HIGH COURT OF SOLOMON ISLANDS

SOMU JOUROMAJA, LOIUS AIVEKERA, LUKE ANEKERA -V- KEVIN ZORO, SILAS VIZIPITU, JACOB HATAKERA, VIVIAN MAEKE (Trading as Miga Integrated Development Company), **ORION LIMITED AND ATTORNEY GENERAL** (Representing Commissioner of Forest).

Civil Case No. 264 of 2002

Honiara: Brown PJ

Date of Hearing: 7th March 2003
Date of Judgment: 21st March 2003

Public Solicitor for Plaintiff
Pacific Lawyers for 1st Defendant
PT Legal Services for 2nd Defendant
Attorney General for 3rd Defendant

Practice and Procedure — *costs – discretionary nature – costs during suit – summons for leave to withdraw by advocate – delay by fresh advocate for party changing lawyers to file "notice of change of advocate" – reason for delay.*

The plaintiffs, by letter, discontinued the services of a firm of private lawyers and the Public Solicitor subsequently appeared. In the absence of a "notice of change of advocate", the original lawyer representing the plaintiffs was obliged by summons, to seek the Courts leave to withdraw, which was granted. The only matter for consideration was whether the original lawyer was entitled to a costs order through the actions of the Public Solicitor in not filing the notice of change for the reasons stated. High Court Rules 0.7 r 2(1)

Held: 1. Delay was caused by the Public Solicitor's misapprehension of his duty to the Court and his client.

2. The power of the Court to award costs in proceedings during suit is discretionary but should be exercised on proper principles.

3. Because of the actions of both lawyers, in giving rise to the imbroglio, the Court would not exercise its discretion to award costs.

Cases Cited: *Donald Campbell Co. Ltd. –v- Pollack* (1927) A.C. 732
Summons for leave to withdraw as Advocate for party.

These plaintiffs by summons returnable on the 27th January, sought interlocutory orders in this logging matter. On the 27th, the Court adjourned the proceedings for there had been a succession of changes of advocates for the defendants, and these changes needed to be regularized and counsel given time to take proper instructions. Unbeknown to Mrs. Tongarutu, then acting for the plaintiffs, her instructions also were soon to be withdrawn.

It is clear that the plaintiffs sought to instruct the Public Solicitor (West). Earlier discussions with the plaintiffs resulted in Ms. Garo being shown a letter by the plaintiffs sent to ANT Legal Services advising those solicitors that they were no longer instructed. Ms. Garo was shown a copy of this letter on the 7th January 2003. If Ms. Garo was satisfied that she was then instructed to represent these plaintiffs, she should have filed "a notice of change of advocate" in accordance with the provisions of 07r.2(1).

In fact Mrs. Tongarutu, of ANT Legal Services received the letter from the plaintiffs (dated 1st December 2002) on the 1st February. She annexed it to her affidavit in support of her application to withdraw. The letter clearly withdraws the plaintiff's instructions to act.

"We hereby forward this letter notifying your good office of our tribes intention to withdraw from seeking further legal advice from ANT Legal Services on the pending civil case no. 264/02". They went on to say why and that they had identified a lawyer nearby to continue with their case.

The letter went on to say, *"therefore we appreciate if you hand over all files pertaining to this case to the Public Solicitor (Gizo) as soon as possible".*

Mrs. Tongarutu, of ANT Legal Services, received this letter on the 1st February, acknowledged receipt of the plaintiff's letter, and advised them of a motion listed before the Court for Wednesday 5th February 2003. She also copied the letter to the other parties to the action and the Registrar, advising that ANT Legal Services no longer represents the plaintiff parties.

On the 5th February there was no appearance by the plaintiff. The hearing date was vacated. The matter was relisted for the 19th February.

On the 19th February, there was still no appearance by fresh representatives of the plaintiff and Mrs. Tongarutu was told that she should seek leave of the Court to withdraw. On the 7th March, ANT Legal Services were permitted to withdraw on the undertaking of Ms. McWilliams, for the Public Solicitor, to file a notice of change of advocate. Mrs. Tongarutu's claim for the costs of her motion was adjourned, to allow the lawyers interested to file short submissions on the costs question. Ms. McWilliams, for the Public Solicitor filed a submission and Mrs. Tongarutu has also. The summons for interlocutory orders has been stood over.

The Court's powers to award costs are undisputed and wide. The power, however, is discretionary. The Court, in its discretion, has power to determine by whom and to what extent, costs are to be paid. Normally costs are awarded at the conclusion of proceedings and usually "follow the event" eg. Costs are awarded to a successful party.

Ms. McWilliams referred me to 0.65 rr 3, 8 which deal with circumstances different to those faced here, for the motion returnable on the 5th February was an interlocutory application by the plaintiffs, which by nature, was discretionary and is not the trial of the cause or matter, spoken of in 0.65 r.3. It is necessary to clearly distinguish between the general rule as to costs on the completion of an action, and an order to pay the costs of another advocate in these circumstances. The principles are discussed in Donald Campbell Co. Ltd. -v- Pollack (1927) A.C.732. The 0.65 r.8 speaks of costs improperly or without reasonable cause, incurred and the rule is not relevant to the question before me.

Who should pay the costs of Mrs. Tongarutu's summons to withdraw? Ms. McWilliams arguments, that the Court cannot make a costs order, *"because the matter is not one over which the Court has jurisdiction"* reflects at best, inexperience. The assertion is not the law, and wrong.

Mrs. Tongarutu pointed to her letter of 1st February 2003 as evidence of her good faith, as it were, in notifying all parties that she no longer represents the plaintiff for she had been instructed to discontinue acting. Her letter also reminded the plaintiffs of the hearing of the motion for 5th February. On the 5th February, however, she failed to appear despite there being no notice of change of advocate. Had she appeared on the 5th February all she could have done was to explain her instructions were withdrawn and seek leave to withdraw there and then (in the face of the letter of discontinuance). The Court would have vacated the hearing date to a fresh date to be fixed, for the Court cannot interfere with the solicitor/client relationship, least of all, call upon an advocate to act in express contradiction of the wishes of the plaintiff.

The Registrar, in those circumstances would normally advise the plaintiffs directly, of the fact that the matter had been stood over to a fresh date, the fact of Mrs. Tongarutu's withdrawal, and remind the plaintiffs to appear for risk of having their summons struck out, or have fresh representation arranged for the next occasion.

The reason advanced, (by Ms. McWilliams letter to the Registrar) for Ms. Garo's earlier failure to file a notice of change of advocate was that she *"has only received instructions very recently had not received the file from ANT Legal Services and so has not had an opportunity to peruse the documents in this matter. In addition, Ms. Garo is touring with the magistrate in the Shortland Islands until 19th February 2003".*

That information was in the Public Solicitor's letter of the 12th February 2003. When Ms. Garo received instructions to act has never been made clear. She was shown a copy of her Principal's letter to Mrs. Tongarutu on the 7th January so it may be presumed she knew then but what should be made clear is that receipt of another lawyer's file is not synonymous with instructions to act. The original lawyer's file is just that, the file of the lawyer, but through professional courtesy, it is often made available to lawyers subsequently briefed. The material in the file of particular relevance is of course, the summons and all other pleadings sealed by the Court, material which is readily available, upon the filing of a notice of change of advocate, at the request of the new advocate, from the Court.

Fees may be involved, but administrative considerations do not affect the advocate's responsibility to the Court and to the client, to file the notice of change of advocate immediately the new advocate has clear instructions to act. Full instructions may follow once the new lawyer either has the earlier lawyers file or has the Court documents sufficient for this purpose, to take those full instructions on the matters then current in the Court.

The state of affairs of the Public Solicitor's office coupled with the fact that Ms. McWilliams in Honiara has been acting as agent, as it were, for Ms. Garo in Gizo, has given rise to this imbroglio. Ms. McWilliams's assertion that Ms. Garo only received instructions very recently does not help the Court. It is clear Ms. Garo knew on the 7th January, certainly not "very recently". In either event, the lawyers duty to the Court, not to mislead the Court by omission, must be remembered here, for the letter of the plaintiffs, withdrawing their instructions from ANT Legal Services, was dated 1st December 2002 and copied to the Public Solicitor, Gizo. There is a presumption, then that the Public Solicitor, Gizo had knowledge of the plaintiff's intentions before the 1st December, (for why else would the plaintiffs presume to mention another lawyer at Gizo unless that other lawyer had indicated her willingness to take over the case) so that Ms. McWilliams assertion that Ms Garo had received instructions recently to the 12th February 2003 does beg the question somewhat.

Nevertheless, I am satisfied Ms. Garo relied on the absence of the file from Mrs. Tongarutu as justification for her failure to give notice of change of advocate, a course of action which, as I say, may reflect inexperience, but does not reflect the client's right to representation once instructions are accepted. Clearly the acceptance of instructions must precede the request for the file.

It is proper for a lawyer to retain his file in circumstances when a request has been made by a subsequently instructed advocate, where a lien is claimed for outstanding costs. Now this issue has not been raised here, but the fact of the apparent refusal by Mrs. Tongarutu to hand her file over to Ms. Garo is not justification for the absence of a notice of change of advocate.

Proper instructions can be obtained by the new advocate once he has put together the summons and pleadings. Any application for an adjournment of a summons, for instance, because the new advocate has had insufficient time to take proper instructions, would clearly put the plaintiffs at the risk of a costs order, and rightly so, for the other parties to the proceedings should not have to pay for the plaintiffs convenience.

The summons may quite properly be adjourned to enable the new advocate time to understand the issues and prepare the plaintiff's case but the costs of the day set down for hearing is wasted by the other parties, and should be borne by the party whose convenience is served.

The first question to be asked is whether Mrs. Tongarutu's application to withdraw was necessary.

Since receiving the letter withdrawing their instructions, Mrs. Tongarutu by the rules was still obliged to appear on the 5th February. She failed to do so, relying on the Public Solicitor to arrange representation, an expectation to which she was entitled, having regard to the tenor of the plaintiff's letter of termination and the terms of her letter to the plaintiff dated 1st February, reminding Mr. Somu of the hearing on the 5th February. The reliance was misplaced but her duty to the Court to appear on the 5th February, to explain her absence of instructions, and to seek further adjournment, remained. On the 5th February, the Court, again adjourned the proceedings, and stated that the change of advocates should be formally done.

In the absence, then of notice of change Mrs. Tongarutu filed her application to withdraw, which was set down for hearing on the same day as the adjourned summons for interlocutory relief. This summons had been before the Court on the 27th January, 5th February and 19th February, and on 19th February the proceedings were adjourned yet again in the absence of lawyers for the plaintiff. On the 7th March Ms. McWilliams appeared.

There can be no conditional appearance for the plaintiff; and the proper officer is the Public Solicitor (S.92 of the Constitution). There can be no quibbling about who is appearing, it is the Public Solicitor and if counsel has no proper instructions, then of course the Court will consider an adjournment. But there should be care to appreciate the fact that the Public Solicitor appears, and the fact that a particular officer has carriage of the matter is a separate issue.

The statement in Ms. McWilliam's letter to the "Office of the Registrar" that "I write on behalf of Ms. Emma Garo (Public Solicitor, West) who is acting for the plaintiffs in this matter" reflects, I believe the mistaken impression in the Public Solicitor's office that individual officers act. That is not so, the Constitution makes that plain, but individuals in that office will have the carriage of the matter. To believe otherwise ignores the nature of the "public office" and lays open the individual to the risk of acting outside the umbrella of the public office. Ms Garo does not act for the plaintiffs, the Public Solicitor, named in the notice, acts.

On the 14th March, a faxed copy of the notice of change of advocate dated by Ms. Garo the 5th March 2003 was filed with the Court. Ms. McWilliam's appearance, then reflected Ms. Garo's notice but does not avoid, in my view for the reasons of delay, the necessity by Mrs. Tongarutu, to file the application to withdraw.

The application was brought by Mrs. Tongarutu, through no fault of her own rather because of the delay of the Public Solicitor. That delay arose out of the Public Solicitors misapprehension of his duty to the Court pursuant to 0.7 r 2(1) of the High Court Rules, and to his client. She would normally be entitled to her costs of her application and those costs should be paid by the Public Solicitor. In the light of what I have said about the imbroglio caused by the inexperience of the officers of the Public Solicitor, it seems unreasonable for the Public Solicitor to attempt to recover these costs from the client.

But Mrs. Tongarutu failed to appear on the 5th February when she would graciously have sought leave to withdraw in the face of the plaintiff's letter. In all the circumstances, then I decline to exercise my discretion and make no order to costs.

I consequently do not have to consider whether, as a matter of public policy, the Court should see the Public Solicitor differently from other advocates appearing, when called upon to exercise is discretion as to costs. That argument will have to wait.

J R BROWN
PUISNE JUDGE