**IN THE SUPREME COURT OF**
**THE REPUBLIC OF VANUATU**
*(Civil Jurisdiction)*

**Civil**
**Case No. 23/198 SC/CIVL**

**BETWEEN: E.T.P LIMITED**
First Claimant

**AND: SANDY ROSE CLOCHARD & PHILIPPE CLOCHARD**
Second Claimant

**AND: ALEX PALAVI**
Defendant

**AND: NATIONAL BANK OF VANUATU**
Interested Party

*Before:* *Justice M A MacKenzie*
*Counsel:* *Mr. A. Bal for the First and Second Claimant*
*Mr. T. J. Botleng for the Defendant*
*Mr. M Hurley for the Interested Party*

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## DECISION

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### The application

1. Mr Palavi asks the Court to order that the Claimants' lawyer Mr Bal recuse himself on the basis of a potential conflict of interest, as Mr Bal previously acted on behalf of Mr Palavi.

2. In his sworn statement filed on 26 February 2025, Mr Palavi said that in 2018, he and Didier Espinasse (as Directors and Shareholders of ETP Limited) agreed to retain the services of Mr Bal to act as the company's lawyer.

3. Mr Palavi contends that Mr Bal has knowledge of a red folder, located at ETP Limited's office. He says that the red folder contained all ETP Limited's files and all documents relating to the written agreements between the Directors and Shareholders of ETP Limited. The agreements were signed and executed by the Directors and Shareholders of ETP Limited. Mr Palavi says that he instructed his lawyer to request Mr Bal to hand over the red file which contained all important documents relating to the acquisition of ETP Limited's shares by the Shareholders. However, Mr Bal did not return the red folder to him.

4. Further, Mr Palavi asserts that Mr Bal continues to retain files relating to civil proceedings initiated by ETP Limited.

5. Finally, Mr Palavi notes that on 28 September 2022, Mr and Mrs Clochard wrote a letter to him terminating him as Director and Shareholder of ETP Limited without any board resolution. Inquiries showed that his name was removed as Director and Shareholder of ETP Limited.

6. All of this is "*very prejudicial*" to Mr Palavi.

7. Mr Bal resists the application. He submits that there are insufficient grounds for Mr Bal to be removed as counsel for ETP Limited. He contends that:

   a. He commenced acting as lawyer for ETP Limited while Mr Palavi was a Director of ETP Limited.

   b. He never received any instructions on behalf of the company from Mr Palavi.

   c. He did not give Mr Palavi ETP Limited's files because he had been removed as a Director.

   d. He does not have any knowledge of the red folder, apparently located at ETP Limited's office.

8. Counsel agreed that the Court determine this issue on the papers, without the need for a hearing.

**Relevant background**

8. Mr Palavi, according to his evidence, was appointed as a director and shareholder of ETP Limited on 26 January 2016. He refers to various company extracts, but in his various sworn statements gives no explanation as to the circumstances of how he became a director and shareholder or what his role in ETP Limited was.

9. On 18 January 2021 Sandy and Phillipe Clochard were appointed as the directors of ETP Limited. From then on, they are the only directors of ETP Limited. Mrs Clochard is the only shareholder currently, holding 1000 shares. The circumstances of the Clochards being appointed directors and the transfer of the shares to Mrs Clochard are not clear. The circumstances are not explained in the evidence. The one glimmer is a document annexed to Mrs Clochard's sworn statement filed on 4 July 2024 as SRC 5. The document appears to be a record of a meeting on 18 January 2021, and refers to an agreement of 18 December 2020 between Mrs Clochard, one of the former directors and Mr Palavi. That agreement is not before the Court.

10. Mr Palavi's role in ETP Limited was terminated by ETP Limited via a company resolution dated 27 September 2022. The written Minutes of the meeting are annexed to Mrs Clochard's sworn statement of 4 July 2024 as SRC 4. The Minutes record that Mr Palavi refused to follow Mrs Clochard's instructions and performed work without consulting or obtaining Mrs Clochard's approval. Therefore, he breached the contractual arrangement and is "*automatically terminated from his employment.*"

11. Mrs Clochard believed that Mr Palavi was undertaking contracts in the name of ETP Limited, using its machinery and not accounting for the contract funds received. Proceedings followed.

12. The claim is that Mr Palavi obtained contracts in the name of ETP Limited, retained the proceeds of such contracts, and used machinery belonging to ETP Limited. The relief sought is for a sum of money for tractor rental, general damages and special damages, on the basis that ETP Ltd suffered substantial loss and damage.

13. In the defence filed, Mr Palavi denies that ETP Limited is entitled to the relief sought and filed a counterclaim. In the counterclaim, Mr Palavi claims under the Employment Act for various employee entitlements. He also seeks payment for his shares in ETP Limited, damages for loss of revenue from ETP Limited and a number of declarations which would see him restored as a director and shareholder of ETP Limited.

## Applicable legal principles

14. *Etmat Bay Estate Ltd v Kalsal* [2011] VUCA 4 considered the jurisdiction of the Court to deal with orders preventing a lawyer from acting. The Court said:

> *10. "Section 49(1) of the Constitution gives the Supreme Court unlimited jurisdiction to hear and determine any civil or criminal proceedings, and such other jurisdiction and powers as may be conferred on it by the Constitution or by law. Vanuatu Courts are able to draw freely on the common law, (Swanson v. the Public Prosecutor, Criminal Appeal Case No.6 of 1997 p.20). We have no doubt the Supreme Court has the unfettered ability shared by other Common Law Courts to control its own processes except as limited by specific legislation. It is within the inherent jurisdiction of superior Courts to deny the right of audience to counsel when the interests of parties so require it; Everingham v. Ontario [1993] 88 DLR (4th) 755, 761, Black v. Taylor [1993] 3 NZLR 403, 418. This can be seen as part of the jurisdiction to ensure that procedures are not abused. An associated concern that lies behind the jurisdiction to deny counsel audience is that justice should not only be done, but should manifestly and undoubtedly be seen to be done; R v. Sussex Justices, ex parte McCarthy [1923] EWHC KB 1; [1924] KB 256, 259, Black v. Taylor, p.408.*
>
> *11. Before it exercises this jurisdiction, a Court must give due weight to the public interest that a litigant should not be deprived of his or her counsel without good cause. The right to the unfettered choice of counsel is important. The*

*Court must be vigilant to ensure that the jurisdiction is not exploited by parties who, for tactical reasons, wish to expose opposing parties to the discouraging and expensive task of being forced to find new counsel. Any consideration of an application to discharge counsel must recognise the realities of legal practice. The Courts should not be too ready to prevent a party from being represented by counsel of its choice".*

*12. A number of cases have emphasized the importance of maintaining the appearance that parties are being subjected to a fair process. In D & J Construction Pty Ltd v. Head [1987] 9 NSWLR 118, 123, Bryson J observed:*

> *"Cautious conduct by the Court is appropriate because the spectacle or the appearance that a lawyer can readily change sides is very subversive of the appearance of justice being done. The appearance which matters is the appearance presented to a reasonable observer who knows and is prepared to understand the facts."*

*13. A similar point was made in the criminal case Mallessons Stephen Jacques v. KPMG Peat Marwick [1990] 4 WAR 357. It was observed that there would be an incalculable and prejudicial effect on the state of mind and therefore the demeanour of the defendant in situations where the other legal advisors had previously advised him. In Australian Commercial Research and Development Ltd, McKenzie J accepted that the impression that a lawyer can change sides during a case is very subversive to the appearance of justice hearing done. There have been similar references to the need to maintain an appearance of even handed justice in MacDonald Estate v. Martin [1991] 77 DLR (412) 249, 267, Black v. Taylor p.411 and Mintel International Group Ltd v. Mintel (Australia) Pty Ltd (2001) 81 ALR 78, [36] – [42].*

15. *Etmat* was then also applied in Sugden v Smith [2011] VUCA 22 at [18].

16. In Vanuatu, the Legal Practitioners Act – Rules of Etiquette and Conduct of Legal Practitioners Order 2011 regulates the conduct of lawyers. Part 5 of these rules are identical to chapter 5 of the NZ Lawyers Conduct and Client Care Rules (about independence and avoiding conflict of interest). These rules were briefly mentioned in *Sugden*.

17. Because the rules of etiquette in Vanuatu are identical to the New Zealand rules, there is utility in considering the approach taken in New Zealand.

18. The principles regarding debarring lawyers from acting are set out in *Orlov v National Standards Committee No 1* [2014] 3 NZLR 302:

> *[17] The relevant principles have been summarised recently by this Court in Accent Management Ltd v Commissioner of Inland Revenue. O'Regan P delivering the judgment of the Court stated:*

*[32] The Court has jurisdiction to debar counsel or solicitors from acting where that is necessary in order for justice to be done or to be seen to be done. Removal will usually be ordered where counsel will not be able to comply with his or her duties to the Court: where there is a conflict of interest, or where there is a real risk that a client will not be represented with objectivity. The threshold for removal is a high one, requiring something extraordinary. The Court should guard against allowing removal applications to be used as a tactical weapon to disadvantage the opposing party.*

*[18] The Court referred in this context to Black v Taylor and other authorities. In Black v Taylor, Richardson J noted the importance of the right to choice of one's counsel but made the point that this is not an absolute value.*

19. The more recent case of *Kennedy v Body Corporate 82981* [2022] NZHC 1927 has also considered this issue and referred to some of the legal principles:

*[41] Both counsel referred to my decision in Fruit Shippers Ltd v Petrie. In that decision I referred to Black v Taylor, where Cooke P put the test as follows:*

*... The jurisdiction extends to the propriety of a representative appearing in a particular case: it is not then a question of the right of practice generally, which is governed in New Zealand by statute, but a question concerning what is needed or may be permitted to ensure in a particular case both justice and the appearance of justice. Obviously it is a jurisdiction to be exercised with circumspection.*

*[42] Richardson J said:*

*Another aspect of the inherent jurisdiction is the control of a particular proceeding in the Court. There the Court's concern is with the administration of justice in a particular case and in the generality of cases and with the associated basic need to preserve confidence in the judicial system.*

*[43] In a more recent decision, Deliu v Auckland Standards Committee 1, Woolford J said:*

- *[22]I am of the view that the public interest in the administration of justice requires an unqualified perception of its fairness in the eyes of the general public. As noted in the Canadian case of Everingham v Ontario the issue is not whether any ethical rules has been breached, nor is the issue solely whether one of the parties has lost confidence in the process.5 The issue is whether a fair-minded reasonably informed member of the public would conclude that the proper administration of justice requires the removal of the solicitor.*

*[44] In Mitchell v Mitchell, Powell J said:*

> *[29] The legal principles are well established having been reviewed and applied in a number of recent cases. The starting point remains Black v Taylor, where the Court of Appeal confirmed that this Court has an inherent jurisdiction to disqualify a solicitor from acting against a former client where counsel's representation of one party against the other may impair the integrity of the judicial process. The cases are clear that the integrity of the justice system will be impaired where counsel has a conflict of interest or there is an appearance of a conflict of interest such that justice will not be seen to be done. In a number of cases the test is couched in terms as to whether a fair minded, reasonably informed member of the public would conclude the proper administration of justice requires that a legal practitioner should be prevented from acting.*

...

*[47] However, I concluded that, while there was a need to be circumspect, I did not consider something extraordinary was required where removal was not sought for a lawyer's actual misconduct. In fairness to Mr Kalderimis, he did not suggest something extraordinary was required but nonetheless submitted the threshold for removal is high and requires "a real risk that a client will not be represented with objectivity", referring to Accent Management Ltd v Cmr of Inland Revenue.*

*[48] Mr Bigio referred to my conclusion in Fruit Shippers Ltd that there was a more than negligible risk that advice given by the solicitors sought to be restrained from acting would be put in issue. I said: "[t]he reference to a 'more than negligible risk' comes from Torchlight Fund No 1 LP (in rec) v NZ Credit Fund (GP) 1 Ltd." In the next paragraph of my decision I referred to Li v Liu, where the Court of Appeal said:*

> *... A reasonable likelihood that [the solicitor] will be called as a witness will be sufficient to make the possibility more than mere speculation and the threat to integrity real.*

*[49] I note Venning J in 100 Investments Ltd v Walker, in an application to recuse solicitors, referred to my reference to a "more than negligible risk" in Fruit Shippers and said:*

> *... For my part, I am not sure that the test should be at that relatively low level but even if the threshold required a reasonable likelihood of the advice being put in issue (similar to the established threshold for the giving of evidence), I consider it to be more than met in this case.*

*[50] In Guardian Retail Holdings Ltd v Buddle Findlay, Courtney J, dealing with a challenge to Buddle Findlay acting on the basis their advice would be in issue in the proceeding, concluded:*

> *... there is a risk that is more than negligible that Buddle Findlay will be unable to properly discharge its obligations ...*

> *[51] At the end of the day, I approach the question of threshold as I did in Fruit Shippers — with circumspection. A challenge to a firm acting based on speculation will not suffice. Whether the test is based on a reasonable likelihood, a real concern or a more than negligible risk, at the end of the day if the Court is not confident the solicitors continued involvement is consistent with the integrity of the judicial process then it should act.*

20. *In Swift v Gray* [2022] NZHC 1794 , the Court said at [44] :

> *"..... The Court has inherent powers to determine who appears before it. It may disqualify solicitors and counsel from acting where necessary for justice to be done or seen to be done, or where allowing them to act would undermine the integrity of the judicial process.[1] But the right of a litigant to his or her chosen representation is important, and not lightly to be disturbed.[2] The threshold for removal is high.[3] Of overriding importance is that solicitors and counsel maintain their professional independence.[4]"*

## Consideration

21. The Court has a discretion to disqualify counsel from acting for a party where necessary for justice to be done or seen to be done. The threshold for removal is high. As the Court of Appeal said in *Etmat,* a Court must give due weight to the public interest that a litigant should not be deprived of counsel without good cause, and that the Courts should not be too ready to prevent a party from being represented by counsel of its choice.

22. The application to disqualify Mr Bal from acting for ETP Limited is made on the basis of a potential conflict of interest. Mr Palavi's sworn statement does not overly assist in identifying what that potential conflict of interest is.

23. Mr Bal acts for ETP Limited. It is a general principle of law that a company is a person of its own.[5] In *James Hardie Industries PLC v White* [2018] NZCA 580, the New Zealand Court of Appeal held that:

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[1] *Black v Taylor [1993] 3 NZLR 403 (CA); Accent Management Ltd v Commissioner of Inland Revenue [2013] NZCA 155 at [32]; and Li v Liu [2018] NZCA 528 at [23].*

[2] *Russell McVeagh McKenzie Bartleet v Tower Corp [1998] 3 NZLR 641 (CA); and Solicitor-General v Alice [2007] 1 NZLR 655 (CA); and Li v Liu, above n 1, at [23].*

[3] *Accent Management Ltd v Commissioner of Inland Revenue, above n 38, at [16].*

[4] *Kooky Garments Ltd v Charlton [1994] 1 NZLR 587 (HC) at 590.*

[5] *Goiset v Blue Wave Limited [2001] VUSC 124 and Estate Stephen Quinto [2023] VUSC 216*

*"[28] The central principle of modern company law is that a company has its own legal personality. As the learned authors of Company Law in New Zealand explain, to say that a company has its own legal personality is to say two things:*

> *First, the law treats a company as a legal person, capable of enjoying most of the rights and bearing most of the duties that can be enjoyed or borne by a natural legal person. Secondly, this legal personality is the company's own, in that it is separate from the legal personalities of those persons who hold shares in the company. "*

24. The principle that a company is a person in its own right is reflected in s 8(2) of the Companies Act No. 25 of 2012, which says:

> *"A company incorporated under this Act is a legal entity in its own right separate from its shareholders, and continues in existence until it is dissolved"*

25. There is no suggestion that Mr Bal has previously acted for Mr Palavi in any capacity. The evidence is that he acted for the company. The mere fact that Mr Palavi was a director and shareholder of ETP Limited and then was removed does not give rise to a potential conflict of interest, given that ETP Limited is a legal entity in its own right. There is nothing in the evidence filed to date to suggest that Mr Bal, in his capacity as ETP Limited's lawyer, is privy to information about Mr Palavi which might be used to Mr Palavi's detriment.

26. That Mr Bal did not make Mr Palavi's files available is not a relevant factor. He was acting for ETP Limited and not Mr Palavi. They were not Mr Palavi's files, but rather ETP Limited's files. By November 2022, Mr Palavi was no longer a director or shareholder of ETP Limited (at least insofar as company records are concerned), and so had no right to the files.

27. The issue of the red folder does not in my view mean there is a potential conflict of interest. I can understand Mr Palavi wishes to have access to company records to support his counterclaim. However, the issue can be addressed by an application for discovery of the documents he seeks access to. ETP Limited has an obligation to disclose all documentation in its possession relevant to the claim and counterclaim. Further, it is mandatory for a company to keep the documents listed in s 113 of the Companies Act as its registered office.

28. Having regard to the matters set out above, I do not consider that there are grounds to disqualify Mr Bal from acting for ETP Limited, particularly as ETP Limited is a legal entity in its own right and Mr Bal has never acted for Mr Palavi. He acts for ETP Limited, a separate legal entity. I am mindful that justice must be seen to be done, but the threshold for disqualifying a lawyer from acting is high. There must be good cause for removal of a lawyer and none of the matters raised by Mr Palavi suggest a potential conflict of interest such that justice requires Mr Bal to be disqualified from acting for ETP Limited.

**Result**

29. Accordingly, the application to disqualify Mr Bal from acting as lawyer for ETP Limited is refused.

30. Costs in favour of the Claimant as either agreed or taxed.

**DATED at Port Vila this 4th day of June 2025**
**BY THE COURT**

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Justice M A MacKenzie