

IN THE HIGH COURT OF FIJI
AT SUVA

CIVIL ACTION NO: HBC 343 OF 2011

THE STATE

-v-

FIJI TIMES LIMITED,
BRIAN O'FLAHERTY and
FRED WESLEY

Respondents

EX PARTE

:

THE ATTORNEY-GENERAL OF FIJI

Applicant

Mr J Apted for the Respondents

Mr S Sharma with Ms R Mani for the Applicant

JUDGMENT

[1]. These proceedings were commenced by the Applicant who on 10 November 2011 applied ex parte for leave to apply for an order of committal against the Respondents under Order 52 of the High Court Rules.

- [2]. On 11 November 2011 leave was granted to the Applicant to issue contempt proceedings. On the same day a Notice of Motion was issued and filed seeking committal to prison of the Respondents for their printing and publishing of an article on page 30 of The Fiji Times on Monday 7 November 2011. Under the heading "*FIFA probes DOC*" the published article contained the following words:

"You should be aware that with no judiciary there, his case has been reviewed by one Australian Judge. It's not a court per se".

- [3]. The Respondents entered pleas of not guilty on 24 January 2012. The application for orders of committal was heard on 9 July 2012. In a judgment delivered on 1 October 2012 the Respondents were found guilty of contempt scandalizing the court. On 26 November 2012 the parties appeared before this court for a mitigation hearing. Prior to the hearing the parties filed affidavits and written submissions for the consideration of the Court. On the day of the hearing Counsel presented further oral submissions.
- [4]. The background facts which were not in dispute may be re-stated briefly. On 3 March 2011 Dr. Muhammed Shamsud- Dean Sahu Khan (Dr. Sahu Khan), who had practised law in Fiji for many years, was found guilty of professional misconduct by the Independent Legal Services Commission (ILSC). On 4 May 2011 the ILSC ordered that the name of Dr Sahu Khan be struck from the Roll of Legal Practitioners in Fiji.
- [5]. At that time Dr Sahu Khan was and had been for many years President of the Fiji Football Association. He also held an official position with the Oceania Football Confederation (OFC).
- [6]. On 7 November 2011 the Fiji Times published the article entitled "*FIFA probes DOC*" in the sporting pages on page 30. The article itself had been downloaded on the previous day from the internet website of The Sunday Star Times, a newspaper published in New Zealand. The article had been written by a reporter, Simon Plumb.

- [7]. The article published in the Fiji Times and on the Sunday Star Times website was based on a telephone interview between Simon Plumb and a Mr. Tai Nicholas who was and still is the General Secretary of OFC. The words that appeared in the article were a direct quotation of comments made by Tai Nicholas during the course of that interview.
- [8]. The Fiji Times is owned and printed by Fiji Times Limited (the First Respondent). Mr. Brian O'Flaherty was at the relevant time General Manager of Fiji Times Limited and publisher of the Fiji Times. Mr. Fred Wesley was and still is the editor of the Fiji Times.
- [9]. The basis for the Court's finding of guilt was set out in clear terms on page 11 of the unreported version of the judgment:

"It is my judgment that the words published in the Fiji Times and thus understood by a fair minded and reasonable reader do represent a real risk to the administration of justice in Fiji by undermining the authority, integrity and impartiality of the court and the judiciary. I am satisfied that publication of the words represents a risk of undermining the confidence of the people in the judiciary and in the judgments of the court since they have the effect of lowering the authority of the Court and its judiciary. The words generate misgivings as to integrity, ability and impartiality which are qualities fundamental to the judicial office and the rule of law."

- [10]. There was a subsequent edition of the Fiji Times dated 30 June 2012 that was also considered by the court in the same judgment. At the sentencing hearing Counsel of the Respondents indicated that the material in this latter edition should be regarded by the Court as an aggravating matter to be taken into account when determining the appropriate disposition. Further reference to the subsequent publication will be made later in this judgment. At this stage the Court notes that the Second Respondent, Mr. O'Flaherty, was no longer the publisher of The Fiji Times nor employed by Fiji Times Limited as at 30 June 2012.

[11]. The task for the Court now is to determine how should its power to punish the Respondents for contempt of court under Order 52 of the High Court Rules be exercised? In my judgment this is a case of contempt of court which should be punished by a penalty that reflects the public interest, acts as a deterrence and appropriately denounces the conduct of the Respondents. This is not a case where the mere ordeal of court proceedings and an offer to pay costs with an apology is sufficient. Such an approach would send suggest that the court does not take seriously the role of safeguarding the community from scurrilous attacks on its judiciary amounting to contempt scandalizing the court.

[12]. In determining what penalty should be imposed on each of the Respondents there are a number of factors that have been identified in the authorities that are usually considered to be relevant. In **Attorney General for the State of New South Wales – v- Radio 2UE Sydney Pty Limited and John Laws** (unreported appeal decision of the New South Wales Supreme Court No. 40236 of 1998 delivered 11 March 1998; [1998] NSWSC 29) Powell J A observed:

"In determining what, if any, is the penalty appropriate to be imposed on a person found guilty of a contempt of court, it is proper for the Court to have regard to such matters as the objective seriousness of the contempt found established, the culpability as for example, whether the relevant statement was made, or the relevant act was done deliberately, with intent to interfere with the administration of justice, or recklessly, or as the result of gross negligence, or, although intended, without any appreciation of the potential consequences of the act or statement – of the person found to have been guilty of the contempt and any other subjective factors."

[13]. Apart from seriousness and culpability, other factors that should be considered in the present case are (i) any early plea of guilty, (ii) any previous convictions, (iii) any demonstration of remorse and (iv) the personal circumstances of the Respondents.

- [14]. In my view this is a serious contempt. The serious nature of the contempt has already been discussed at length by the Court in its earlier judgment dated 1 October 2012. It is not proposed to repeat the reasons discussed in that judgment. It is sufficient for the purpose of the present decision to state that the contempt is serious as a matter of principle and because it is directed towards the whole judiciary of Fiji and the Court at a time of Fiji's on-going constitutional development.
- [15]. As a matter of principle the publication scandalizes the entire judiciary and the Court in so far as there is a real risk that the effect of the publication will be to undermine the authority of the court and discourage citizens from relying on the judiciary to settle their disputes. The publication represents a real risk to the effective administration of justice in Fiji.
- [16]. Furthermore the publication should be considered as a serious contempt considering the nature of the jurisdiction to which the publication related. The observations of the Privy Council in **Ahnee and Others -v- Director of Public Prosecutions** [1999] 2 W.L.R 1305 support the proposition that the contempt should be considered in the context of the recent constitutional history of Fiji which renders the administration of justice in Fiji, as a developing small islands state, more vulnerable than in developed nations. The publication served to create doubt and misgivings as to the existence of the judiciary in Fiji and misgivings as to the integrity, propriety and impartiality of the court.
- [17]. The First Respondent's newspaper under the editorship of the Third Respondent and published by the Second Respondent has in recent years reported the outcome of court proceedings in Fiji. These proceedings have been presided over by the judiciary. So why would the Respondents publish the words if it were not to challenge the very existence of a judiciary duly appointed according to law. In other words, its legitimacy. The doubts and misgivings raised in the minds of citizens as a result of the publication compounded the seriousness of the contempt when considered in the context of the present vulnerability of the administration of justice in Fiji. The publication was not only intolerable in the sense that

the court was entitled to find the Respondents guilty, but also it was of such seriousness that the court has concluded that penalties must be imposed.

[18] The circumstances leading to the publication of the article raise the issue of culpability. The question is whether the publication was intentional in the sense that the contempt was deliberate or should it be regarded as reckless or even possibly negligent? It is accepted that this question, although not relevant to guilt, is relevant to the issue of penalty.

[19]. At the outset I accept that the Respondents did not draft the contemptuous words nor the article itself. They were spoken by Tai Nicholas, recorded by Simon Plumb and initially published by the Sunday Star Times in New Zealand and then on the internet website of the same newspaper. An assessment of the culpability of the Respondent must therefore start at that point. The issue of culpability is clearly of more significance to the Second Respondent as publisher and the Third Respondent as editor. The First Respondent Company's liability for the publication is strict and the penalty to be imposed on it is to be determined by somewhat different considerations.

[20]. It is convenient to deal first with the Second Respondent, Brian O'Flaherty who was at all material times General Manager of the First Respondent Company and publisher of its newspaper, The Fiji Times. He gave three months notice of his intention to resign on 11 October 2011 and left the organization on about 11 January 2012. The Second Respondent has deposed that he was not at work on Sunday 6 November 2011 and was unaware of the existence of the article, let alone its publication, until some time after it had been published in The Fiji Times. Is that sufficient to relieve the Second Respondent of any culpability for the publication of the contemptuous words? In my judgment it is not.

[21]. In his affidavit sworn on 19 December 2011 the Second Respondent deposed in paragraph 15:

"This is not to say that I do not concern myself with whether there are systems in place in the newsroom to avoid breaching the law or incurring any liability for Fiji Times Limited or whether those systems are being followed. _ _ _ I was made aware that all reporters, sub-editors and editors have been provided a comprehensive style guide which includes detailed coverage on the law of defamation and of contempt and that there was a procedure for referring any story that might have legal implications for Fiji Times Limited and its staff to our lawyers for their legal review_ _ _."

- [22]. It is clear that as publisher the Second Respondent has acknowledged that there was an obligation to have in place a system to ensure that contemptuous and defamatory material was not published. This responsibility was shared jointly with the Third Respondent as editor. The management, implementation and supervision of all systems in the workplace was a function of the Second Respondent's position. He cannot divest himself of any of his responsibilities by simply saying that he was not at work that day or that the material was published because junior staff or even more senior staff did not follow the system. At no stage has the Court been informed as to the contents of the *"detailed coverage of the law of defamation and of contempt"* that was allegedly included in the *"comprehensive style guide"* to which the Second Respondent referred in paragraph 15 of the affidavit sworn on 19 December 2011.
- [23]. One explanation for the contemptuous publication that appears in the affidavit material is that no person involved in the steps that lead to publication read the whole article. Even if that was due to unforeseen staff absences and time deadlines, the fact that the article was not read in its entirety, that there was additional pressure due to staff being absent and a shortage of material with time constraints all point to either inadequate work place systems or inadequate staff in terms of quantity and /or quality of staff. As a result I am not satisfied that the Second Respondent should be relieved of responsibility and culpability.
- [24]. The Third Respondent's culpability as editor is in even less doubt. He is directly responsible for the content of each and every edition of the

newspaper. If he is not on duty he is nevertheless charged with the responsibility of ensuring that the person who stands in his place is fully aware of the responsibility, duties and role of the editor. The Third Respondent cannot divest himself of culpability by claiming that he was not at work on the day in question. He must accept responsibility for the failure of his staff who were at work to read the article in its entirety.

[25]. In written submissions filed by the Respondents, Counsel has acknowledged that the publication of the article was due to a lack of human resources. In my judgment this was only part of the explanation. Lack of resources is not alone a sufficient explanation for either inadequate systems or incompetency in the management and supervision of such systems. Quite clearly, the systems in place were capable of improvement since the same written submission states that steps were taken to strengthen the systems after the publication of the article.

[26]. As for the First Respondent, Fiji Times Limited was the proprietor of The Fiji Times and is liable to be punished for its contemptuous publication. As a corporate entity its culpability can only be determined by examining the conduct of those who control its activities and who act on its behalf. As a corporate entity its liability is strict and any penalty is determined by the seriousness of the contempt along with any mitigating or aggravating factors.

[27]. The principles that are generally applied in sentencing proceedings require the court to consider the issue of genuine remorse and any plea of guilty. In my judgment these two matters can be considered together since a plea of guilty, especially an early plea of guilty, is regarded as one of the indicators of genuine remorse. These matters are referred to as mitigating factors.

[28]. At the outset, it is noted that at all times up to hearing of the Applicant's Motion the Respondents all maintained pleas of not guilty. As a result the Respondents cannot claim any indulgence from the court on that basis.

[29]. That leaves the question of remorse. After the finding of guilt the Respondents have, in the various mitigation affidavits, expressed remorse for the contempt. To what extent should the court regard such expressions of remorse as genuine and how much weight should the court attach to such expressions of remorse? In my view usually a plea of not guilty is inconsistent with a submission of genuine remorse or contrition. During the course of the present proceedings it became apparent that the plea of not guilty entered by all three Respondents was on the basis that the article did not amount to contempt scandalizing the court. Then the Second and Third Respondents appeared to be claiming that even if the article was contemptuous, they could not be held responsible and that no culpability should be attached to either of them. If the only basis for pleading not guilty had been that the article was not contemptuous then it might have been open to submit that the Respondents regretted the publication and were remorseful on the basis that it had been considered not to be contemptuous. On the basis of the affidavit material before the court it may have been possible for the court to conclude that there was a suggestion of genuine remorse. However when the Second and Third Respondents as a basis of their not guilty pleas claimed not to be responsible and denied culpability, any plea in mitigation that involved a claim of genuine remorse must necessarily be regarded as less worthy of credit.

[30]. In their affidavits in support of mitigation, both the Second and Third Respondents have offered apologies to the judiciary and to the court. To some extent the apologies may be viewed as qualified in the sense that the Respondents appear to be reluctant to accept responsibility or acknowledge culpability.

[31]. Counsel for the Respondents submitted that there was evidence before the court as to the good character of the Second and Third Respondents. Furthermore it is apparent that neither Respondent has any prior conviction nor does either appear to have had any prior involvement with the criminal law apart from one minor traffic matter in the case of the Third Respondent. To that extent I accept that the Second and Third

Respondents are of good character and to some extent that counts in their favour. However, this is a second conviction for the editor of the Fiji Times and a second appearance before this Court for the publisher of the Fiji Times. **In re: Application by the Attorney-General of Fiji and The Fiji Times and Others** (unreported High Court Action 124 of 2008 delivered on 22 January 2009) the then editor of the Fiji Times (Netani Rika) was convicted of contempt scandalizing the court on his plea of guilty and was sentenced to a term of imprisonment of three months to be suspended for two years. In the same proceedings the then publisher (Rex Gardner) on a plea of guilty to contempt scandalizing the court was discharged without conviction on entering into a bond to be of good behavior for 12 months.

[32]. Whilst the Court acknowledges that the Second and Third Respondents were not the publisher or editor in the earlier proceedings, it cannot be completely overlooked that the two Respondents as publisher and editor held positions whose earlier occupants had been subject to prosecution for exactly the same offence of contempt scandalizing the court. It reflects poorly on the Second and Third Respondents that they find themselves before this Court convicted of contempt scandalizing the court when less than four years earlier their predecessors had found themselves in a similar position. These two Respondents appear to have failed to acknowledge that there was surely a lesson or lessons to be learnt from the earlier court proceedings. It does not make a great deal of difference whether the contempt in the earlier proceedings was more or less serious than the contempt in the present proceedings. The point to be made is that the two Respondents failed to heed the warning from the earlier proceedings in which their predecessors were involved.

[33]. As for the First Respondent, there was material before the Court and submissions made by counsel as to the history of the company and The Fiji Times and also to their roles and positions in Fiji. The Company has a long history and to a large extent has over a number of years made a positive contribution to the development of Fiji. However, it cannot be overlooked that this is the second conviction for contempt scandalizing the

court. In the 2009 Fiji Times Limited decision (supra) the First Respondent had pleaded guilty to contempt scandalizing the court, was convicted and ordered to pay a fine of \$100,000.00 within 27 days. Furthermore the company was ordered to enter into a bond (through the Chairman of Fiji Times Limited) in the sum of \$50,000.00 to be of good behavior for a period of 2 years.

[34]. Apart from the aggravating and mitigating matters that have been discussed in the preceding paragraphs the court must now consider one further matter. This concerns an edition of the First Respondent's newspaper that was published on 30 June 2012. The Third Respondent was at that time still the editor. The Second Respondent was no longer the publisher. It arises for consideration as an aggravating factor for the First and Third Respondents.

[35]. The matter is discussed in detail (pages 16 to 18) in the earlier judgment delivered in these proceedings on 1 October 2012. The Court's concern related to the material, consisting of a photograph and an article that appeared on page 71 of the edition of the Fiji Times dated 30 June 2012. I indicated in the judgment that a fair minded and reasonable person who read that material would conclude that a donation of \$25,000.00 and an apology was sufficient to settle committal for contempt of court proceedings. It was also open to a fair minded and reasonable reader to conclude that the judiciary and the government of the day are not independent of each other and that the judiciary may well be imposed upon by the Government to dispose of the matter favourably in return for the donation of \$25,000.00. In short the material presented in the way that it was, left open the inference that the Judiciary was corrupt and lacked independence, impartiality and integrity. I am more than satisfied that so far as the First and Third Respondents are concerned this material must be viewed as an aggravating matter of a grave nature.

[36]. Considering all of the above matters together with the written submission filed by the parties I must now determine an appropriate disposition in respect of each Respondent.

- [37]. I propose to deal first with the Third Respondent, Fred Wesley, as editor. The personal circumstances of the Third Respondent are set out randomly in two affidavits. His employment history is set out in his affidavit sworn on 19 December 2011. The Third Respondent has worked as a journalist in Fiji for 19 years. He started work as a cadet reporter in July 1992 at the Fiji Daily Post. Between 1992 and 1999 he progressed from Cadet Reporter to Senior Reporter, Photo Journalist and Western Bureau Chief in Lautoka. In 2000 he joined the Fiji Sun as Features Editor, Deputy and then Acting Editor. In 2001 he re-joined the Daily Post and worked as a Sub-editor, Chief Sub-editor, Acting Editor and Acting Publisher. Since 2004 he has been employed at The Fiji Times as Deputy Chief Sub-Editor, Features Editor, Editor of the Sunday Times and Features Editor. Since October 2010 he has held the position of Editor-in-Chief. In recognition of his ability and experience he has been awarded three Fiji Awards for Media Excellence (FAME). Outside of work, he is currently studying for a Master in Business Administration degree from the University of the South Pacific.
- [38]. The Third Respondent is married with three children. He assists members of his extended family with their education expenses and fees. He describes himself as an active member of his church group and assists youths in his neighborhood of Kinoya. The court was not provided with any information as to the financial circumstances of the Third Respondent.
- [39]. In my judgment the sentence imposed must reflect the findings I have made in relation to the seriousness of the contempt. As a result I have come to the conclusion that a custodial sentence must be imposed. In my opinion a custodial sentence is necessary to act as a deterrence, to reflect the public interest and to effectively denounce the contempt. Although decided in 1972, I consider the decision of Court of Appeal in **Parmanandan -v- The Attorney General (1972)** 18 F.L.R. 90 to be a useful guide for determining an appropriate term. Whilst it may be argued that the contempt in that case was more serious, it is apparent that the court has in recent times taken a more robust approach to

punishing contemnors for contempt scandalizing the Court. The contempt, on account of the aggravating matter is sufficiently serious to warrant a term of imprisonment of six months.

[40]. However, in view of the fact that he comes before the court with a virtually unblemished personal record, his age, family commitments and his distinguished employment history in journalism, I am prepared to order that the sentence be wholly suspended for a period of two years. The Third Respondent is also ordered to pay to the Applicant costs fixed in the sum of \$2000.00 within 28 days.

[41]. Turning now to the Second Respondent, Brian O'Flaherty as publisher. He began his career in South Africa in 1975 with The Rand Daily Mail and Sunday Express, both published by South African Associated Newspapers Limited. He started work as a reporter and was appointed Chief of Staff, a position which he held until 1984. Between 1984 and 1986 he worked for a public relations firm in South Africa. In February 1986 the Second Respondent migrated to Australia. He worked as a sub-editor at the Melbourne Sun. Between 1987 and 1990 he worked at "*The West Australian*" newspaper as Deputy Chief of Staff, Night Editor and Deputy Editor. In July 1990 he was appointed General Manager/Publisher of The Post Courier in Papua New Guinea. This paper was owned by News Limited. In 1992 he was transferred to Fiji Times Limited (the First Respondent) as General Manager/Publisher of the Fiji Times. In 1996 he was transferred by News Limited to various positions in Australia until he resigned in 2002. Between 2002 and 2010 he was self-employed in Queensland running "*his own private business*". In December 2010 he took up the position with the First Respondent of General Manager and Publisher until his resignation took effect in January 2012. He has since gained employment in Australia as Group Manager Western with Fairfax Regional Media in New South Wales from 1 February 2012.

[42]. In April 2012 he was diagnosed with a life threatening condition being splenic lymphoma and an extremely enlarged spleen. He underwent surgery in June 2012 and is receiving on-going post-operative care in

connection with the condition. He was not able to be present in court for these proceedings on account of his illness.

- [43]. Unlike in the earlier **Fiji Times Limited** case (supra) when the publisher (Mr Gardner), as the learned Judge noted, had accepted responsibility and pleaded guilty "*with a full consciousness of guilt*" the Second Respondent in these proceedings has pleaded not guilty and has been reluctant if not unwilling to accept responsibility or acknowledge culpability.
- [44]. Taking into account that the Second Respondent was not employed by the First Respondent at the time that the contempt was aggravated by the subsequent material that appeared on 30 June 2012, I have concluded that committal is not appropriate in his case. I am satisfied that the imposition of a lesser penalty in the form of a fine will be sufficient to indicate to the Second Respondent the seriousness of the contempt.
- [45]. As to the amount of the fine, the court has a discretion which must be exercised fairly and in accordance with accepted principles. The fact that the Court has no information before it to determine the financial circumstances of the Second Respondent does not prevent the court from imposing a fine. Having considered all of the matters that were raised in the submissions I consider that a fine of \$10,000.00 is appropriate. In view of the serious nature of the contempt the fine is imposed with conviction. The fine is to be paid within 28 days. The Second Respondent is also ordered to pay costs in the sum of \$2000.00 to the Applicant also within 28 days.
- [46]. The First Respondent must accept the ultimate responsibility for the publication of the contempt. It cannot hide behind its special position that has been acquired over its many years of publishing in Fiji. In fact it is its long history and its position in the newspaper publishing business in Fiji that imposes upon it an onerous responsibility to ensure that it pursues the highest standards of journalism.

[47]. This is its second conviction. The First Respondent and its management appear to have learnt little from the first conviction. The fine imposed for the first conviction was \$100,000.00. The penalty on this occasion must reflect the fact that this is a second offence following the conviction of the First Respondent in 2009 for the same type of contempt. I might well have taken a more lenient view as to an appropriate penalty in this instance had that been the only consideration. However, in my view the penalty on this occasion must not only reflect the fact that this is a second conviction but also the penalty must in addition reflect the grave aggravating factor to which reference has already been made.

[48]. In case there is any doubt as to how this Court views that matter, I shall briefly state again the reason why the Court considers the material to be an aggravating factor of a grave nature. The material that appeared on page 71 of the edition of the First Respondent's newspaper on 30 June 2012 aggravated the risk of undermining public confidence in the administration of justice in Fiji. The material consisting of the heading, the article itself and the photograph, when read together, conveyed to a fair-minded and reasonable reader the impression that the judiciary was not independent from the government, that payment by cheque of \$25,000.00 from the OFC would bring about the termination of the contempt proceedings against that organization's General Secretary (Tai Nicholas) and that the judiciary in Fiji was corrupt. As a consequence the Court is left with no choice but to impose a heavy fine. I therefore convict the First Respondent and impose a fine of \$300,000.00 to be paid within 28 days. I also order the First Respondent to pay costs to the Applicant in the sum of \$2000.00 to be paid within 28 days.

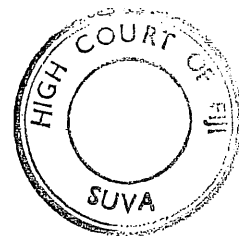
[49]. As a result the orders of the Court are:

1. *The First Respondent (Fiji Times Limited) is convicted and fined FJD \$300,000.00 to be paid within 28 days from the date of this judgment.*
2. *The First Respondent is ordered to pay costs to the Applicant in the sum of FJD \$2000.00 within 28 days from the date of this judgment.*

3. *The Second Respondent (Brian O'Flaherty) is convicted and ordered to pay a fine of FJD \$10,000.00 within 28 days from the date of this judgment.*
4. *The Second Respondent is ordered to pay costs in the sum of FJD\$2000.00 to the Applicant within 28 days from the date of this judgment.*
5. *The Third Respondent (Fred Wesley) is convicted and is sentenced to a term of six months imprisonment to be wholly suspended for a period of two years.*
6. *The Third Respondent is ordered to pay costs to the Applicant in the sum of FJD\$2000.00 within 28 days from the date of this judgment.*
7. *The First and Third Respondents are ordered to arrange for an apology directed to the judiciary of Fiji to be first drafted and submitted to the Court for approval prior to being published in the Fiji Times within 28 days from the date of this judgment.*
8. *The fines are to be paid to the High Court (Civil) Registry in Suva.*
9. *The costs are to be paid to the Office of the Attorney General in Suva.*

W. Calanchini

W D CALANCHINI
JUDGE



20 February 2013
At Suva