

WIUTLYN VIULU, RAEVIN REVO, BROWM LAMU, ISSAC NAPATA, AND SETH PIRUKU (representing the Veala tribe) -V- TUI KAVUSU, MOLTON LUMA, SAMSON SAGA, PESETI KUITA, HAMI LAVI, GORDON YOUNG, PAUL KAVUSU, OPHIU VANDI, ISACH NOGA AND ABRAHAM KUMITI (trading as Nama Development Company), TUI KAVUSU (representing the Ojanga Kiki landholding group), STEVEN VENO (representing the Hibiwo landholding group), SAMSON SAGA (representing the Kolobangara landholding group), PESETI KUITA (representing the Gulagulasa landholding group), ISACH NAGA (representing the Malemale landholding group), OMEX LIMITED AND THE ATTORNEY-GENERAL

HIGH COURT OF SOLOMON ISLANDS  
(KABUI, J.).

Civil Case No. 015 of 2002

Date of Hearing: 30<sup>th</sup> September 2003

Date of Ruling: 7<sup>th</sup> October 2003

*P. Tegavota for the Plaintiffs*

*A. Radcliff for the 1<sup>st</sup> to 6<sup>th</sup> Defendants*

*J. Sullivan for the 7<sup>th</sup> Defendant*

*F. Waleamisia for the 8<sup>th</sup> Defendant*

### RULING

**Kabui, J.** By Summons filed on 24<sup>th</sup> September 2003, the 1<sup>st</sup> to 6<sup>th</sup> Defendants sought a restraining order against Mr. Tegavota, restraining him from acting for the Plaintiffs in this case on the ground that he had acted for them in the past and therefore a conflict of interest was at stake preventing him from so acting.

#### **The Brief Facts.**

On the 8<sup>th</sup> June 1997, Messrs Livingstone, Kavusu, Tui Kavusu (the 2<sup>nd</sup> Defendant), Veno (the 3<sup>rd</sup> Defendant), Molton LUMA and Ophiu Vendi (members of the 1<sup>st</sup> Defendant) applied to the High Court for leave to apply for an order of certiorari to quash the decision of the Western Customary Land Appeal Court made on 6<sup>th</sup> June 1997. Palmer, J. granted leave on 17<sup>th</sup> July 1997. In a judgment delivered on 9<sup>th</sup> January 1998, Palmer, J. made the order of certiorari and quashed the decision of the Western Customary Land Appeal Court. Mr. Tegavota was then acting for them as their Solicitor and Counsel. This was Civil Case No. 150 of 1997. Again, the same persons as applicants in that case, engaged Mr. Tegavota as their Solicitor and Counsel in Civil Case No. 16 of 1998. They were again the applicants in that case. Mr. Tegavota filed an Originating Summons on 5<sup>th</sup> February 1998, seeking a declaration that the boundaries of Kuvotu land ran from Chochole to Sabunu Rivers as described by Wiutlyn Viulu in Civil Case No.4 of 76 in the Marovo Local Court. In his judgment delivered on 20<sup>th</sup> August 1998, Palmer, J. struck out the Originating Summons on the ground of lack of standing. The Applicants in Civil Case No. 150 of 1997 and the Applicants also in Civil Case No.16 of 1998 then filed a Writ of Summons and Statement of Claim on 30<sup>th</sup> January 2002 against the Respondents in Civil Case No.150 of 1997 and the Respondents also in Civil Case No.16 of 1998. The Solicitor and Counsel acting for them was Mr. Suri. The relief they sought are set out in the Statement of Claim. By letter dated 25<sup>th</sup> August 2003, the Plaintiffs withdrew from Mr. Suri and engaged Mr. Tegavota to be their Solicitor and Counsel in this case.

**The case for the 1<sup>st</sup> to 6<sup>th</sup> Defendants.**

It is not disputed that Mr. Tegavota had been the Solicitor and Counsel for these Defendants in Civil Case No. 150 of 1997 and Civil Case No. 16 of 1998. They allege that for Mr. Tegavota to act against them now would create a situation of conflict of interest. They said they had given to Mr. Tegavota confidential information that he might use against them in the present case. They want him to stop doing that because of conflict of interest. This is the instruction given by them to their Counsel, Mr. Radclyffe who argued their case on their behalf in Court.

### The case for Mr. Tegavota.

Mr. Tegavota did admit having acted for the Defendants as alleged by them but said the issue in Civil Case No. 150 of 1997 was whether or not an order of certiorari should issue against the decision of the Western Customary Appeal Court and be brought into and quashed by the High Court. He said in Civil Case No. 16 of 1998 the issue was whether the declaration sought on the boundaries of Kuvotu land should be granted. He said the issues raised in the Statement of Claim for determination were different in nature and scope from the issue in the present case and therefore he was not barred from acting for the Defendants.

### The issues to be determined by the Court.

There are two issues to be determined. The first issue is whether or not a solicitor such as Mr. Tegavota can act for a new client against his old client. That is, can he switch sides as and when it suits him to do so. The second issue is whether or not under what circumstances can he be permitted to act against his old client and likewise under what circumstances he cannot do so. That is, under what circumstances can he switch sides and under what circumstances he cannot do so.

### The law on these issues.

The rule that governs the question of conflict of interest of solicitors in Solomon Islands is rule 11(8)(b) of the Legal Practitioners (Professional Conduct) Rules 1995. The said rule however does not lay down the principles underlying these two issues which underpin the existence of the rule of conflict of interest of a solicitor. The law on these issues have been restated clearly and firmly by Lightman, J. in His Lordship's judgment in **Re a firm of solicitors**,<sup>1</sup> This case had been cited by Palmer, J. in his judgment delivered on 6<sup>th</sup> August 2003 in **Tropical Resources Development Co. Ltd. v. Dalgro (SI) Limited**,<sup>2</sup> Civil Case No. 87 of 2003. I do not wish to quote verbatim all that was said by His Lordship on this issue but a brief summary would I think suffice. The rule that governs conflict of interest, he said, served as a balance between two public interests, the first being the client's right to be entitled to trust his or her solicitor that any information obtained by his or her solicitor about his or her affairs arising from the solicitor/client relationship being a relationship of trust would be kept secret from anyone else, and, secondly, there is in existence the freedom of the client to choose his or her own solicitor without any hindrance. His Lordship then set out the principles to be applied according to the facts of each case. Such principles, according to His Lordship, are based upon compromising the conflicting public interests that underpin the confidentiality of information arising from the solicitor/client relationship. The first principle is that the Court's concern for intervening is not based on any perception of unsuitable misbehaviour or dishonest practice on the part of the solicitor but on the protection of confidential information. The solicitor/client relationship and the fact that the solicitor is an officer of the court, do oblige the court to protect any confidential information that arises from that relationship. The second principle is that

<sup>1</sup> [1995] 3 All E. R. 482. At 488 to 489.

<sup>2</sup> Civil Case No. 87 of 2003.

not all confidential information acquired during the solicitor/client relationship will remain confidential for all time. To be worthy of consideration, the confidential information must be capable of being considered as confidential information, must be capable of being remembered or recalled and must be relevant to the subject matter at the date of the subsequent retainer. The reason is that confidential information can be irrelevant, forgotten or already known so that confidentiality can be no longer an issue of debate. The result is that a solicitor who acted for a client on a previous occasion but is not in possession of relevant confidential information is not precluded from subsequently acting against that client but a solicitor who is possession of relevant confidential information is precluded from so acting against the former client. In the case of partners or employees of a firm, the same restriction applies where any partner or employee is in possession of relevant confidential information irrespective of whether they continue in the firm or practice elsewhere. Those who are not in possession of any relevant confidential information are free from that restriction on leaving the firm but not so if they continue in the firm and the court considers there is a real risk of relevant confidential information having been passed on to them by others in that same firm. The third principle is that the allegation of possession of relevant confidential information must be beyond general allegation of that fact. Proof of the particular or particulars is required but the degree of particularity would largely depend on the facts of the case. Very often, the nature of the matter upon which the solicitor took instructions in the first place, the length of time of the original retainer, the date of the subsequent retainer and the nature of the subject matter would have been enough to establish the possession by the solicitor of relevant confidential information. The conclusion may also be inferred from the evidence before the court. The evidence by the solicitor of the solicitor's state of knowledge and whether the solicitor has relevant confidential information can be of weight where the integrity and credibility of the solicitor is unchallenged.

#### The test to be applied.

Counsel for the 1<sup>st</sup> to 6<sup>th</sup> Defendants, Mr. Radclyffe, urged me to apply the test stated by Palmer, J. in the **Tropical Resources case**<sup>3</sup> cited above in that the Court would not intervene unless there was a real risk of relevant confidential information being passed on. Counsel also urged me to consider in the alternative the test of a reasonable man's perception of the relevant status quo. Counsel for the 7<sup>th</sup> Defendant, Mr. Sullivan, however, argued that the only relevant test was the one stated by Palmer, J. stated in the **Tropical Resources case**<sup>4</sup> cited above and the reasonable man's test should be discounted. I have read the judgments delivered in **Rakusen v. Ellis, Munday and Clark**<sup>5</sup> [1911 to 1913] (Reprint) All E.R. 813. The relevant passages had already been cited by Palmer, J. in the **Tropical Resources case**<sup>6</sup> cited above and so I need not repeat them. Lord Cozen-Hardy at page 815 put the test as being that the court would not interfere unless to allow the solicitor to act would cause a real mischief, or prejudice. Lord Fletcher-Moulton at page 818 put the test as being that the court would not act unless the mischief is rightly anticipated in that there is a probability of it happening. Lord Buckley at page 820 put the test as being that the court would not act unless there is in existence or a possibility of existence, a danger of breach of duty on the part of the solicitor. In **Supasave Retail Ltd. v Coward Chance (a firm)**<sup>7</sup> [1991] 1 All E.R. 668, Sir Nicolas Brown Wilkinson V-C said that he found difficulty in equating the tests stated by the Law Lords in the **Rakusen's case**<sup>8</sup> cited above but decided to agree with the test put by Lord Fletcher-Moulton. Sir Nicolas Brown-Wilkinson, V-C said at page 673 that the test to see whether mischief was rightly anticipated was a fair expression of what the court had to look for in each case. **In Re a firm of**

<sup>3</sup> *Civil Case No. 87 of 2003.*

<sup>4</sup> *Civil Case No. 87 of 2003.*

<sup>5</sup> [1911 to 1913] (Reprint) All E.R. 813.

<sup>6</sup> *Civil Case No. 87 of 2003.*

<sup>7</sup> [1991] 1 All E.R. 668

<sup>8</sup> [1911 to 1913] (Reprint) All E.R. 813.

solicitors<sup>9</sup> [1992] 1 All E.R.353 at pages 361 to 362, [1992] 1 All E.R.353 at pages 361 to 362,<sup>10</sup> Lord Parker agreed with Lord Fletcher-Moulton's test affirmed by Sir Nicolas Brown-Wilkinson V-C in **Supasave's case**<sup>11</sup> cited above. Lord Parker also favoured the test put by Lord Buckley because, as His Lordship put it, that test did suggest the reasonable man's test. Lord Staughton at page 366, like Lord Parker, agreed with Lord Fletcher-Moulton's test as affirmed by Sir Nicolas Brown-Wilkinson V-C in **Supasave's case**<sup>12</sup> above. However, Sir David Croom-Johnson adopted the Lord Buckley test as favoured by Lord Parker being the reasonable man's test that the court will act if danger of a breach of duty may reasonably be anticipated. That test was also cited by Sir Nicolas Brown-Wilkinson V-C in **Supasave's case**<sup>13</sup> cited above. Clearly, there have been these varying views on these tests and how they should be applied. The test extracted by Palmer, J. from the judgment by Lightman, J. in **re a firm of solicitors**<sup>14</sup> cited above and restated by His Lordship in **Tropical Resources's**<sup>15</sup> case above, appears to have been coined by Lightman, J. without reference to any of the tests stated in **Rakusen's case**<sup>16</sup> cited above. Be that as it may, I do not think the Lightman test necessarily flouts any of the tests stated in **Rakusen's case**<sup>17</sup> cited above or the reasonable man's test favoured by Lord Parker in **In re a firm of solicitors's case**<sup>18</sup> above. Each of the tests in **Rakusen's case**<sup>19</sup> cited above is broad enough in my view to be melted and brought down to the Lightman test. In fact, Lord Staughton cited above expressed the same view at page 368 by saying that-

"...There is a considerable difference of emphasis and degree in those judgments. In **Re a solicitor** (1987) 131 SJ 1063 Hoffmann J. applied the test of Cozen-Hardy M.R., although it may well be that he would have reached the same conclusion if instead he had followed Fletcher-Moulton L.J. or Buckley L.J..."

Clearly, whichever of the tests is applied, the result undoubtedly is bound to be the same in that either the solicitor is allowed or not allowed to act for the new client, depending on the evidence before the Court.

The evidence in this case.

Paragraph 7 of Mr. Veno's affidavit states-

"... I and the other plaintiffs in Civil Case 16 of 1998 gave detailed instructions to Mr. Tegavota and he drafted affidavits for us based on those instructions. We gave him confidential information concerning our rights in custom over the land in the concession area and he made use of that information when acting for us in Civil Case 16 of 1998. Mr. Tegavota is now acting for the same group of people who were suing in Civil Case 16 of 1998 and is making use of the confidential information we gave him at that time to prosecute a case against us in these proceedings. The same Kuvotu land is involved..."

Paragraph 11 of the same affidavit states-

<sup>9</sup> [1992] 1 All E.R.353 at pages 361 to 362,

<sup>10</sup> [1992] 1 All E.R.353 at pages 361 to 362, [1992] 1 All E.R.353 at pages 361 to 362,

<sup>11</sup> [1991] 1 All E.R. 668

<sup>12</sup> [1991] 1 All E.R. 668

<sup>13</sup> [1991] 1 All E.R. 668

<sup>14</sup> [1992] 1 All E.R.353 at pages 361 to 362.

<sup>15</sup> Civil Case No. 87 of 2003.

<sup>16</sup> [1911 to 1913] (Reprint) All E.R 813.

<sup>17</sup> [1911 to 1913] (Reprint) All E.R 813.

<sup>18</sup> [1992] 1 All E.R.353 at pages 361 to 362.

<sup>19</sup> [1911 to 1913] (Reprint) All E.R 813.

“... The First to the Sixth Defendants are very concerned that if Mr. Tegavota is allowed to continue to act for the Plaintiffs herein he will continue to make use of the confidential information we gave him in the other proceedings and therefore request that this Honourable Court grants the orders sought in our summons...”

The first thing to note is that Mr. Tegavota is a sole practitioner. When he acted for the 1<sup>st</sup> to the 6<sup>th</sup> Defendants in Civil Case No.150 of 1997, the subject matter before the High Court was an application for leave to apply for an order of certiorari, followed by the application for the order of certiorari, leave having been granted. The Defendants did succeed in that regard. In Civil Case No. 16 of 1998, he acted for the Defendants again but the subject matter was an application for a declaration to confirm the boundaries of Kuvotu land. The application was refused. In Civil Case No.44 of 2003, he acted for a man called Abel Luipule Siope, a man related to Wiutlyn who was one of the persons Mr. Tegavota was acting against in Civil Case No.150 of 1997 and Civil Case No. 16 of 1998 and one of the Plaintiffs in this case. The dispute between the parties is over the exact boundaries of Kuvotu land won by the Plaintiffs in 1976 in the Marovo Local Court. Whilst the Plaintiffs say that Kovuto land lies within the concession area covered by Licence Number 10108 issued on 24<sup>th</sup> December 2001, the Defendants say that is not the case. The Defendants say that whilst they do recognize the Marovo Local Court decision, the physical boundaries on the ground of Kuvotu land have not been conclusively established by the Marovo Local Court or any other authority. Setting the boundaries of Kuvotu land right is not a matter within the jurisdiction of the High Court (See Simbe’s Civil Appeal No. 8 of 1997). That is, the High Court has no jurisdiction to determine ownership of customary land or matters connected therewith. That is the preserve of the Chiefs, the Local Courts and the Customary Land Appeal Courts as the case may be.

#### **Application of the law to the facts.**

The first problem with the Defendants’ case is that I can find no specifics of the allegation of likely misuse of relevant confidential information by Mr. Tegavota. That is, I can find no evidence of the specifics of the alleged passing of relevant confidential information to Mr. Tegavota. If, there was any, what was it, its nature and relevance to the subject matter of this case? I can find none. Even if I am wrong in my finding in this regard, I can still reach the same conclusion on another ground. I have read the affidavits filed by Mr. Veno on 9<sup>th</sup> February 1998 and 20<sup>th</sup> February 1998, by Mr. Nonga filed on 3<sup>rd</sup> March 1998, by Mr. Tozaka filed on 10<sup>th</sup> March 1998, by Mr. Kavusu filed on 3<sup>rd</sup> March 1998 and by Mr. Kuiti filed on 10<sup>th</sup> March 1998 in Civil Case No. 16 of 1998 which the Defendants say Mr. Tegavota had prepared and filed on their instruction. The deponents of these affidavits all had said the boundaries of Kuvotu land ran from Chochole to Sabunu rivers and therefore Chochole, Ozanga Kiki and Kolobangara land areas were outside the boundaries of Kuvotu land. Whilst that information might have been relevant to the Originating Summons in Civil Case No. 16 of 1998, it is not relevant to this case. In fact, Palmer, J. found that the Defendants lacked standing to seek the declaration they sought. The critical issue for the parties is the discovery of the exact boundaries of Kuvotu land. Mr. Tegavota will play no critical role in the process of discovering the exact boundaries. He would not know anyway because he will not be allowed to appear before the Chiefs or the Local Courts or the Customary Appeal Court for the Western Province being the relevant forums for determining the exact boundaries of any customary land situated within the jurisdiction of those forums. Even if as alleged by the Defendants, confidential information about the boundaries had been passed on to Mr. Tegavota, such information would not be relevant for the purpose of this case. The present case is not about boundaries of Kuvotu land and so such information would not be relevant confidential information. Also, as I have said above, the subject matters in Civil Case No. 150 of 1997 and Civil Case No. 16 of 1998 were not the same as the subject matter in the present case. The subject matter in the present case is the non-compliance of section 8(2) of the Forests Resources

timber Utilization Act (Cap. 40) and thus the invalidity of Licence 10108. Civil Case No. 44 of 2003 bears no significance as it was discontinued with effect from 19<sup>th</sup> September 2003. In fact, the same affidavits sworn and filed in Civil Case No. 16 of 1998 were used in Civil Case No.44 of 2003. Mr. Tegavota must have realized this fact and therefore advised against proceeding with Civil Case No. 44 of 2003 any further. There is therefore no bar against Mr. Tegavota acting for the Plaintiffs in this case. There is no possibility of any real risk of subsequent passing of any relevant confidential information to the Plaintiffs in this case. As I have said, there is no evidence of any specifics of the allegation and even if there is any, it would not be of such a nature that it can be regarded as relevant confidential information. The Defendants have failed to establish their case at the threshold. The Defendants application is dismissed with costs. The 7<sup>th</sup> Defendant is also entitled to its costs.

F. O. Kabui  
Judge