not clear to me at this stage, that the court will be required to make a finding on that. That may become clearer once the evidence/or submissions are filed and served by the respondent. Therefore, that cannot be a basis and clearly not enough to warrant extending rights of hearing beyond the parties to the particular case for intervening in the proceedings. Besides, the court can make a finding on that issue without the aid of the Fiji Law Society. Because, where to draw the line between tolerable and intolerable depends on[16]:

- The identity of the critic.
- To the audience to whom the communication is addressed.
- The authority and the expertise of the critic.
- Whether the audience will be persuaded by the view of the statement of the critic.

[34]. In the case before, the Fiji Law Society, has **not** put emphasis on its legal expertise, as indicative of its ability to give the court significant assistance on the legal issue at stake. It is unusual for the court to regard the foreshadowed legal content alone as demonstrating the necessary likely value of an intervener's contribution. The court expects an applicant for intervention to submit an affidavit outlining the general experience and expertise which he believes can assist the court. In the present case no affidavit has been provided.

[35]. The principal purpose of litigation is to resolve disputes between parties and to allow outsiders to participate has been seen by the Court as creating a risk of expansion of issues, elongation of appellate hearings and overall increase in the cost of litigation to parties. More recently, the Court has however, recognized that **in some special situations** the power to permit intervention can

[15] Citing, Citizens Constitutional Forum Limited v The Attorney-General, HBC 195 of 2021. Decision 03.05.2013.
[16] In particular, criticism based on a complete misunderstanding of the functions of courts and of judicial process may be tolerated to a degree. Such criticism may, nonetheless, be adjudged to have overstepped the fine line between the tolerable and intolerable when it makes baseless accusations of incompetence, bias, improper motives, susceptibility to improper influences, or when it misrepresents court proceedings in such a way as to suggest an intention to bring ridicule upon a court (or Judge).
Where to draw the line in a particular case as to what is tolerable and intolerable must depend to some extent on the identity of the critic, the publisher and also on the audience to whom communication is addressed. Thus, less tolerance may be shown towards those purporting to speak with authority, or expertise, and those apparently seeking to influence the opinion of an audience who are likely to be persuaded by the views of the speaker, writer or publisher – The Australian Judiciary, Second Edition, H.P. Lee and Enid Cambell, p-210

constructively be exercised more liberally, while emphasizing "**that does not mean that it should ever be exercised as a matter of course or lightly**[17].

[36]. In paragraph 3.6 (a) of the written submission filed on behalf of the Fiji Law Society states:

> *(a) …. the substantive outcome of this proceeding will have important precedent effected, so it is appropriate that the Fiji Law Society participates in order to perform its 'special interest' statutory functions.*

[37]. Clearly this is not enough to warrant extending rights of hearing beyond the parties to the dispute in the present case.

[38]. In the case of New Zealand Fire Service Commission (supra) the Court granted an application by an association of employers to intervene in an appeal which was concerned with rights under employment legislation to representation in employment contract negotiations. This was a subject at the heart of the relevant legislation and the Court considered it reasonable to grant the request. **In doing so it reiterated that intervention by such an association would not be appropriate simply because the outcome might establish a principle of importance to members**. The Court said[18]:

> *"An interest group such as the Employers Federation is able to help its members by providing advice and information for those involved in litigation. Normally there is no need or reason for the organization as such to participate in the hearing. Moreover many cases, in the field of employment law as in other fields, raise questions of principle transcending the particular facts and are likely to be relevant as precedents, and as expositions of principle for other cases also; and that alone is ordinarily clearly not enough to warrant extending rights of hearing beyond the parties to the particular dispute."*

[39]. Subsequently, in ***Wellington City Council v Woolworths New Zealand Ltd***[19], the Court permitted a national association of local authorities to intervene in an appeal concerning the operation by a local authority of a differential rating system. The Court did so because **it saw the appeal as raising issues of general**

[17] New Zealand Fire Service Commission v Ivamy (1995) 8 PRNZ 632 at p 633.
[18] at p 633
[19] [1996] 2 NZLR 436

principle and public policy which were of fundamental importance to local authorities in the field of rating.

[40]. As I said before, there is jurisdiction for this court to grant leave for an interested party to intervene in proceedings before the court. Exercise of the discretion enables the court to obtain assistance from a non-party in order to improve the quality of information available to court on wider issues than the parties may wish to address. In granting intervener status, the court must endeavor to ensure that the parties will not be prejudiced by the intervention. It is not possible for this court to identify in advance the situations in which the court will be assisted by submission that will not or may not be presented by one of the parties.

[41]. There are 2053 registered practicing Lawyers in Fiji. The Fiji Law Society has not provided to the court as to the number of Legal Practitioners registered as members in the Fiji Law Society. The court is cognizant of the fact that the Fiji Law Society **does not** represent a significant number and sector of the Fiji Legal profession and therefore, Fiji Law Society does not represent the interests of a significant number and sector of legal profession in Fiji. That being so, its perspective, with respect, is not of considerable interest to the court. Besides, the Fiji Law Society has no statutory function to facilitate Administration of Justice in Fiji [See Section 13 of the Legal Practitioner Act 2009 for its statutory functions]. **Therefore, the court would not welcome the involvement of the Fiji Law Society**. As per Section 13 of the Legal Practitioner Act 2009, the Fiji Law Society's objects include:

(c) *to assist the Government in all matters affecting legislation and law reform.*

[42]. The bodies such as Fiji Law Society may bring political motivation to the litigation in which they take part in the sense that their purpose is often to have the currently understood state of the law changed depending on the context. The policy decision of this kind are generally the role of the legislature assisted by the executive government. **This is a further factor reinforcing the court's restraint in allowing those not parties to this case to participate in the case.**

[43]. As noted, the Fiji Law Society seeks to intervene on public interest grounds.

[44]. The Attorney-General's role as the guardian of the public interest is particularly important in this case. The role of the Attorney-General on guardian of the

public interest was explained in the following uncompromising terms by Lord Wilberforce in "**Gouriet v Union of Post Office Workers**"[20]

> *"It is the **exclusive right** of the Attorney-General to represent the public interest even where individuals might be interest in a larger view of the matter- is-not technical, not procedural, not fictional. It is constitutional."*
>
> [Emphasis added]

[45]. It is clear that the Attorney-General is the person who has the **exclusive responsibility** for protecting the public interest in this case. I am sure that the Fiji Law Society does not have an interest upon sense of public interest that extends beyond the interests of the Attorney-General.

[46]. I fail to see how I can be assisted by the Fiji Law Society presenting submissions on the topic of public interest which the Attorney General intends to address.

[47]. I was referred to **'Andrew Borrowdale v Director General of Health and Attorney General'[21]** in which New Zealand Law Society is granted leave to intervene. In this case Mr. Borrowdale challenged the legality of restriction imposed by the New Zealand Government on the public in response to the Convid-19 pandemic (the restrictions). Mr. Borrowdale's application was for Judicial Review and the New Zealand Law Society sought leave to intervene. The relevant issues in 'Andrew Borrowdale involved administrative law, statutory interpretation and constitutional issues and the New Zealand High Court granted leave to intervene primarily on the following grounds ;

- *The New Zealand Law Society represents over 98% per cent of Lawyers holding New Zealand practicing certificate and therefore its perspective was of considerable interest to court.*

- *The court was satisfied that the court would be assisted by submissions of New Zealand Law Society which would call on the expertise of 16 specialist National Committees and, in particular, will be able to draw on specialist expertise in constitutional, public and human rights law.*

[20] [1978] AC 435 [HL] AT 477
See also; Locus Standi and the Public Interest by Dianne L. Haskett, Canada – United States Law Journal, Vol 4, January 1981, at page 75
[21] (2020) NZHC 1379

- *There was no risk of prejudice and unfairness to the parties by the intervention.*

[48]. In '**Lecretia Seales v The Attorney-General**[22], the court granted applications made by Care Alliance (a broad coalition established in 2012 to oppose euthanasia and assisted suicide) and the Human Rights Commission for leave to intervene in the proceedings.

[49]. Ms Seales is a 42 year old woman, who is dying from a brain tumor[23]. Ms Seales' life expectancy is difficult to predict because brain tumors vary greatly in their behaviour. As at 2 April 2015 Ms Seales' oncologist estimated she could expect to live somewhere between three and 18 months.

[50]. Ms Seales' brain tumor was diagnosed in March 2011. Since then Ms Seales has undergone surgery, courses of chemotherapy and radiation therapy. Despite this treatment Ms Seales' oncologist is confident her tumor is inoperable and that while further treatment may temporarily halt or even slow progression of the brain tumor, it will ultimately cause Ms Seales' death. In his affidavit, Ms Seales' oncologist also explains that usually it is possible to provide palliative relief to patients in Ms Seales' circumstances to reduce the effects of pain, nausea and seizures.[24]

[51]. Ms Seales "wishes to have the choice to die by way of facilitated aid in dying or administered aid in dying at the point that she reaches a state of suffering that is intolerable to her as a result of her grievous and terminal illness"

[52]. Ms Seales sought two alternative sets of declarations under the Declaratory Judgments Act 1908.

[53]. The first set of declarations sought by Ms Seales involves two aspects of the criminal law. The court referred to those declarations as "the criminal law declarations" although the court appreciated that s 6 of the New Zealand Bill of Rights Act 1990 (NZBORA) is relevant to the criminal law declarations. The alternative sets of declarations primarily relate to the NZBORA. The court referred to those declarations as "the Bill of Rights declarations".

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[22] [2015] NZHC

[23] Dr Hamilton, Ms Seales' oncologist has explained Ms Seales has "diffuse astrocytoma ... with elements of an oligodendroglioma. This combination is often abbreviated to 'oligoastrocytoma. Both astrocytoma ... and oligodendroglioma grow diffusely and infiltrate the brain". Affidavit of D A Hamilton, 2 April 2015 at [7]-[8].

[24] It is anticipated further evidence from a palliative care specialist will be provided before the substantive hearing.

[54]. Ms Seales asked that the court issue declarations to the effect that in her circumstances Seales' doctor would not commit a criminal offence by either assisting Ms Seales in ending her own life, or by committing an act that ends Ms Seales' life.

[55]. Specifically the two criminal law declarations sought by Ms Seales are:

(1) In circumstances where the Court is satisfied that the plaintiff is a competent adult who:

i clearly consents to the facilitated aid in dying; and

ii has a grievous and terminal illness that causes enduring suffering that is intolerable to her in the circumstances of her illness, facilitated aid in dying is not prohibited by section 179 of the Crimes Act.

(2) In circumstances where the Court is satisfied that the plaintiff is a competent adult who:

i. Clearly consents to the administered aid in dying; and

ii. Has a grievous and terminal illness that causes enduring suffering that is intolerable to her in the circumstances of her illness, administered aid in dying is not unlawful under section 160 of the Crimes Act.

[56]. In his affidavit in support of the application by Care Alliance, Dr Kleinsman explains that the evidence which it wishes to put before the Court covers the following topics:[25]

1). The impact of the proposed orders on the practice of palliative care in New Zealand.

2). The impact of the proposed orders on the medical profession and the ethics of medical practice in New Zealand.

3). The impact of the proposed orders on disabled people.

[25] Affidavit of J Kleinsman

4). The impact of the proposed orders on people who are elderly and infirm, with particular reference to the issues facing this group in New Zealand.

5). The impact of the proposed orders on those suffering from mental illness, including depression, and in particular on the issue of youth suicide — again with particular reference to these issues in the New Zealand context.

6). The impact of the proposed orders on others suffering chronic or terminal illnesses.

7). The ethical concerns and wider social impacts that ought to be taken into account in any assessment of the proposed law change, including issues particular to New Zealand's multi-cultural context.

8). The nature of palliative care that is available to people in New Zealand in situations similar to Ms Seales, which would provide a fourth option to the three she lists in her statement of claim.

9). Any other issues that might be of assistance to the Court.

[57]. **In Seales,** the Attorney-General did not oppose the applications to intervene and suggested that he would be assisted in receiving submissions and/or evidence from the proposed interveners. In support of this aspect of his case the Attorney-General said in **Seales** that allowing the applications to intervene would enable the Court to receive information that the parties might not be in a position to provide. The Attorney-General said that intervention on this basis would be consistent with the interests of justice

[58]. The **Seales** case involves human rights. In that case, the proposed interveners put emphasis on their legal expertise in human rights jurisprudence, as indicative of their ability to give the court significant assistance on the issues raised by the case. Besides, in New Zealand third party intervention in cases involving especially human rights and public law litigation are more likely to be granted.

[59]. In the case before me, the Attorney – General vigorously opposed the application. Here the risk of prejudice and unfairness to the Attorney-General is greater by the intervention of the Fiji Law Society because the Fiji Law Society may not be impartial. Moreover, no attempt has been made by the Fiji Law

Society to demonstrate to this court as to what are the points which the Fiji Law Society may wish to advance before this court. As I said before, the Fiji Law Society has not shown to this court that in the past, upon a sense of responsibility for the public interest and in the pursuit of its objectives, it has applied to intervene in proceedings concerning other legal practitioners who were also charged with contempt of court. In the circumstances, it is doubtless true that the Fiji Law Society is seeking to intervene in litigation before me with the objective of influencing the court in order to attain what they perceive to be a favorable outcome. I have a strong sense that they might move to play an active advocacy role by persuading the court to resolve one or more of the issues raised in the litigation in a manner that they consider desirable. With respect, this means of influencing judicial decisions.

[60]. I believe that the recognition of interests extending beyond those of the parties to the litigation before me which is not a public litigation [**which does <u>not</u> involve human rights or judicial review – issues of broad interest to the population at large**] forces this court to transform the proceedings into something akin to legislative hearing. Courts are not equipped to act as roving commissions established for the improvement of our legal system, nor does anyone want them to be. Of Course there is some value in attempting to come to grips with difficult and complex issues in the context of a concrete situation, and the courts wisely have been reluctant to attempt to resolve points of law in a factual vacuum.[26]

[61]. As noted above Borrowdale is a Judicial Review [Public Law] case. Seales case involves human rights. The judicial review and human rights cases have the potential to impact a wider range of parties and are more likely to give rise to issues requiring development of the law, so the potential for intervention is greater. The more significant and multi-faceted the public policy implications of decision, the more likely it is that a multiplicity of perspectives, rather than binary argument, will assist the court. That has been so in cases raising issues of assisted dying, teaching Christianity in public schools, earthquake recovery, the crown's overlapping trendy claims policy and the validity of the total allowable catch for fish stocks[27].

[26] See; McEvoy V Attorney – General of New Brunswick (1983) 1 S.C.R 704 , Re Authority of Parliament in relation to the Upper house (1980) 1 S.C.R 54

[27] SEE: Aotearoa Water Action Inc [2019] NZHC 3187 , Seales v Attorney-General (supra), McClintock v Attorney-General of New Zealand [2015] NZHC 1280; Independent Fisheries Ltd v Minister for Canterbury Earthquake Recovery [2012] NZHC 1177; Ngati Whatua Orakei Trust v Attorney General [2019] NZHC 2363; Royal Forest and Bird Protections Society of New Zealand Inc v Minister of Fisheries [2020] NZHC 741

CONCLUSION

I have not been convinced that this is an appropriate case on which to give the leave sought.

The application is accordingly refused.

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Jude Nanayakkara
JUDGE

High Court – Suva
Wednesday, 5th October, 2022