

IN THE HIGH COURT OF FIJI
WESTERN DIVISION
AT LAUTOKA

COMPANIES JURISDICTION

Winding Up Cause No. 23 of 2019

IN THE MATTER of a Statutory Demand dated 23rd day of May, 2019 taken out by **QUARRY 1 PTE LIMITED** (“the Respondent”) against **DENARAU WATERS PTE LIMITED** formally known as **GULF INVESTMENTS (FIJI) PTY LIMITED** (“the Applicant) and served on the Applicant on 24th May 2019.

A N D

IN THE MATTER of an Application by the Applicant for an Order setting aside the Statutory Demand pursuant to **Section 516 of the Companies Act 2015**.

BETWEEN : **DENARAU WATERS PTE LIMITED** formerly known as **GULF INVESTMENTS (FIJI) PTY LIMITED** a limited liability company having its registered office at 184 Queens Road, Nadi.

APPLICANT

A N D : **QUARRY 1 PTE LIMITED** of Westfield Complex, Nadi.

RESPONDENT

Appearance : **Mr. Shalend Krishna for the applicant**
Mr. Wasu Pillay for the respondent

Hearing : **Friday, 30th October 2020 at 2.30 p.m.**

Decision : **Friday, 22nd January 2021 at 9.00am**

DECISION

(A) INTRODUCTION

- (01) On 24th May 2019, a statutory demand was served on the applicant by the respondent. The statutory demand has been prepared and signed by Messrs Young & Associates. The statutory demand is in the sum of \$119,569.25 and is comprised of moneys said to be due to the respondent arising out of goods sold and delivered to the applicant from 01.01.2017 to 11.02.2019.
- (02) By application filed on 14.06.2019, the applicant seeks to set aside the creditor's statutory demand issued by the respondent. The applicant says that there is no debt owed.
- (03) The respondent through their new Solicitor Messrs Gordon & Company filed an affidavit in opposition on the 04th September 2019 sworn by Mr. Mohammed Nazim, a shareholder and director of the respondent.
- (04) In the affidavit in opposition, Mr. Mohammed Nazim raised objections to Messrs Krishna & Co. acting for the applicant and raised the issue of conflict of interests. Mr. Nazim in his affidavit in opposition deposed that; [Reference is made to paragraph (7), (8), (9) and (10)]
- (7) *Prior to engaging its previous solicitors Young & Associates the Respondent had engaged Krishna & Co. to act for it in this matter.*
- (8) *Copies of the Respondent's files, documents and evidence in this matter was provided to Krishna & Co. for legal advice and opinion and to carry out legal services for the Respondent against the applicant.*
- (9) *In addition, numerous communications were sent to and from Krishna & Co. and the Respondent in this matter. Now shown to me and marked as "MZ-2" are copies of some of that communication.*
- (10) *In addition, officers and/or employees of the Respondent met with employees and/or solicitors of Krishna & Co. to discuss this matter and sought legal advice from Krishna & Co. and was provided legal advice by Krishna & Co. in this matter.*
- (05) In reply, Mr. Nilesh Virendra Kumar, a Legal Practitioner at Messrs Krishna & Co. deposed in his affidavit sworn on 03.07.2020;
- (6) *That at paragraphs 6 to 10 of the Affidavit in Response, the Respondent has raised the issue of Conflict of Interest.*

- (7) *We as the Applicant's Solicitors say that there is no conflict of interest issue however we need the same to be determined before the substantive hearing on this issue.*
- (8) *That Krishna & Co. had never provided any legal opinion or legal advice to the Respondent. The Respondent had only emailed invoices which are annexed in their Affidavit in Opposition. There was no documents provided to us and subsequently the Respondent had withdrawn the services hence there was no legal advice or opinion provided to the Respondent. No Legal professional charges were ever discussed or communicated or paid. No meetings, talks or anything of that nature took place.*
- (9) *That the invoices forwarded to us is disclosed in the Affidavit in Response and it does not have any impact on the Respondent's cause of action.*
- (10) *Also there is no possibility that Mr. Krishna or I or any employees of the Krishna & Co. will be called as material witness in these proceedings.*
- (11) *There is no confidentiality materials disclosed.*
- (12) *It is clear from the annexure "MZ-2" of the Respondent's own Affidavit in response that the conduct of the Krishna & Company was limited to only search of the Company at Registrar of Companies.*
- (06) Mr. Mohammed Nazim replied in his affidavit sworn on 21.07.2020; [Reference is made to paragraph (10) to (15)]
- (10) *I join issue and disagree with paragraph 7 of the Kumar's Affidavit. I annex and mark:*
- [i] *"A" an email from us to the Deponent dated 22 February 2019 where we forward all documents relating to this matter to the Deponent. In the email we specifically refer to our discussion with the Deponent. We instructed them to commence work on issuing a statutory demand for the payment of the sum that is the subject of this action. This decision was made after extensive discussion with Shailend Krishna and the Deponent and their advice to commence proceedings for winding up and not a civil action in the High Court. I vividly recall that during this discussion it was the Deponent who said that Mr. Faiyaz Koya – now Minister in the Fijian Government – was a part of the Respondent and that our company ought not to have engaged with the Respondent as they owe money to people from Sigatoka to Ba (so as to speak). Krishna & Co. had carriage of the matter for a week. They did not respond to our urgent request to have this matter actioned immediately.*

- [ii] “B” an email from us to Krishna and Co and a response from the principal of Krishna & Co – Shailend Krishna – advising us that they had commenced work on the matters referred to them and specifically the debt subject to this action.
- (11) Krishna & Co. gave us an opinion that the debt can be claimed by way of a statutory demand being issued on the Respondent. Based on this opinion and advice, and our agreement, they commenced work. It would not be sensible to do so otherwise.
- (12) I join issue and disagree with paragraph 8 of the Kumar Affidavit. I repeat paragraph 11 herein above and specifically refer to annexure marked A. We discussed this matter extensively with the Deponent. I believe he has perjured himself in saying he did not even talk to us.
- (13) I join issue and disagree with paragraph 9 of the Kumar Affidavit for the reasons stated in paragraph 11 and 12 above.
- (14) I join issue and disagree with paragraph 10 of the Kumar Affidavit. It is immaterial whether Krishna & Co or anyone related to it will be a witness in these proceedings. It is, however, material that the law firm for the Respondent has actual knowledge of our case pursuant to our discussion and specific instructions and that same law firm now acts for the Respondent.
- (15) I join issue and disagree with paragraph 11 of the Kumar Affidavit. A debtor and financial information about the Applicant is confidential information we do not disclose to third parties. It was disclosed to Krishna & Co as they were our lawyers at that point. To say that what was disclosed in confidence is not confidential is an affront to the relationship of a solicitor and its client.

(B) Consideration and the determination

- (01) In evidence before me on the present application were copies of email communications between the respondent and its previous solicitors Messrs Krishna & Co.
- (02) The first communication is an email dated 22.02.2019 from the respondent to Mr. Nilesh Virendra Kumar, a legal practitioner employed at Messrs Krishna & Co. That email noted that “As discussed, we would like to move with a stat demand on this. He will then discuss with his options”. The attachment to the email contains invoices and statements of the applicant. An email response by Mr. Shailend Krishna, the Principal of Messrs Krishna & Co, on 12.03.2019 noted that “we are carrying out full searches for the company, so we know their registered offices as we wish to serve winding up notices pursuant to Section 515 of the Companies Act.”

- (03) Thus, it is clear to me that Messrs Krishna & Co. came into possession of confidential information (the business transactions) of the former client and to the disclosure of which the former client i.e. the respondent has not consented.
- (04) On the hearing of the application, Counsel for the respondent submitted; (verbatim)
- ❖ *Krishna & Co. and/or Mr. Shailend Krishna and/or Nilesh Virendra Kumar have been privy to confidential information disclosed to them by the respondent and relating to dealings between applicant and the respondent and relating directly to this exact matter.*
 - ❖ *Krishna & Co and/or Mr. Shailend Krishna and/or Nilesh Virendra Kumar have knowledge of the respondent's position with respect to this matter.*
 - ❖ *Mr. Shailend Krishna and/or Mr Nilesh Virendra Kumar are advantaged vis-à-vis the respondent.*
 - ❖ *Mr. Shailend Krishna and/or Mr. Nilesh Virendra Kumar cannot avoid the seepage of confidential information and its use against the respondent.*
- (05) Counsel for the respondent relies substantially on the decision of the United Kingdom House of Lords in "**Bolkiah v KPMG**¹
- (06) On the other hand, Counsel for the applicant submitted;
- ❖ The conduct of Krishna & Company was only limited to search of the Company at Registrar of Companies.
 - ❖ There is no prejudice caused by conducting a search.
 - ❖ There should be a greater scrutiny of the facts and the law if the court is going to restrain a party from having a solicitor of his or her choice. (The attention of the court is drawn to the Fiji Court of Appeal decision in **R.C.Manubhai and Company Limited and Ors v Herbert Construction Company (Fiji) Limited** Civil Appeal No :- ABU 0002 of 2010.)
 - ❖ The evidence, affidavits and annexures clearly show that the instructions and the work carried out by Krishna & Co. was limited to only search of the Company at Registrar of Titles.
 - ❖ There is no evidence before this Court that provides and details of information that Krishna & Co. has in their possession that might be misused.

¹ (1998) UKHL 52 (1999) 2 AC 222

- (07) The leading case that is relevant to this scenario is the House of Lords decision in **Prince Jefri Bolkiah v KPMG (a firm)** [1999] 1 All E.R. 517 and in particular the unanimously adopted speech of Lord Millet. In that case, the appellant, a Prince of the Sultanate of Brunei had for some period acted as a Chairman of an investment agency of the Sultanate and in that capacity had employed KPMG, an accountancy firm to act as auditors during which time they acquired a great deal of confidential information as to the personal assets and their whereabouts of H.R.H., the Prince. In 1998, the Prince was relieved of his position amidst claims of financial irregularity and subsequently the Government of the Sultanate desired to instruct the firm KPMG to act for it in its investigation of the Prince and his financial affairs. The Prince sought to have the firm injected from so acting because he regarded that they were in conflict of interest having acted for him previously and were privy to a great deal of his confidential information. The court of appeal, found in favour of the firm and the Prince appealed to the House of Lords.

Lord Millet decided that in cases where a solicitor is acting against the interests of a former client, the only duty a solicitor has is to keep confidential any information that the Solicitor may have been privy to in the course of the prior relationship. His Lordship said this (at p.527, b):

"Where the Court's intervention is sought by a former client, however, the position is entirely different. The Court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the Solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence."

And later (at p527e):

"Whether a particular individual is in possession of confidential information is a question of fact which must be proved or inferred from the circumstances of the case."

- (08) The evidence in the case before me suggests that the respondent had engaged Messrs Krishna & Co to issue a statutory demand to the applicant for payment of debt which is the subject matter of this action. As adverted to earlier, (See paragraph (2) and (3) above) Messrs Krishna & Company came into possession of confidential information (the business transactions) of its former client and to the disclosure of which the former client; i.e. the respondent has not consented.

- (09) **The Rules of Professional Conduct and Practice (Schedule to the Legal Practitioners Act 2009) provide, in Chapter 1 Relations with Clients:**

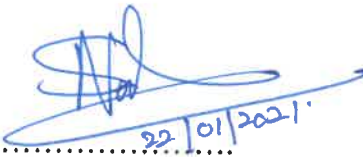
1.1 *A practitioner shall not abuse the relationship of confidence and trust with a client.*

- 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.*
- 1.4 *Information received by a practitioner from or on behalf of a client is confidential and shall not be communicated to others save with the client's consent or where so required by law.*

- (10) There is no evidence to show that any information gathered on account of Messrs Krishna & Co. having acted on behalf of the respondent has been used by Messrs Krishna & Co. to the benefit of the applicant in breach of rule 1.4. It cannot be said nor is there any evidence before this court that Messrs Krishna & Co. has communicated or used any information belonging to the respondent in the course of representing the applicant.
- (11) **In law, there is no conflict of interest here.**

ORDERS

- (1) The objection to Messrs Krishna & Co acting for the applicant is overruled.
- (2) There will be no order as to costs.


..... 22/01/2021

Jude Nanayakkara
[Judge]

High Court – Lautoka
Friday, 22nd January 2021