

IN THE HIGH COURT OF FIJI AT SUVA

CIVIL JURISDICTION

Civil Action No. 50 of 2019

BETWEEN

LARRY CLAUNCH of 12900 Beck Road, Dallas, Oregon 97338,
United States of America as Director and Shareholder of
One Hundred Sands Limited.

PLAINITFF - RESPONDENT

AND

ONE HUNDRED SANDS LIMITED a Private Limited Company incorporated
under the Laws of the Republic of Fiji of Aliz Pacific, Level 8,
BSP Life Centre, 3 Scott Street, Suva, Fiji.

FIRST DEFENDANT - APPLICANT

AND

TIMOTHY MANNING of 19-21 Como Street, Takapuna, Auckland,
New Zealand as Director and Share Holder of
One Hundred Sands Limited.

SECOND DEFENDANT - APPLICANT

Counsel : Mr. Haniff F. for the Plaintiff-Respondent
Mr. Nand A. for the Defendants-Applicants

Date of Hearing : 25th November, 2021

Date of Ruling : 17th December, 2021

RULING

(On the application for Recusal)

[1] The defendants-applicants (the defendants) filed the summons on 21st June 2021 seeking the following orders:

1. That Messrs Haniff Tuitoga Lawyers being the Barristers and Solicitors on record for the plaintiff be removed from appearing and / or acting any further for the plaintiff in Civil Action No. 50 of 2019 forthwith.
2. That Haniff Tuitoga Lawyers are in conflict of interest and are to be recused from acting any further in the action against One Hundred Sands Limited.
3. That the costs of this application be paid by the plaintiffs on indemnity basis.
4. Such further and other orders as the court deems just and fit.

[2] Currently apart from this matter there is another matter between these parties. The plaintiff in this matter is the defendant in HBC 152 of 2019. The plaintiff is a director of the 1st defendant company

[3] The learned counsel for the defendants relied on Rule 1.2 and Rule 1.5 of the Rules of Professional Conduct and Practice in support of the application.

Rule 1.2 – A party shall not act for more than one party in the same matter without the prior consent of all parties.

Rule 1.5 – Where a practitioner has received information from or on behalf of a client, a practitioner shall not thereafter act for another client in circumstances where the practitioner’s receipt of such information may result in detriment to the first mentioned client.

[4] For the court to order the solicitors of the defendants to recuse themselves, it must have sufficient material showing that the information received by them from the plaintiff may result in detriment to him.

[5] The defendants tendered the letter dated 06th April 2017 written by him to Haniff Tuitoga lawyers advising them to discontinue the petition filed by the 1st defendant company in the Supreme Court. It is clear from this letter that the plaintiff in giving instructions had acted in the capacity of a director of the 1st defendant company and not in his personal capacity.

[6] In **R.C Manubhai & Co. Ltd v Herbert Construction Company (Fiji) Ltd** [2014] FJCA 175; ABU0002.2010 (29 May 2014) the Court of Appeal, in paragraphs 49, 50 and 51, made the following observations:

[49] I also had occasion to reflect on the Judicial thinking reflected in *World Medical Manufacturing Corp v. Phillips Ormonde and Fitz Patrick Lawyers (a firm)* [2000] VSC 196.

[50] In that case Gillard J had suggested that, when a court is determining whether a lawyer should be able to act against a former client, the following questions should be asked:

[i] Is the former supplier of services whether it be a solicitor, accountant or a patent attorney or some other person providing services, in possession of information provided by the former client which is confidential and which the former client has not consented to disclosure?

- [ii] Is or may the information be relevant to the new matter in which the interest of the other client is or may be adverse to his own?
- [iii] If the answers to the first two issues are yes, then is there a risk which is real and not merely fanciful nor theoretical that there will be disclosure?
- [iv] If there is that risk then the evidential burden which is heavy, rests upon the provider of the services to establish that there is no risk of disclosure and this may be established in exceptional cases by the provision of a 'Chinese wall' but this is rarely of sufficient protection.
- [v] Should a permanent injunction be granted?

[51] I would suggest for the Fijian approach a further question to be asked, viz:

"Is there a nexus between the cause of action together with the claim contained in the Statement of Claim of the new client and the confidential information he might be said to be in possession through his relationship with the former client that could be regarded as material and might be detrimental to the former client?"

In **Bano v Rashid** [2010] FJHC 273; HBC218.2009 (26 March 2010) the High Court said:

The relevant authorities indicate that the common law has advanced the cause of protecting confidential information disclosed to a legal practitioner by a former client.

A recent authority in England on this subject is the House of Lords decision in *Prince Jefri Bolkiah v. KPMG (a firm)* [1998] UKHL 52; [1999] 1 All ER 517. Lord Millett delivered the principal judgment on behalf of the House of Lords and noted at page 525.

"The controlling authority in England hitherto has been the decision of the Court of Appeal in *Rakusen –v- Ellis Munday and Clerk* [1912] 1 Ch 831

The case is authority for two propositions: (i) that there is no absolute rule of law in England that a solicitor may not act in litigation against a former client; and (ii) that the solicitor may be restrained from acting if such a restriction is necessary to


avoid a significant risk of the disclosure or misuse of confidential information belonging to the former client."

- [7] For the court to decide whether the information provided by the plaintiff to Haniff Tuitoga Lawyers may result in detriment to the defendants it must have sufficient information as to the nature of instruction given by the plaintiff.
- [8] In the letter relied on by the defendants the only instruction given to Haniff Tuitoga Lawyers was only to discontinue the proceedings before the Supreme Court and such an instruction cannot be resulted in detriment to the defendants.
- [9] For the reasons set out above the court makes the following orders.

ORDERS

1. The summons filed by the defendants on 21st June 2021 is struck out and orders sought are refused.
2. There will be no order for costs.




Lyone Seneviratne

JUDGE

17th December 2021