IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P. 235/96

BETWEEN: MORELLE VAUN AGNEW of 725 Maxville Drive, Hastings, New Zealand, Pensioner

Plaintiff

A N D: POLYNESIAN AIRLINES (HOLDINGS) LTD a duly incorporated company in Western Samoa having its registered office at Apia, Western Samoa, Airline

Defendant

Counsel: R Drake for plaintiff
T K Enari for defendant

Hearing: 13 February 1997

Judgment: 13 March 1997

JUDGMENT OF SAPOLU, CJ

Before the Court are two applications by the plaintiff who is a New Zealand resident. The first is an application for an injunction to restrain the present firm of barristers and solicitors acting for the defendant from continuing to act for the defendant in these proceedings. For convenience I will refer to that firm of barristers and solicitors as "KEB". The second application by the plaintiff is an application for extension of the limitation period to six years to file proceedings against the defendant.

Also before the Court is a motion by the defendant to strike out the statement of claim filed by the plaintiff. The defendant is the principal airline company in Western Samoa. The aforesaid applications and motion to strike out were heard together. The Court will deal first with the plaintiff's application for an injunction to restrain the firm KEB from further acting for the defendant in these proceedings as the outcome of that application will determine whether it is necessary to proceed further to deal with the plaintiff's second application and the defendant's motion to strike out the statement of claim in these proceedings.

In relation to the plaintiff's first application for an injunction to restrain KEB from further acting for the defendant, the essential facts may be briefly stated. The plaintiff was travelling in a defendant aircraft from Auckland, New Zealand, via Tonga to Western Samoa to catch a flight to Hawaii, United States. She says that at Tonga while the aircraft was positioning for take off a heavy bag fell on her from the overhead baggage compartment. As a result she suffered serious personal injuries. There followed correspondence between the plaintiff's solicitor in New Zealand and the defendant here in Western Samoa. As it appeared that the defendant was not admitting or denying liability, the plaintiff's solicitor wrote in July 1994 to the local firm of barristers and solicitors then known as "KVB" if they would be willing to accept instructions on behalf of the plaintiff and for an outline of their fees. Then on 5 September 1994, the plaintiff's solicitor wrote again to KVB saying that further to his letter of 9 August 1994 he was enclosing copies of all relevant documents in the plaintiff's file. Those documents contain confidential information and included copies of relevant evidence, client statements and

counsel's notes. On 19 September 1994 the plaintiff's solicitor again wrote to the defendant about the plaintiff's claim and copied that letter to KVB. Then on 16 January 1995 one of the three partners of KBV wrote to the plaintiff's solicitor in New Zealand giving an outline of his fees and accepted that KBV will act as local agent for the plaintiff's solicitor in respect of certain relevant matters. In the beginning of 1996 that partner left KVB.

Later in 1996, KVB became known as KEB when the present counsel who is acting for the defendant joined the partnership. Apparently the defendant became a client of KVB towards the end of 1995 while KVB was still acting as local agent for the plaintiff's solicitor in New Zealand. When KVB became known as KEB in 1996 after the change in the composition of the partnership, it is clear to me that both the present plaintiff and defendant were clients of the new firm of solicitors KEB. This new firm consists of two of the three partners that formerly made up KVB and a new partner who joined in 1996 and who is now acting as counsel for the defendant on instructions from KEB.

Counsel for the defendant informed the Court in these proceedings that after he joined KEB he used to go through the case files which had been handled by KVB. It appears that towards the end of 1996 he came across the file of the plaintiff which he returned to the plaintiff in New Zealand. Evidently the plaintiff has paid for the services of KVB now known as KEB.

The problem in this case arose when on 19 November 1996 the plaintiff filed her claim against the defendant and KEB filed a motion on behalf of the defendant on 27 November 1996 to strike out the plaintiff's claim. KEB is now the

solicitors on record for the defendant and one of its partners is acting as counsel for the defendant. The plaintiff is now represented by a different local firm of barristers and solicitors in these proceedings.

I should mention one other matter here. In Western Samoa we have a dual profession. A lawyer may therefore practise as both a barrister and solicitor. Most, if not all, of the Western Samoan lawyers hold certificates which permit them to practise as both barristers and solicitors. So KEB, a firm of barristers and solicitors, is acting in both professional capacities for the defendant in this case.

Even though the present application is to restrain KEB by means of an injunction from further acting for the defendant in these proceedings, in reality what is sought is not only an injunction to restrain KEB from further acting as solicitors for the defendant in these proceedings but also an injunction to restrain present counsel for the defendant from further acting as counsel for the defendant.

With those circumstances, I turn now to the relevant legal issues. In dealing with these issues, I do acknowledge the helpful submissions and citation of authorities presented by counsel for the plaintiff.

Court's jurisdiction:

It is now well established that the Court has jurisdiction to intervene and grant an injunction to restrain a barrister or solicitor from further acting for a client or party in a litigation, or to grant a declaration that a barrister or

solicitor should not further act in a litigation, or to order that the name of a barrister or a solicitor should be removed as counsel or solicitor on record. For cases on the Court's jurisdiction to intervene in respect of barristers : see *Everingham v Ontario (1992) 88 DLR (4th) 755; Black v Taylor [1993] 3 NZLR 403.* For cases on the Court's jurisdiction to intervene in respect of solicitors : see *Rakusen v Ellis Munday & Clarke [1912] 1 Ch 831; Mac Donald Estate v Martin [1990] 3 S.C.R. 1235; Supasave Retail Ltd v Coward Chance (a firm) [1991] 1 All E R 668; Re a firm of solicitors [1992] 1 All E R 668.*

I will refer now in some detail to the Court's jurisdiction to intervene in respect of barristers and solicitors engaged in litigation and to the difficult question of the test to be applied when invoking that jurisdiction.

Barristers:

It is now quite clear that the Court has inherent jurisdiction to supervise and control its own processes in order to preserve public confidence in the integrity of the judicial process and to uphold the right to a fair hearing. It is on that broad basis that the Court will intervene by granting an injunction to restrain a barrister from further acting as counsel in a litigation, or by granting a declaration that a barrister should refrain from further acting as counsel in litigation. On that same basis the Court may intervene where it appears that a barrister who is acting as counsel in a litigation is involved in a conflict of interest or apparent conflict of interest situation, or where there is a danger of misuse of confidential or relevant information gained by a barrister from a professional association with a former client particularly to

the prejudice of that client. However, the inherent jurisdiction must be exercised with circumspection.

In the case of ***Everingham v Ontario (1992) 88 DLR (4th) 755*** where a Crown solicitor met and reassured a mental patient the day before he was to cross-examine the patient on his affidavit, the Full Court of the Ontario Divisional Court at pp 761-762 of its judgment says :

> "It is within the inherent jurisdiction of a superior Court to deny the "right of audience to counsel when the interests of justice so require by "reason of conflict or otherwise. This power does not depend on the rules "of professional conduct made by the legal profession and is not limited "to cases where the rules are breached. The issue here is not whether or "not the rule was breached, or whether the solicitor worked for the "government. Nor is it solely whether the patient lost confidence in the "process. The issue is whether a fair minded reasonably informed member "of the public would conclude that the proper administration of justice "required the removal of the solicitor.
>
> "The public interest in the administration of justice requires an "unqualified perception of its fairness in the eyes of the general "public... The goal is not just to protect the interests of the "individual litigant but even more importantly to protect public "confidence in the administration of justice".

There will of course be no necessity for the Court to intervene in respect of counsel where the other side consents to allow opposing counsel to continue to act.

Now the passage I have just cited was adopted in its entirety by Richardson J in the New Zealand Court of Appeal in ***Black v Taylor [1993] 3 NZLR 403 at p.412.*** At p.408 of his judgment Richardson J says :

"The High Court has an inherent jurisdiction to control its own processes "except as limited by statute. As an incident of that inherent "jurisdiction it determines which persons should be permitted to appear "before it as advocates.... Another aspect of the inherent jurisdiction "is the control of a particular case and in the generality of cases and "with the associated basic need to preserve confidence in the judicial "system. The right to a fair hearing in the Courts is an elementary but "fundamental principle of British justice.... An associated consideration "is the fundamental concern that justice should not only be done but "should manifestly and undoubtedly be seen to be done...

"The assessment of the appearance of justice turns on how the conduct in "question - here Mr Gazley's wish to be able to act as counsel for the "defendants against M A Taylor - would appear to those reasonable members "of the community knowing of that background.

"In making that assessment the Court will also give due weight to the "public interest that a litigent should not be deprived of his or her "choice of counsel without good cause. The right to the choice of one's "counsel is an important value. But it is not an absolute".

Further on at p.412 Richardson J goes on to say :

"Where the integrity of the judicial process is perceived to be at risk "from the proposed or continuing representation by counsel on behalf of "one party, disqualification is the obvious and in some cases the only "effective remedy although considerations of delay, inconvenience and "expense arising from a change in representation may be important in "determining in particular cases whether the interests of justice truly "demand diaqualification".

McKay J who cites with a approval the first paragraph of the passage that I have quoted from ***Everingham v Ontario*** says at p.418 of his judgment :

"It is essential to the functioning of the Court as a Court of justice "that it must be able to prevent a barrister from acting as counsel in a "matter in which he has a conflict of interest, or in which he appears to "have a conflict of interest such that justice will not be seen to be "done. The fact that a barrister who so acted would be subject to the "disciplinary powers contained in Part VII of the Law Practitioners Act "1982 does not in any way diminish the inherent jurisdiction of the Court "to control proceedings before it in such a way as to enable justice to be

"done and to be seen to be done".

McKay J at p.420 goes on to say that for applications against barristers acting as counsel in proceedings to be brought without proper grounds but merely as weapons to discomfort the opposite party by adding to the length and cost of litigation would be a serious abuse of process.

Cooke P who agreed with the judgments of Richardson and McKay JJ and their reasons says at p.406 :

> "As to those who may be allowed to represent parties to argue cases, the "courts have an inherent jurisdiction... 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".

It is therefore evident that the Court in the exercise of its inherent jurisdiction to supervise and control its own process has the power to prevent a barrister from further acting as counsel for a party in a litigation in the interests of preserving public confidence in the integrity of the system of justice and of upholding the right to a fair hearing. Other factors to be considered are a litigant's right to choice of counsel and considerations of delay, inconvenience and expense arising from a change of counsel.

It appears from the judgment of the Court in *Everingham v Ontario (1992) 88 DLR (4th) 755* and thejudgment of Richardson J in *Black v Taylor [1993] 3 NZLR*

403 that the test to be applied in determining whether to invoke the Court's inherent jurisdiction to prevent a barrister from further acting as counsel in a litigation is whether a reasonable member of the public who is informed of the relevant circumstances would conclude that a barrister should be prevented from further acting as counsel. I am content to apply that test for the purpose of this judgment.

That brings me to the position in respect of solicitors engaged in litigation proceedings.

Solicitors:

It appears from the cases in other jurisdictions that the Court's jurisdiction to intervene in litigation proceedings and restrain a solicitor from further acting as a solicitor for a party because of a conflict of interest or apparent conflict of interest is based either on the law of confidence or the Court's inherent jurisdiction to control the integrity of its own process. The jurisdiction based on the law of confidence has as its main focus the affording of protection against the danger of misuse of confidential information by a solicitor who acquired such information from a professional relationship or association with a client against whom he is now acting. Therefore the primary concern here is to protect against breach of confidence by a solicitor in relation to a client. Whether that should also include a breach of fiduciary duty by a solicitor was not raised in this case.

When the inherent jurisdiction of the Court is invoked to restrain a solicitor from further acting for a party in litigation proceedings because of

a conflict of interest or apparent conflict of interest, the concern has been to preserve public confidence in the integrity of the judicial process and to uphold the right to a fair hearing. The consideration that not only must justice be done but it must also be seen to be done is often emphasised in this connection. The fact that solicitors are officers of the Court and therefore subject to the Court's inherent jurisdiction to control its process has also been mentioned in some cases.

In England the Courts have approached the question whether there is a conflict of interest situation to warrant Court intervention to restrain a solicitor from further acting for a party in litigation, by invoking the requirement of preventing a breach of confidence, or protecting against the danger of misuse of confidential information obtained in a professional association by a solicitor from a client. The test which the English Courts now apply is whether in the particular circumstances of a case there is or is not a reasonable anticipation of mischief flowing from a solicitor continuing to act for a party in a litigation. The genesis of that test may be seen in the judgment of Buckley LJ in ***Rakusen v Ellis Munday & Clarke [1912] 1 Ch 831*** where he says at p.845 :

> "The whole basis of the jurisdiction to grant an injunction is that there "exists, or, I will add, may exist, or may be reasonably anticipated to "exist, a danger of a breach of that which is a duty, an enforceable duty, "namely the duty not to communicate confidential information".

The test of "probability of mischief" which was pronounced by Cozens-Hardy MR in the same case has definitely not found support with the Courts in England or

other major common law jurisdictions.

In the next English case of ***Supasave Retail Ltd v Coward Chance (a firm) [1991] 1 All E R 668,*** Sir Nicholas Browne-Wilkinson V-C while applying the reasonable anticipation of mischief test as stated by Buckley LJ in the ***Rakusen*** case clearly hinted that England is in the slow lane of legal development in this area of the law and needs to rethink the law as stated in ***Rakusen.*** He says at p.674 of his judgment :

> "It is clear that in certain jurisdictions in North America the law has "been taken much further than it was in ***Rakusen's*** case, to the extent of "saying that where, if a solicitor continues to act where his partner has "acted for the other side this would give rise to a possible perception of "impropriety, irrespective of the substance of the matter, the Court would "not permit that to continue. That is not the law in this country. It "may well be that it will be desirable in the light of 1990, to rethink "what was laid down as the law in 1912. But that is for some other Court, "not for me".

I think the message in that passage is clear. English law in this area is not in an entirely satisfactory state in the light of modern developments. In the next English case of ***Re a firm of solicitors [1992] 1 All E R 353*** Staughton LJ and Sir David Croom-Johnson expressly adopted the reasonable anticipation of danger test.

As for the Court's inherent jurisdiction to intervene to remove a solicitor on record from further acting for a party in a litigation because of a conflict of interest, that was clearly recognised by the Supreme Court of Canada in ***Mac Donald Estate v Martin [1990] 3 S.C.R. 1235.*** Sopinka J who delivered the majority judgment says at p.1245 :

"The Courts which have inherent jurisdiction to remove from the record "solicitors who have a conflict of interest, are not bound to apply a code "of ethics. Their jurisdiction stems from the fact that lawyers are "officers of the Court and their conduct in legal proceedings which may "affect the administration of justice is subject to this supervisory "jurisdiction".

The "code of ethics" which is mentioned by Sopinka J in that passage from his judgment is the Law Society professional code of ethics. After a review of Canadian authorities and those from other common law jurisdictions Sopinka J noted that the modern trend is towards ensuring that not only should there be no conflict of interest but also no appearance of a conflict of interest. His Honour then goes on to pp 1259-1260 to state the test to be applied in determining whether there is a conflict of interest or apparent conflict of interest which would justify Court intervention. He says :

"The test must be such that the public represented by the reasonably "informed person would be satisfied that no use of confidential "information would occur. That, in my opinion, is the overriding policy "that applies and must inform the Court in answering the question. Is "there a disqualifying conflict of interest? In this regard, it must be "stressed that this conclusion is predicated on the fact that the client "does not consent to but is objecting to the retainer which gives rise to "the alleged conflict".

His Honour at p.1260 goes on to say :

"Typically, these cases require two questions to be answered : (1) Did "the lawyer receive confidential information attributable to a solicitor "and client relationship relevant to the matter at hand? (2) Is there a "risk that it will be used to the prejudice of the client?"

In answering the first question posed, His Honour goes on to say :

> "In my opinion, once it is shown by the client that there existed a "previous relationship which is sufficiently related to the retainer from "which it is sought to remove the solicitor, the Court should infer that "confidential information was imparted unless the solicitor satisfies the "Court that no information was imparted which could be relevant. This "will be a difficult burden to discharge".

And in answering the second question posed, His Honour goes on to say at p.1261 :

> "A lawyer who has confidential information cannot act against his cleint "or former client. In such a case the disqualification is automatic. No "assurances or undertakings not to use the information will avail. The "lawyer cannot compartmentalize his or her mind so as to screen out what "has been gleaned from the client and what was acquired elsewhere. "Furthermore, there would be a danger that the lawyer would avoid use of "information acquired legitimately because it might be perceived to have "come from the client. Moreover, the former client would feel at a "disadvantage. Questions put in cross-examination about personal matters, "for example, would create the uneasy feeling that they had their genesis "in the previous relationship".

In the exercise of the Court's jurisdiction, the policy considerations which Sopinka J states in his judgment that would be relevant to the present Western Samoan situation are the concern to maintain the high standards of the legal profession and the integrity of the justice system on one hand, and the litigant's right of choice of solicitor on the other. In the minority judgment delivered by Cory J, he expresses the opinion that preservation of the integrity of the justice system should be the predominant consideration. In the more recent case of ***Everingham v Ontario (1992) 88 DLR (4th) 755***, which has already been referred to in this judgment, the Full Court of Ontario Divisional Court held that the public interest in the administration of justice requires a perception of justice; and while the goal is not only to protect the interests

of the individual litigant, the more important consideration is to protect public confidence in the administration of justice.

Application of principles:

In determining whether there is an actual or apparent conflict of interest which would warrant Court intervention to restrain KEB from further acting for the defendant, I will first apply the principles stated by Sopinka J in the majority judgment in ***MacDonald Estate v Martin*** while also bearing in mind what was said in the same case by Cory J in the minority judgment. It is evident that the firm of KVB accepted instructions from the plaintiff's solicitor in New Zealand and acted as local agent for the plaintiff in respect of the very matter which is the subject of the present litigation. KVB also received copies of correspondence between the plaintiff's New Zealand solicitor and the defendant regarding this very matter. They also received from the plaintiff's New Zealand solicitor a file of confidential and privileged information on the matter at hand.

When KVB ceased to exist, its successor KEB which consists of two of the previous partners of KVB and a new partner took over possession of the plaintiff's file in 1996. It was not until towards the end of 1996 that KEB returned the plaintiff's file to the plaintiff. So in relation to the first question posed by Sopinka J : "Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand?", it is quite evident that KEB's possession of the file containing confidential information from the plaintiff about this case, was attributable to a solicitor and client relationship relevant to the matter at hand. So the first

question posed should be answered in the affirmative.

As to the second question : "Is there a risk that it will be used to the prejudice of the client?", I am satisfied applying the test of what a reasonably informed member of the public would infer, that there is such a risk. Sopinka J also pointed out that a lawyer who has relevant confidential information cannot act against his client or former client; he is automatically disqualified. And no undertaking not to use the confidential information would avail. As it would be recalled, the plaintiff filed her claim against the defendant on 19 November 1996 and on 27 November 1996 KEB filed a motion on the defendant's behalf to strike out the plaintiff's claim. Even though the plaintiff's file containing confidential information was returned to her towards the end of 1996, I think it is fair to say that a solicitor, or other member of the staff, of KEB who had perused the confidential information in the file, may still retain in his mind the information he has read. And as Sopinka J pointed out, the lawyer cannot compartmentalize his mind to screen out what has been gleaned from the client and what was acquired elsewhere. Moreover, the former client would feel at a disadvantage. Therefore, in my view, the second question should also be answered in the affirmative.

Having answered both questions in the affirmative, the conclusion which follows is that there is a conflict of interest or apparent conflict of interest. It follows that the Court in the exercise of its jurisdiction, whether it is based on the law of confidence or inherent jurisdiction, should grant the injunction sought by the plaintiff. I am also of the view that even if the reasonable anticipation of mischief test which is presently adopted by the

English Courts is applied, I will still come to the same conclusion. As already indicated in this judgment, the thrust of the English approach which is based on the law of confidence is to afford protection against the danger of misuse of confidential information gained by a solicitor from a professional association with a former client against whom he is now acting. In this case, I take the view such a danger exists.

Whether the Court proceeds on the basis of safeguarding against breach of confidence and the danger of misuse of confidential information or by invoking its inherent jurisdiction to protect the integrity of the judicial process, I am of the clear view that the conclusion will be the same in this case in respect of KEB continuing to act as solicitors for the defendant.

I turn now to the position of present counsel for the defendant. The plaintiff is of course objecting to present counsel, who is a partner of KEB, continuing to act for the defendant in the present litigation. Given that there is an apparent conflict of interest in the firm of KEB continuing to act as solicitors for the defendant, I am also of the view that justice will not be seen to be done if one of KEB's partner continues to act as counsel for the defendant. The Court's inherent jurisdiction to control its own process by preserving public confidence in the integrity of the judicial process and upholding the right to a fair hearing has been properly invoked in this case. The injunction sought by the plaintiff in this regard is therefore also granted.

The question of costs, delay or any inconvenience to the defendant was not raised. So I do not have to consider that question.

It must, however, be made clear that nothing in this judgment suggests, or should be taken to suggest, that present counsel for the defendant or his partners in KEB, who are all very respectable members of the legal profession and the community have committed any professional misconduct.

The injunction sought by the plaintiff in her application is granted. In view of that conclusion, it will not be necessary to consider the plaintiff's application for extension of time to file her claim and the defendant's motion to strike out in these proceedings. The defendant would need to engage new counsel and solicitor to represent itself in respect of those matters if it wishes to do so. The name of KEB as solicitors on record for the defendant and of present counsel as counsel on record for the defendant should also be removed.

The defendant is allowed until 7 April 1997 to engage a new counsel and solicitor when this case will be re-mentioned.

Present counsel to file memoranda as to costs within seven(7) days.

TFM Sakala

.....

CHIEF JUSTICE