

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

CIVIL ACTION NO. HBC 14 OF 2015

BETWEEN : NAINASO I RA HOLDING LIMITED a limited liability company having its registered office at 33 Raojibhai Patel Street, Suva, P O Box 4132 Samabula Post Office, Suva.

PLAINTIFF

AND : RAJNEEL KARAN SINGH of Samuel K Ram Lawyers, 2nd floor, Kamel Building, Kings Road, Ba Town, Legal Clerk.

1ST DEFENDANT

AND : SAMUEL K RAM trading as SAMUEL K RAM LAWYERS, a legal practice, duly established under the Legal Practitioners Decree, and having its registered office at 2nd floor, Kamel Building, Kings Road, Ba. P. O. Box 3318, Ba.

2ND DEFENDANT

AND : MATAQALI NAINASO HOLDINGS LIMITED a duly incorporated private company having it registered office at 2nd floor, Kamel Building, Kings Road, Ba. P. O. Box 3318, Ba.

3RD DEFENDANT

AND : YASAWA PROJECTS COMPANY LIMITED a duly incorporated private company, having its registered office at 2nd floor, Kamel Building, Kings Road, Ba. P. O. Box 3318, Ba.

4TH DEFENDANT

AND : CAPITAL GROUP INVESTMENTS (FIJI) LIMITED, a duly incorporated private company having its registered office at Suva, Fiji, P O Box 15859.

5TH DEFENDANT

AND : ANWAR KHAN, of Drasa, Lautoka, P. O. Box 5490, Lautoka Businessman.

6TH DEFENDANT

AND : **KELEVI NABA**, of Drasa, Lautoka, Retired.

7TH DEFENDANT

AND : **PATIMIO BACAIVALU**, of Drasa, Lautoka, Company Director.

8TH DEFENDANT

AND : **Waisea Ratubusa**, of Vatuwaqa, Suva, Pharmacist.

9TH DEFENDANT

Appearances : Mr A. Rayawa for the plaintiff
Mr Samuel K. Ram for the first defendant
Mr S. Krishna for the second defendant
No appearance for the third-the ninth defendants

Date of Hearing : 5 July 2018

Date of Ruling : 28 August 2018

R U L I N G

[on Conflict of Interest]

Introduction

[01] This ruling concerns an issue of conflict of interest raised by the court in respect of the first defendant and the second defendant who is a legal practitioner representing the first defendant (*'the issue'*).

[02] Before me both parties advanced oral arguments and only the first defendant filed written submissions and supplementary written submission. The plaintiff did not file written submissions. They relied on their oral submissions only.

The background facts

[03] Mr Rajneel Karan Singh (Rajneel), the first defendant is a law clerk at Messrs Samuel K Ram Lawyers. Mr Samuel K Ram (Ram) trading as Samuel K Ram Lawyers is a legal practitioner, the second defendant (*'second defendant'*). The plaintiff's claim arises out of an allegation that both of them acted fraudulently

and colluded with the other defendants to deprive the plaintiff of their land which is valued at \$20M. It is alleged that the second defendant caused the first defendant to swear an affidavit in the winding-up proceedings to have the plaintiff company wound up even before its incorporation. Initially, a winding-up order was granted. It was however withdrawn on appeal after a protracted legal battle. It is also alleged that the first and the second defendants along with other defendants at the time of filing the winding-up petition, made representations to the High Court at Lautoka that were false, fraudulent and misleading in that they presented the Winding-up petition naming a non-existent company to be the petitioner on their behalf. The plaintiff claims among other things \$20M against the defendants including the first and second defendants.

[04] Initially, the first defendant was represented by Messrs Krishna & Co until Mr Ram, the second defendant filed the notice of change of solicitors in place of Krishna & Co on 10 February 2015.

[05] I invited the parties on the issue of conflict of interest that would arise when Mr Ram, who is the second defendant in the same matter representing and acting the first defendant.

The Issue

[06] The question arises as to whether or not there would be a conflict of interest in circumstances where a solicitor who is also defendant representing and defending another defendant who is an employee of the solicitor in the same proceedings where the solicitor and the client faced with the same allegations.

The Law

[07] The Rules of Professional Conduct and Practice (Sch to the Legal Practitioners Act 2009), (*the Rules*), 3.4 provide: -

“3.4 A practitioner shall not, save in exceptional circumstances, continue to act for a client in a matter in which the practitioner is likely to be a witness unless-

(i) the practitioner’s evidence relates to an uncontested matter;

(ii) the practitioner’s evidence relates to formal matters;

(iii) the practitioner’s evidence will relate solely to the nature and value of legal services rendered;

(iv) refusal to act or withdrawal from the matter will jeopardise the client’s interest.”

The Submissions

Mr Ram

- [08] Mr Ram counsel for the first defendant and the second defendant himself submits: The second defendant's personal interest is to oppose the claim and to submit that it discloses no cause of action. It is no different from the interest of the first defendant. The first defendant maintains that the action against him ought to be dismissed summarily. The detailed evidence given in his application to strike out clearly shows that he has the same interest as the second defendant. In this case, neither the first nor the second defendant can be a material witness. The allegation against them to what they did on instructions of the other defendants. They are bound by confidentiality and cannot give any evidence in relation to the allegations save for what was filed in Court. The evidence will be a mere formality. Mr Ram refers to me the case authorities such as 1. *RCM v Herbert*. 2. *Cook v Evatt* (No 2) [1992], NZLR 676 and 3. *Handyhard Marketing (Fiji) Ltd and anor v Sushil Chand*, Fiji Court of Appeal, Civil Appeal No. ABU 71 of 2014 ("*Handy hard Marketing Case*").

Plaintiff

- [09] Mr Rawaya counsel for the plaintiff, on the other hand, contended that Mr Ram instructed Mr Rajneel to swear an affidavit which was filed in the winding-up proceedings and obtain a winding-up order which was subsequently withdrawn in appeal. The winding-up petition was clearly an abuse of process. Mr Ram is trying to hang all the liability on Rajneel making him as his client. This is a serious matter as a defendant in this case. Mr Ram will be called to give evidence. I will ask him questions in cross-examination on this issue. I will ask questions about Rajneel's activity. At that point, one of them will have to take the blame, whether it is Mr Rajneel or Mr Ram. Did Rajneel, the clerk act on his own fraudulently or did Mr Ram his employer authorize him (*Rajneel*) to do the first set of documents. Rajneel has to be given liberty to engage another lawyer to protect himself. If my learned friend (*Mr Ram*) says what he did was not fraud that is a trial issue that we have to canvas during the trial. Right now the question is: will Mr Ram be giving evidence on this? He had already made his plans by swearing evidence which is very detrimental to his client.

The Decision

- [10] The issue raised by the Court is whether a solicitor who is a defendant in the same matter can represent and defend another defendant in circumstances where both of them faced with the same allegation.
- [11] Mr Ram, trading as Samuel K Ram Lawyers, is a Barrister and Solicitor who is the second defendant in this matter. Mr Rajneel is a legal clerk employed by Mr Ram. Mr Rajneel is the first defendant in this case. Both of them are facing a claim founded on the fraudulent act on the part of the defendants. It is alleged that Mr Rajneel on the instructions of Mr Ram swore an affidavit and filed it in a winding-up proceeding to have the plaintiff's company wound up even before its incorporation. It is worthy of note that the first defendant and his solicitor, the second defendant are facing the same allegation in the same matter.
- [12] Here, the conflict of interest arises between the parties in the same proceedings and not between the solicitor and his former client. The issue raised here relates to conflict of interest in the circumstances where a solicitor as one of the defendants representing and defending another defendant in the same proceedings in which both the solicitor and his or her client are facing the same allegation.
- [13] Mr Ram contended that there is no conflict of interest as the defence taken by the solicitor and his client is the same and the solicitor will only be required to give formal evidence. He also contended that no particulars of fraud have been given and on that basis, the first defendant has filed a striking-out application which is pending.
- [14] As regards the striking-out application filed by the defendant, I should say Mr Ram did not file any striking out application. He simply relies on the application filed by the first defendant, his client. Mr Ram does not want to file an affidavit for one reason or the other. Instead, through his solicitors (Messrs Krishna & Co) Mr Ram told the Court that he is not objecting to the first defendant's application.
- [15] The Courts dealing with the problem of conflict of interest between clients are seeking to balance two conflicting public interests: 1. the freedom of the solicitor to obtain instructions from any member of the public and 2. All the members of the public to instruct the solicitor of their choice. These rights are subject to the limitation imposed by the law or rules or case authorities.

- [16] The RPC, R 3.4, prohibits a legal practitioner to continue to act for a client in a matter in which the practitioner is likely to be a witness unless the practitioner's evidence relates to an uncontested matter or formal matters or the nature and value of legal services rendered;
- [17] Mr Ram submits that the lawyer should be seen to give evidence which is impartial is not applicable in this case given the fact the lawyer will be able to give evidence of formal matters if he is required to give evidence.
- [18] In *Tsutomo Yamaji and Caysand*; *Caysand* [1992] FCA 253; (1993) 115 ALR 235 (1993) 42 FCR 431 (31 May 1993, The Federal Court of Australia (Drummond J) said (at para 7 and 8):

"7. I would, for myself, respectfully adopt those comments as words that need to be heeded by legal practitioners. But I find nothing in this decision in Chapman v Rogers to suggest that there is jurisdiction to restrain a solicitor for a party from continuing to act for that party on the basis that it is apparent that he is going to be required as a witness for one side or the other on contentious issues, even though, by so acting, the solicitor may fall short of meeting a proper standard of professional conduct.

8. I note that the Supreme Court has disciplinary jurisdiction over practitioners, a jurisdiction over federal practitioners that is possessed, so far as I understand the position, only by the High Court. It is unnecessary for me to examine whether a court with appropriate disciplinary jurisdiction over practitioners may for that reason be in a position to issue a restraint in circumstances like the present against a solicitor on the record for one of the parties. Senior counsel for the applicants disclaimed any reliance on such a basis for the exercise of the jurisdiction which he seeks to invoke. He puts his claim in this way: a court in proper circumstances would have power to enjoin the solicitor on the record for one party continuing to act in the action where it is likely that he will be a witness for one side or the other on contentious matters in the litigation. He went on to submit that the power to issue such a restraint against the solicitor in those circumstances arises out of the authority of the court to prevent the undesirable situation arising of a solicitor being in a position of apparent conflict between his duty to the court to give impartial evidence and his duty to advance the interest of his client and that there is ground for apprehension that Mr Moro, who will be an important witness, will not be or at least will not appear to be impartial. But bias does not make any witness incompetent to give evidence."

- [19] The Fiji Court of Appeal in *Handyhard Marketing (Fiji) Ltd and Anor v Sushil Chand* (Civil Appeal No. ABU 71 OF 2014 (28 May 2015)) in its deliberations on the test commonly employed to ascertain a conflict of interest observed (at para 48 and 52)

"[48] Another test that could be extracted from past precedents is the possibility of a lawyer for a party being called as a material witness in ongoing proceedings. (see: Clay v Karlson [1996] 17 WAR 493.

[52] Yet another test is where, because of allegations made in the pleadings or even outside them, a lawyer (whether solicitor or counsel) would be required to defend his professional conduct."

- [20] None of the cases cited by Mr Ram supports his contention that if a solicitor is called to give evidence in a matter he will be able to give evidence relating to formal matters. In all of the cases he cited, the solicitors were not parties to the proceedings, whereas Mr Ram is one of the defendants in the current proceedings and he is facing the allegation of professional misconduct in accepting instructions from a non-existing party namely a company before its incorporation.
- [21] The solicitor will have to consider carefully whether he or she is able to act for one of the parties in view of the fact that he is also one of the defendants in the same matter.
- [22] In *Matthews v Munster* (1987) 20 QBD 141 Lord Esher MR Said, at p.143:

"When the client has requested counsel to act as his advocate... he thereby represents to the other side that counsel is to act for him in the usual course, and he must be bound by that representation so long as it continues. ... The request does not mean that counsel is to act in any other character than that of advocate or to do any other act than such an advocate usually does. The duty of counsel is to advise his client out of court and to act for him in court, and until his authority is withdrawn he has, with regards to all matters that properly relates to the conduct of the case, unlimited power to do that which is best for his client." (Emphasis supplied)

- [23] The House of Lords in *Hilton v Barker Booth and Eastwood* (a firm) [2005] UKHL 8 cited a passage in the judgments of Lord Cozens-Hardy MR, Warrington LJ and

Scrutton LJ [1917] 2 Ch 71, 81, 85, 91 are set out in Sir Andrew Morritt V-C's judgment (paras 12, 13 and 14 respectively) where Lord Cozens-Hardy MR said, at p 81:

"A man may have a duty on one side and an interest on another. A solicitor who puts himself in that position takes upon himself a grievous responsibility. A solicitor may have a duty on one side and a duty on the other, namely, a duty to his client as solicitor on the one side and a duty to his beneficiaries on the other; but if he chooses to put himself in that position it does not lie in his mouth to say to the client 'I have not discharged that which the law says is my duty towards you, my client, because I owe a duty to the beneficiaries on the other side'. The answer is that if a solicitor involves himself in that dilemma it is his own fault. He ought before putting himself in that position to inform the client of his conflicting duties, and either obtain from that client an agreement that he should not perform his full duties of disclosure or say – which would be much better – 'I cannot accept this business.' I think it would be the worst thing to say that a solicitor can escape from the obligations, imposed upon him as solicitor, of disclosure if he can prove that it is not a case of duty on one side and of interest on the other, but a case of duty on both sides and therefore impossible to perform." (Emphasis supplied)

- [24] Every lawyer is deemed to be an officer of the High Court (see section 51 of the Legal Practitioners Act (LEP). Solicitors and counsel must be regarded as owing a duty to assist the Court in achieving the overriding objective.
- [25] The Chief Registrar has a right and a duty to supervise the conduct of solicitors, and may commence disciplinary proceedings against a legal practitioner or a law firm or any employee or agent of a legal practitioner or law firm by making an application to the Independent Legal Services Commission (*'the Commission'*) in respect of allegations of professional misconduct or unsatisfactory misconduct on the part of the legal practitioner or a law firm and its partners or any employees or agent of a legal practitioner or law firm (see section 111, LEP). The Commission has the power to impose penalties where the conduct of a solicitor or his law firm or his employee or his agent of a solicitor or his law firm is of such nature as to tend to professional misconduct (see section 121, LEP).

[26] The High Court exercises inherent supervisory jurisdiction over solicitors. The Commission's disciplinary jurisdiction over solicitors is without prejudice to the jurisdiction exercisable by the court or Judge thereof, over solicitors. Where a party establishes conflict of interest, the most the court can do is to grant an injunction forbidding the solicitor from continuing to act for the other party and, if necessary, a stay unless and until new solicitors are instructed.

[27] A solicitor who discovers a conflict of interest in representing a client must inform the client of his or her inability to act, and that the client should seek legal advice from other solicitors, starting afresh and not relying on any advice already given by the solicitor (see *Hilton* above).

Conclusion

[28] Mr Ram has to play the dual role in this matter. As a defendant in the same matter, he has to defend himself and his law firm. As a solicitor for the first defendant, he has the duty to look after his client's interest in the same proceedings. The solicitor and his client are facing the allegations of fraudulent act and collusion against the plaintiff in the same proceedings. In essence, the allegations tend to be professional misconduct on the part of the solicitor (Mr Ram) and his employee and client in this matter (Rajneel). As a party to the proceeding, there is a strong likelihood that Mr Ram would be called as a witness to give evidence in this contested matter. As a party to the proceedings, his evidence would not be on formal matters because he has to defend the allegations levelled against him and his law firm. I should say that Mr Ram's evidence is going to be the substantial one in this contested matter. A solicitor must not continue to act for a client in a matter in which the solicitor is likely to be a witness. The plaintiff in the course of the argument confirmed that Mr Ram will be called to give evidence and the plaintiff will cross-examine on the allegations. I would decisively reject Mr Ram's argument that if he is called to give evidence, he will only be able to give evidence on formal matters.

[29] As Lord Cozens-Hardy MR (above) said: *A man may have a duty on one side and an interest on another. A solicitor who puts himself in that position takes upon himself a grievous responsibility. A solicitor may have a duty on one side and a duty on the other, namely, a duty to his client as solicitor on the one side and a duty to his beneficiaries on*

the other. Mr Ram has a duty to defend himself and his law firm on one side and another duty to his client, the first defendant as the solicitor.

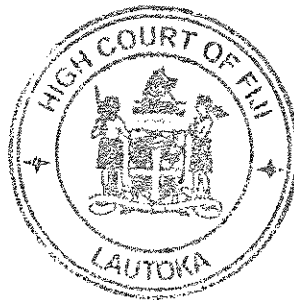
- [30] In the Matthew's case (above), it was held that: '... the request (to act for a party) does not mean that counsel is to act in any other character than that of advocate or to do any other act than such an advocate usually does. ...' Mr Ram is a defendant in the matter. He has to act for himself as a defendant. If he is appointed to act for another party in the same matter, he will not be able to act in that character only. A solicitor who is the defendant in the same proceedings should not act for another defendant as there will be the conflict of interest between the parties. Moreover, as the defendant, Mr Ram is likely to be called to give evidence on the contested issues. A solicitor must not continue to act for a client in a matter in which the solicitor is likely to be a witness to give evidence relating to contested matter (see the Rules, 3.4).
- [31] The Fiji Court of Appeal in *Handyhard* (above) said that yet another test (test to determine conflict of interest) is where, because of allegations made in the pleadings or even outside them, a lawyer (whether solicitor or counsel) would be required to defend his professional conduct.
- [32] In this matter, allegations are made in the statement of claim concerning Mr Ram's professional conduct. In the circumstances, he would be required to defend his professional conduct and, he has to give evidence in that process.
- [33] I am of the opinion that there would be a conflict of interest in circumstances where a solicitor who is also defendant in the matter acting for another defendant who is an employee of the solicitor in the same proceedings where the solicitor and the client faced with the same allegations. It follows that Mr Ram, the second defendant should not continue to act for Mr Rajneel, the first defendant as there is a conflict of interest. The fact that an application for striking-out the claim filed by the first defendant is pending and that the solicitor and his client has taken the same defence to attack the claim would not lead to a different conclusion. I would accordingly, exercising the inherent supervisory jurisdiction over solicitors, restrain Mr Ram from continuing to act for the first defendant in this matter. In all the circumstances, I would make no order as to costs.

The outcome

1. Mr Ram, the second defendant shall be restrained from continuing to act for Mr Rajneel, the first defendant in this matter.
2. There will be no order as to costs.

H/H/2018/28
..... 28/8/18

M. H. Mohamed Ajmeer
JUDGE



At Lautoka

28 August 2018

Solicitors:

For the plaintiff: Messrs Rayawa Law

For the first defendant: Messrs Samuel K Ram, Barrister & Solicitor

For the second defendant: Messrs Krishna & Company, Barristers & Solicitors

For the third-ninth defendants: Messrs Fa & Company, Barristers & Solicitors