IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No HBC No 175 of 2013

BETWEEN: **SUSHIL CHAND**

Plaintiff

AND: **HANDYHAND MARKETING (FIJI) LTD**

1st Defendant

AND: **AVINESH NAIDU**

2nd Defendant

Appearances: Mr L. Sovau for the Plaintiff
Mr A.K. Narayan for the Defendants

Date of Decision: 7 November 2013 at Lautoka

DECISION

INTRODUCTION:

[1] The substantive matter before this court stems from the Inter-parte Notice of Motion filed by the plaintiff on 19 September 2013, seeking an order that the plaintiff be granted leave to institute these proceedings out of time against the defendants. I do not wish to go any further into the

details of the substantive application at this stage, as I propose to briefly make mention of the same, later in my decision.

[2] More to the point, the particular matter before me at present, to be dealt with is, one which relates to the issue of whether or not a conflict of interest would arise out of a situation, where the counsel who appeared on record for the plaintiff on a previous occasion now submits to court that he and his firm of solicitors are entitled to act for the defendants, and that would not amount to a conflict of interest situation.

BACKGROUND FACTS:

[3] The plaintiff's solicitors Messrs Qoro Legal filed the inter-parte motion dated 19 September 2013 seeking an order that the plaintiff be granted leave to institute proceedings out of time against the defendants, which was filed together in support with the affidavit of the plaintiff sworn on the same date.

[4] The matter was mentioned before me on 30 September 2013. At the mention, Mr Ashneel Kumar Narayan of Counsel marked his appearance on record for the plaintiff before this court based on the instructions from Qoro Legal.

[5] On the day, Mr Narayan on behalf of the plaintiff, made application seeking two weeks time to serve the application on the defendants. The court granted orders on the 30 September 2013, directing the plaintiff's solicitors to take necessary steps to serve the application forthwith on the first and second defendants. Court also made order that the matter be mentioned on 14 October 2013 at 9.30am.

[6] At the mention of the matter on 14 October 2013, Mr Narayan submitted that he is now appearing "*formally*" for the defendants.

[7] I alluded Mr Narayan to the fact that his appearance was recorded on the previous occasion for the plaintiff on the case record.

[8] I also observed that the plaintiff was present in court. However, there was no appearance marked for the plaintiff, except for the fact, the clerk of Qoro Legal was present in the court room.

[9] Court directed Mr Narayan to make submissions on the conflict of interest issue. Mr Narayan made submissions to the effect that on the previous occasion he appeared for the plaintiff, only for the mention, from the "*gallery*".

[10] Mr Narayan submitted that he would require clarification from the plaintiff's solicitors that the plaintiff's solicitors would consent to the fact that there is no conflict of interest in Mr Narayan now appearing for the defendants as it was clear that Mr Narayan had not obtained the consent from the plaintiff's solicitors until that point in time.

[11] Mr Narayan then made submissions that the matter be mentioned on a short date, to clarify the issue with the plaintiff's solicitors, given that the plaintiff's counsel was at the time unable to be present in court as he was before Nadi Magistrates Court.

[12] Court adjourned the matter to be resumed later in the morning at 10.45am.

[13] When the matter resumed at 10.45am, Mr L. Sovau of counsel appeared for the plaintiff instructed by Qoro Legal.

[14] Mr Narayan submitted that the plaintiff's counsel has now consented to Mr Narayan appearing for the defendants, though he had previously appeared for the plaintiff.

[15] Mr Narayan made further submissions, once again reiterating and submitting that he only appeared from the "*gallery*" on the last mention. In addition, Mr Narayan quite consistently recalled that, when questioned by court at the mention on 30 September 2013, admittingly that the court was more aware of the matter than himself, in that he did not have a scrap of paper with any details of the litigant whom he was representing on the day, let alone the nature of the matter.

[16] On the issue of having discussed the consent of the plaintiff's counsel with regards to Mr Narayan now appearing for the defendants, counsel for plaintiff Mr Sovau submitted that he has no objection for the same.

[17] Court observed that the defendants at that point in time were yet to file their appointment of solicitors in the Registry.

[18] With regards to this observation and on the courts direction for Mr Narayan to make submission on the same, Mr Narayan submitted that the plaintiff had not taken steps promptly to serve the defendants, and that the defendants (the insured) have been served with the notice only on the previous Wednesday, the 9 October 2013, and the insurer (Sun Insurance Company Ltd) retained Mr Narayan's firm, AK Lawyers, only at 4.25pm on last Friday being 11 October 2013.

[19] Court then sought to be addressed by Mr Narayan on the two following queries:

i. Can a counsel appear on behalf of a litigant without the appointment of solicitors filed in the Registry;

ii. Can he (Mr Narayan) now appear for the defendants having formally marked his appearance on the case record on the instructions of Qoro Legal for the plaintiff on a previous occasion.

[20] Mr Narayan's submission to the above first query was in the affirmative, and addressing the second query Mr Narayan submitted also in the affirmative.

[21] Court then further directed Mr Narayan to address on the issue, elaborating, in the counsels' views, as to whether solicitors can randomly appear for both parties in an action on the premise that there is no conflict of interest. Mr Narayan submitted to court that having practiced as a legal practitioner in Fiji for the last 3 years, that is his experience, it is the common practice amongst legal practitioners in Fiji, to do so.

[22] Court inquired from Mr Narayan as to whether he could refer the court to any supporting authorities on the point, to which he submitted in the negative.

[23] However, Mr Narayan submitted that he wished to continue acting for the defendants.

[24] Court made the following orders:

i. Defendants to file their appointment of solicitors by 4.30pm on 15 October 2013 in the Registry;

ii. If the defendant's solicitor and counsel wishes to continue acting for the defendants, defence counsel to provide supporting authority on the same to be filed in the Registry by no later than 15 October 2013;

iii. Matter to be mentioned on 22 October 2013 at 9.30 am and court to make ruling on the issue.

[25] I note that AK Lawyers filed their Notice of Appointment of solicitors on 14 October 2013.

[26] I note that Mr Narayan has filed written submission on 16 October 2013 in the Registry. I thank Mr Narayan for his submissions.

[27] On the mention of the matter on 22 October 2013, court made enquiries from Mr Narayan with regards to the composition and the structure of AK Lawyers, noting Mr Narayan's submission on 14 September 2013, wherein he made reference to AK Lawyers as *"his firm"*. Clarification sought by court was on whether Mr Narayan was himself a partner, an associate or an employed solicitor of AK Lawyers.

[28] Mr Narayan submitted that he is an associate of the firm AK lawyers. Mr Narayan also submitted that the firm consists of two partners as well as another associate apart from Mr Narayan himself.

[29] Court sought clarification from the plaintiff's counsel Mr L. Sovau who presently appears on the instructions of Qoro Legal, as to whether Qoro Legal had given access to any other documents relating to the matter, other than the Instructions Sheet to Mr Narayan as stated in Mr Narayan's written submission, at the time his services were engaged

having been retained by Qoro Legal to appear for the plaintiff on the 30 September 2013.

[30] Mr Sovau confirmed to the court that Qoro Legal had provided only the instruction sheet at the time Qoro Legal formally retained Mr Narayan when Qoro Legal engaged Mr Narayan's service as counsel, to appear for the plaintiff on 30 September 2013.

MATTERS FOR DETERMINATION

[31] (a) Can Mr Ashneel Kumar Narayan of Counsel having marked his appearance on the case record formally as counsel for the plaintiff instructed by Qoro Legal, now appear as counsel for the defendant, as the counsel instructed by the firm AK Lawyers;

(b) Given the structure and the relationship between Mr Ashneel Kumar Narayan of counsel and the firm AK Lawyers, can AK Lawyers continue to act as the solicitors on record for the defendants;

(c) If either of the two matters referred to above in (a) and (b), is allowed, give rise to any or any potential conflict of interest situation by Mr Narayan and AK Lawyers now appearing for the defendants in this matter.

[32] **THE LAW APPLICABLE**

Primarily, I will consider the Rules which govern this particular area of law pursuant to the provisions under the Legal Practitioners Decree 2009, Chapter 1 which stipulates:

1.1 A practitioner shall not abuse the relationship of **confidence** and **trust** with a client;

1.2 A party shall not act for more than one party in the same matter **without the prior consent of all parties**;

1.3 On becoming aware of a conflict of interest between clients a practitioner shall forthwith;

(a) advise all clients involved in the matter of the situation;

(b) continue acting for all clients only with the consent of all clients and only if no actual conflict has occurred;

(c) decline to act further for any party where so acting would **disadvantage** any one or more of the clients.

[33] Secondly, with a more descriptive and a broader sense, I will now consider the view adopted by the courts on this point.

[34] The first aspect to be mentioned about the phrase **"conflict of interest"** in conjunction with examining the authorities on conflict of interest, there are seem to be more of cases not about "*conflict of interest*" but rather about "*conflict of duty*".

[35] The underlying principle is that, in accepting a retainer to act for a client, a legal practitioner owes a **duty** to act in the **best interest of his client** and to make available to the client all of his expertise and knowledge.

[36] If a practitioner concurrently acts for another client who has interests adverse to the first client and conflict arises the practitioner must necessarily sacrifice the interest of the one client to the other or vice

versa or perhaps by failing to act at all on a particular issue might sacrifice the interests of both clients. Whichever way it goes the practitioner fails to perform to the full, the duties which he owes to the two clients.

[37] **In Archer v Howell (No 2) (1992) 10 WAR 33**, 49 Rowland J as a member of the full court of the Supreme Court of Western Australia said:

> "*Whenever a practitioner acts for two persons whose interests may not be identical there is a* ***prospect*** *that there will be a conflict."*

[38] The current edition of **Riley Solicitors Manual** quotes as follows:

> *"[7015] professional consequences of client-client conflicts;*
>
> *A lawyer who accepts a retainer from a client that is* ***inconsistent*** *with his or her* ***duty*** *to a current client may be found guilty of misconduct, although this is unlikely to merit striking off unless the conflict in question unearths other unethical conduct."*

[39] At 7025.5 Riley also quotes from two decisions which are adopted as follows:

(a) Wilson JA in a Canadian case of **Davey v Wooley**, Homes, Dale & Dingwell (1982) 35 OR 92d) 599 at 602;

> "*The underlying premise……is that, human nature being what it is, the solicitor* ***cannot give his exclusive, undivided attention*** *to the interests of his*

client if he is torn between …..his client's interests and those of another client to whom he owes the self-same duty of loyalty, dedication and good faith."

(b) Davies JA in **Alexander (t/a Minter Ellison) v Perpetual Trustees WA Ltd [2001] NSW CA 240 at [125**]:

"A conflict of interest is an insidious thing. Aspects of a duty of care, which ought to be seen clearly and distinctly, are seen in a ***hazy light when a solicitor seeks to reconcile the interests of two clients who each have interests which differ from those of the other.*** *Over many years, in judgments which I have written or in which I have joined, the point has been made that* ***solicitors should never allow themselves to have a conflict of interest****. Those judgments appear to have had no impact. Too many solicitors continue to act for two or more clients who have conflicting interests.* ***Year after year, cases come before the courts because a solicitor, in such a position, has failed to fulfill his duty to one or more of his or her clients."***

[40] Riley also quotes from Windeyer J in **Lowry v Alexander** [2000] NSWSC 66] and the English Court of Appeal in **Hilton v Barker Booth & Eastwood** (a firm) [2005] 1 All ER 651. [at 34].

"The cases themselves illustrate the practical consequences that arise in conflict situation where the ***practitioner's every act*** *may*

*potentially be for the **benefit** of one client and to the **detriment** of another".*

[41] Scrutton LJ in **Moddy v Cox** [1917] 2 Ch at 91 said:

> "*It may be that a solicitor who tries to act for both parties puts himself in a position that **he must be liable to one or the other whatever he does**....[It] would be his fault for mixing himself with the transaction in which he has two entirely inconsistent interests".*

[42] In **Blackwell v Barroile Pty Ltd** (1994) 51 FCR 347: 123 ALR81, Federal Court, it was reflected that the principle behind the law in this area is that ***'NO MAN CAN SERVE TWO MASTERS".***

[43] In Blackwell it was also held that a firm is in no better position than a sole practitioner if it purports to act for separate clients whose interests are in contention.

[44] The concept of reliance upon "*Chinese Walls"* was discussed also in ***BLACKWELL***. Simply *"Chinese Walls*" involve the firm taking steps to ensure that different lawyers within the firm act for each client and that the legal staff acting for the respective clients do not come into contact with confidential information given to the firm by that client for whom their section of the firm is not acting, and that the integrity of the client's information in terms of their right to confidentiality is not comprised.

[45] The concern of the courts over the adequacy of *'Chinese walls'* to protect client information was expressed by Newnes M in **Zalfen v Gates** [2006] WASC 296 (21 December 2006) at [76] – [79]:

> *"There is, I think, also a strong body of authority to the effect that in circumstances where there is a real risk of disclosure it will rarely be the case that a 'Chinese wall' will be sufficient justification for allowing a firm to act: see, for example,* ***D & J Constructions Pty Ltd v Head*** *(supra), Effem Foods Pty Ltd v Trade Consultants ltd (1989) 15 IPR 45,* ***David Lee & Co (Lincoln) Ltd v Coward Chance*** *(a firm) [1991] Ch 259, Re a firm of Solicitors [1992] QB 959."*

[46] In **D & J Constructions Pty Ltd v Head** (supra), Bryson J (at 122 – 123) said that the Court would not usually undertake attempts to build walls around information in the office of a partnership, even a very large partnership, by accepting undertakings or imposing injunctions as to, among other things, communications among partners and their employees. His Honour noted that among the difficulties involved in attempting to contain information in that way:

> *"[e]nforcement by the court will be extremely difficult and it is not realistic to place reliance on such arrangements in relation to people with opportunities for daily contact over long periods, as wordless communication can take place inadvertently and without explicit expression, by attitudes, facial expression or even by avoiding people one is accustomed to see, even by people who sincerely intend to conform to control".*

[47] Similarly, in **David Lee & Co (Lincoln) Ltd v Coward Chance** (a firm) (supra), Browne Wilkinson VC said (at 674):

> *"When one has sensitive information in a firm or in any other group of people, there is the element of seepage of that information through casual chatter and discussion, the letting slip of some information which is not thought to be relevant but may make the link in a chain of causation or reasoning."*

[48] Historically courts have quite correctly shown grave concern in regards to the standards of the profession and how that reflects upon the public in terms of reputation of legal practitioners as officers of the court, on the issue of situations bordering or situations of conflict of interests.

In –Exparte Macaulay (1930) 30 SR NSW 193 of 193-4 Street CJ Comments:

> *"Unless the court insists on a high standard of conduct on the part of solicitors – unless the court punishes severely any lapse from the proper standard – the* ***public will never be properly safe-guarded and the profession will never retain the respect which it ought to have in the community."***

[49] In **Harvey v The Law Society of New South Wales** (1975) 49 ALJR 362 at 364: the court of Appeal commented:

> *"The court's duty is to ensure that those standards of the profession are fully maintained particularly in relation to the proper relationship of the practitioner with*

practitioner, practitioner with the court and practitioner with the member of the public who find need to use the services of the profession."

[50] The view adopted, clearly, by courts is that as officers of the court, who are duty bound to hold the supreme esteem of the legal profession, practitioners should always take every precaution not to put themselves in situations which are seemingly a conflict of interest situation, irrespective of the question of access to confidential information or otherwise.

[51] I also wish to examine briefly, the view taken by courts, on the issue, with regards to concurrent conflict situation in solicitors representative of both insured and insurer, as this has relevance to this particular matter to be decided before me.

[52] Insurance policies ordinarily give the insurer a right of subrogation, that is, to stand in the shoes of the insured for the purpose of legal proceedings relating to the insured's liability.

[53] In Mercantile Mutual Insurance (NSW Workers Compensation) Ltd v Murray (2004) 13 ANZ Ins (as 61 – 612 at (50) Mason P said:

"The proceedings remain in the name of the insured, even though the insurer appoints the lawyer. Though the insurer-appointed lawyers most judges agree, becomes the lawyer for the insured, this does not necessarily deny a concurrent lawyer-client relationship with the insurer. That insurers regularly appoint solicitors to act for the insured representatives as implicit acceptance that in

most cases there is coincidence between the interests of insured and insurer."

ANALYSIS OF THE FACTS OF THE MATTER TO BE DECIDED IN THE CONTEXT OF THE APPLICABLE LAW.

PRIMARY FACTORS:

[54] (i) It is evident that Mr Narayan was formally retained to appear as counsel for plaintiff by Qoro Legal on the 30 September. Accordingly Mr Narayan's appearance has been formally marked on the case record for the plaintiff.

(ii) Mr Narayan had no knowledge of the confidential information, let alone was not able to address court with regards to the type of matter before court, or the nature of the matter, as he admittingly appeared before this court without a piece of paper, confined to the instruction sheet from Qoro Legal.

(iii) Mr Narayan made application to court on the 30 September 2013 seeking 14 days to serve notices on the defendants.

(iv) Mr Narayan submits that he now wishes to continue acting as counsel for the defendants instructed by AK Lawyers who have filed their appointment of solicitors for the defendants, of which firm he is an Associate.

[55] Clearly at the time Mr Narayan accepted instructions from Qoro Legal on 30 September 2013, by accepting the instruction sheet to appear for the

plaintiff, the ethical and contractual obligation of Mr Narayan commenced towards the plaintiff.

[56] The consistent view of the courts, affirms the cardinal principal of the solicitor-client relationship which commences the moment a litigant steps in to a solicitors firm. Qoro Legal obviously bore that obligation to the plaintiff as their appointed solicitors, who in turn retained the services of Mr Narayan as counsel to appear for the plaintiff, thus, passing on that ethical and contractual obligation to Mr Narayan and Mr Narayan accepting that obligation.

[57] I dismiss Mr Narayan's submission in response to the courts query, that a counsel could appear on behalf of a litigant without a proper appointment of solicitors filed in the registry prior to the appearance.

[58] I do not wish to go into detailed analysis on this point, given that, at present, it is not the matter before me to be decided, as AK Lawyers have now filed Notice of Appointment as solicitors for the defendants.

[59] Mr Narayan submits that in his experience as a legal practitioner, the common practice of legal practitioners in Fiji is that appearances can be marked by counsel randomly for both parties on the premise that there is no conflict of interest, in doing so.

[60] If that be the current practice amongst the legal practitioners in this country, I am bemused by said practice, as such practice would be, in my view be contrary to the view taken by the English and Australian supreme courts over the years, as it would be clearly contrary to the ethical and contractual obligations of solicitors, at the risk of damaging the reputation of the legal practitioners.

[61] Litigants are lay people, illiterate in many instances. It is clearly the ordinary litigant that forms a perception of the legal practitioner, whom they retain, in a commercial world, for a consideration, to act on their behalf to endevour to protect their interest to the optimum, against the interests of their opponent.

[62] It is certainly a floodgate the legal profession will attempt to open up if such practice is to continue, which will leave a bad taste in the mouths of the ordinarily litigant, when they come to realize their solicitor who represented them the previous day in court, in most cases for a commercial consideration, is now appearing for their opponent.

[63] I am of the view that the court of law is by no means a "theater" or a stage for other dramatic impromptu performances where counsel robed in their wigs and gowns can appear from the "gallery", with next to no knowledge about a litigant and on the matter, marking their appearance on the case record, and then swap their appearances around conveniently to appear for the opponent on the basis of there been no access by the practitioner for any confidential information up to that point in time.

[64] I am of the view that such conduct of a legal practitioner will be in breach of the contractual and the ethical obligations of a legal practitioner, at any level, which has to be viewed from a broader perspective of general law rather than been confined to the narrower rules which govern the area.

[65] Mr Narayan submits that he subsequently obtained consent of the plaintiff counsel to act for the defendants. I am of the view that this is not an issue which can be dealt by way of striking agreements with opposing counsel, as an afterthought.

CONTRIBUTORY FACTORS:

[66] I note the following contributory factors which I have also considered in arriving at my decision.

[67] The very nature of the substantive matter:

This is a matter where the plaintiff, the father of a deceased, is seeking an order for an extension of time to file Writ of Summons against the defendants for personal injuries arising out of a motor vehicle accident which occurred on or around 16 April 2008. Plaintiff's son died as a result of the injuries on 19 April 2008.

i. In his affidavit of 19 September 2013, in support of the Notice of Motion, the plaintiff in paragraph 9 pleads:

> *"Sometimes on or about March 2010, I met with my new landlord, Saha Deo. In our conversation, Mr Deo asked me how many children I have. I said three but the youngest died. He asked me how he died. I said he died from injuries suffered in an accident on or about 16 April 2008. Mr Deo then asked me what I have done about it. I said nothing. He then asked me whether I have sought legal advice from a lawyer. I said no because I did not know what to do and what rights do I have".*

ii. Clearly the plaintiff appears to be an average common member of the public with no knowledge of his legal rights;

iii. Mr Narayan sought 2 weeks to serve the Notice on the Defendants on his appearance for the plaintiff on 30 September 2013;

iv. On the 14 October 2013 whilst now appearing for the defendants,(Insured) Mr Narayan alleged late Service of the Notice on the defendants by the plaintiff, i.e. on 9 October 2013, which has resulted in the insurer having retained AK Lawyers on the previous Friday 11 September 2013, at 4.25pm;

v. Even without the access to any confidential information, as submitted by Mr Narayan, the mere submission in itself, on the issue of late Notice by the plaintiff on the defendants, for whom he previously appeared for, in my view, constitutes conflict of interest in the conduct of Mr Narayan (as per **Hilton v Barker Booth & Eastwood**).

[68] **Nexus between Mr. Narayan and A. K. Lawyers**

i. Mr. Narayan submits he is an Associate for A. K. Lawyers. As per Mr. Narayan's submission there appears to be two partners as well as another Associate apart from himself;

ii. In his written submission Mr. Narayan states that A. K. Lawyers is a firm which is on the panel of solicitors for Sun Insurance Company Limited, the Defendant insurer in the matter;

iii. Endorsing the concept of reliance upon "Chinese Walls" as discussed in **BLACKWELL**, and the concern over the

adequacy of these as discussed in **Zalfer v Gates** (referred in my paragraphs 44, 45), I am of the view that A. K. Lawyers bear the same onus to discharge as much as Mr. Narayan himself;

iv. This situation also can be distinguished from the establishment if large national and international firm where it raises the possibility of the one firm (perhaps in a different jurisdiction) dealing with competing interest. This could be a potential problem for practitioners in country towns where one or two firms might have to deal with legal problems of the whole town. This is clearly not such a case.

[69] In the circumstances I am of the view that;

a) Mr. Narayan should discontinue to act as Counsel for Defendants, Handyhand Marketing (Fiji) Ltd and Sun Insurance Company Ltd;

b) A. K. Lawyers should discontinue to act in this matter any further as solicitors on record for Handyhand Marketing (Fiji) Ltd and Sun Insurance Company Ltd .

DECISION

[70] Accordingly, I make orders that;

a) Mr. Ashneel Kumar Narayan to discontinue acting as Counsel for Defendants, Handyhand Marketing(Fiji) Ltd and Sun Insurance Company Ltd;

b) Messrs A. K. Lawyers to discontinue acting as Solicitor for the Defendants, Handyhand Marketing (Fiji) Ltd and Sun Insurance Company Ltd;

c) Defendants are directed to take steps for the appointment of new solicitors.

S. Weeratne

Judge

To:

1. Qoro Legal appearing for the Plaintiff
2. AK Lawyers appearing for the Defendants
3. File HBC 175 of 2013