VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D1071/2010

DOMESTIC BUILDING LIST

CATCHWORDS

Solicitor – conflict of interest – application to restrain from acting – solicitor formerly acting for other party – relevant principles

APPLICANTS	Ofer Benzvi and Simone Benzvi
FIRST RESPONDENT	Gunther Developments Pty Ltd
SECOND RESPONDENT:	Jake Gunther
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Directions Hearing
DATE OF HEARING	9 June 2011
DATE OF ORDER	20 June 2011
CITATION	Benzvi v Gunther Developments Pty Ltd and Anor (Domestic Building) [2011] VCAT 1161

ORDER

1. The Respondents' application that the Applicants' solicitor, Hassall's Litigation Services, be restrained from continuing to act in this proceeding is dismissed.

2. The Respondents' application that Mr Graeme Devries of counsel be restrained from continuing to act on behalf of the Applicants in this proceeding is dismissed.

3. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicants	Mr R. Squirrell of Counsel
For the Respondents	Mr P. Lithgow of Counsel

REASONS

The application

1 The Respondents in this matter seek an order restraining the Applicants' solicitors, Hassall's Litigation Services Pty Ltd ("Hassalls") and their Counsel Mr Graham Devries from continuing to act in this matter against them.

2 The application came before me for hearing on 9 June 2011. Mr Lithgow of Counsel appeared on behalf of the Respondents to seek the orders and Mr Squirrell of Counsel appeared on behalf of the Applicants to oppose the making of them.

Background

3 The Applicants are the owners of premises situated at 68 and 69 Beach Road Hampton.

4 In 2009 the Applicants were having domestic building work undertaken at the premises by Dome Builders Pty Ltd ("Dome"). A dispute arose between the Applicants and Dome leading to litigation in this Tribunal between them (Proceeding No. D815/2009).

5 In 2009 the Applicants entered into an agreement with the first respondent to complete the work. They also engaged Hassall's as their solicitors in their litigation against Dome. The director of the first respondent, Mr Gunther, had retained the predecessor of that firm, Hassall and Byrne, as his solicitors in litigation in some years earlier. There appears to be a dispute as to whether Mr Gunther was referred to the Applicants by Hassalls or whether it was Mr Gunther who recommended Hassalls to them.

The Dome litigation

6 During the course of the building work undertaken by the first respondent, Mr Gunther was requested by the Applicants and by Mr Hassall of Hassalls, to provide information and, ultimately, instructions for a witness statement. According to Mr Gunther's affidavit, he gave Mr Hassall and Mr Devries of Counsel all of his files relating to the Applicants including all written communications between the parties. These were later returned.

7 Mr Gunther saw both Mr Hassall and Mr Devries in conference for, he says, between 6 and 8 hours. A witness statement was prepared on his behalf by Mr Devries on 23 July 2010 but it is unclear whether he ever signed it.

8 In one of the conversations between Mr Gunther and Mr Hassall, Mr Gunther expressed a concern to Mr Hassall that his co-operation and the information that he was providing might be "thrown back in his face". To allay these concerns a form of indemnity was prepared by Mr Hassall but it was never signed.

The pertinent facts

9 The basis of Mr Gunther's concern is as follows:

(a) Hassall and Byrne, Solicitors, had acted for Mr Gunther in 2001 and 2002 in litigation concerning two unrelated building disputes. Mr Hassall was a partner of that firm at the time and is now the sole principal of Hassalls;

(b) Mr Gunther believes that in about 2005 he had a telephone conversation with Mr Hassall in relation to another building dispute. He does not recall that any work was done by Mr Hassall as a result of this call and he received no bill. Mr Hassall said that no file was opened on that occasion and that his practice would have been to send a fee agreement and to open a file if he had done anything.

10 Mr Hassall said that the Applicants were referred to him by the Law Institute and that it was he who recommended Mr Gunther to them.

11 Mr Gunther said that Mr Hassall had assured him that if there was a dispute between the Applicants and the Respondents he would not act due to a conflict of interest. Mr Hassall denies that allegation and points to Clause 16 in the Memorandum of Understanding signed by the parties which states:

> "The builder will not object to the Applicants retaining Roland Hassall and Hassall's Litigation Services Pty Ltd as their lawyers should any dispute or difference arise out of or in connection with the contract".

This is quite inconsistent with Mr Gunther's assertion and so I prefer Mr Hassall's evidence.

12 The conferences that took place with both Mr Hassall and Mr Devries of Counsel were for the purpose of preparing a witness statement of the evidence Mr Gunther was to give in the Dome proceedings. This was prepared for the benefit and use of the Applicants. It was not prepared on behalf of the Respondents.

The relevant principles

13 At the outset, I expressed concerns to Mr Lithgow as to whether I had any jurisdiction to prevent a legal practitioner from acting in a proceeding before this Tribunal. Although the Supreme Court has jurisdiction to exercise control over legal practitioners that have been admitted to practise at the Court, that jurisdiction does not extend to this Tribunal. The *Legal Practice Act* 2004 confers jurisdiction upon this Tribunal for certain disciplinary matters but no power to control solicitors in the way sought is specifically given, whether by that Act, by the *Victorian Civil and Administrative Tribunal Act* 1998 ("the VCAT Act") or by any enabling enactment.

14 Mr Lithgow said that he based his application upon Sections 80 and 98 of the VCAT Act.

15 Section 80 provides as follows:

> "**Directions**
>
> (1) The Tribunal may give directions at any time in a proceeding and do whatever is necessary for the expeditious or fair hearing and determination of a proceeding.
>
> (2) The Tribunal's power to give directions is exercisable by any member.
>
> (3) The Tribunal may give directions under this section requiring a party to produce a document or provide information in a proceeding for review of a decision despite anything to the contrary in section 106(1) or any rule of law relating to privilege or the public interest in relation to the production of documents."

16 Section 98 provides as follows:

> "**General procedure**
>
> (1) The Tribunal—
>
> (a) is bound by the rules of natural justice;
>
> (b) is not bound by the rules of evidence or any practices or procedures applicable to courts of record, except to the extent that it adopts those rules, practices or procedures;
>
> (c) may inform itself on any matter as it sees fit;
>
> (d) must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit.
>
> (2) Without limiting subsection (1)(b), the Tribunal may admit into evidence the contents of any document despite the non-compliance with any time limit or other requirement specified in the rules in relation to that document or service of it.
>
> (3) Subject to this Act, the regulations and the rules, the Tribunal may regulate its own procedure.
>
> (4) Subsection (1)(a) does not apply to the extent that this Act or an enabling enactment authorises, whether expressly or by implication, a departure from the rules of natural justice."

17 Section 80 confers power upon the Tribunal to direct and control its proceedings. Section 98 is concerned with how hearings are to be conducted. The words of both sections are certainly very general.

18 Section 62 of the VCAT Act permits the Tribunal to allow representation in the circumstances set out in that section and the Tribunal might refuse to allow a party to be represented at all. However if representation is permitted, the choice of representative is for the party concerned.

19 Mr Squirrell submitted that the powers in s.80 and s.98 were confined to the manner in which proceedings should be conducted and were not intended to extend to whether a legal practitioner should be allowed to appear. I do not think they are so confined. The words of s.80(1) are quite clear. The Tribunal may do whatever is necessary for the expeditious or fair hearing and determination of a proceeding. That would include an order preventing a legal practitioner from continuing to act if, in the circumstances of the case, that were necessary in order to ensure the fair hearing and determination of the proceeding.

20 For these reasons I believe that I have the power to restrain either Mr Hassall or Mr Devries from continuing to act if I should find that it is necessary to do so in order to ensure the fair hearing and determination of this proceeding. However any power to refuse a right of audience to a legal practitioner whom a party wishes to engage must be exercised with great care.

The relevant principles

21 I was referred a series of cases relevant to the point that I have to decide.

22 In the unreported case of *Younghanns and Others v Elfic Limited* (3 July 1998 per Gillard J – unreported), the learned Judge said (a p.10:

> "The authorities establish that there are a number of factors which must be considered and weighed on an application such as the present, namely:
>
> (i) The right of a solicitor to act for any client and the right of all members of the community to retain a solicitor of their own choice;
>
> (ii) The right of the client for the maintenance of all confidential information obtained by the solicitor during the course of the retainer, which right continues until the client expressly or impliedly consents to the discharge of the obligation of confidence;
>
> (iii) As a general rule it is necessary to identify and establish that there was some confidential information provided (see *Bricheno v Thorp* (1833) 149 ER 725). The degree of particularity of the confidential information must depend upon all the circumstances. Often it cannot be identified for fear of disclosure. In considering this factor it must be borne in mind that a solicitor makes notes, forms the views and opinions of clients and observes things that the client may have forgotten or overlooked. In some cases the circumstances of the retainer and the nature of the legal work will be sufficient to establish the nature of the confidential information. In this regard the relationship between solicitor and client may be such that the solicitor learns a great deal about his client, his strengths, his weaknesses, his honesty or lack thereof, his reaction to crisis, pressure or tension, his attitude to litigation and settling cases and his tactics. These are factors I would call the "getting to know you" factors. The overall opinion formed by a solicitor of his client as a result of this contact may in the circumstances amount to

confidential information that should not be disclosed or used against the client;

(iv) A solicitor, must consistent with this retainer, act in the best interests of his client which means not only exercising skill, but putting at his client's disposal all relevant knowledge that if a solicitor is in a position where he is unable to reveal all his knowledge to a client he should not act for him … This must especially be the position where the solicitor has acted for two clients in relation to one transaction and then thereafter acts for one against the other in relation to matters arising out of the same transaction".

23 In *Spincodes Pty Ltd v Look Software Pty Ltd* [2001] VSCA 248, after a very scholarly analysis of the history of the principles involved, Brooking JA said (at para 52):

"…the danger of misuse of confidential information is not the sole touchstone for intervention where a solicitor acts against a former client. That danger can and usually will warrant intervention, but it is not the only ground. There are two other possible bases for an interdict. In the first place, it may be said to be a breach of duty for a solicitor to take up the cudgels against a former client in the same or a closely related matter."

21. In *Dennis Hanger Pty Ltd v Brown & Ors* [2007] VSC 495 the principles were summarised by Warren CJ, where her Honour said (at para 16):

"The authorities clearly establish several principles. First, a solicitor has a duty of confidentiality to its client and to its former clients.(*Spincode v. Look Software* - Ibid*).* Not only is this clear on the authorities, but it is a statutory requirement of the profession, a breach of which may lead to disciplinary proceedings. (*Professional Conduct and Practise Rules* 2005*, r.3).* Secondly, an injunction should be granted to restrain a solicitor from acting against a former client if there is 'a real and sensible possibility of the misuse of confidential information *(Farrow Mortgage Services Pty Ltd (in liq.) v Mendall Properties Pty Ltd* [200] VSCA 16*).* Thirdly, the 'confidential information' may include instructions, as well as the 'getting to know you' factors. These include the client's strengths and weaknesses, honesty or lack thereof, reactions to situations and attitudes to litigation (*Yunghansns v Elfic Ltd* - unreported). Fourthly, the applicant bears the burden of identifying 'with some precision the confidential information' which is said to be held (*Carringdale Country Club Estate v Astill* [1993] 42 FCR 307 at 313). Fourthly, determining whether such an injunction should be granted must involve the 'question of balancing the competing considerations – one party's right to be represented by solicitors of its choosing against another party's right not to have its (former) solicitors acting against it in the same or substantially the same proceeding' (*Australian Liquor Marketers Pty Ltd v Tasman Liquor Traders Pty Ltd* [2002] VSC 324)."

24 In Mr Hassall's case, the "getting to know you" factors are slight. The firm of Hassall and Byrne acted for the Mr Gunther many years ago and the employee solicitor who handled the file is no longer working there. There

was no ongoing or continuous contact with Mr Hassall, which might reasonably by expected to give rise to the sort of knowledge contemplated by his Honour in *Younghanns*.

25 The only recent contact was for the purpose of obtaining instructions for a witness statement and although that involved discussing work that the Respondents had carried out on the premises it was in a different context. It was with a view to quantifying the Applicants' loss in regard to the claims they were bringing against Dome.

26 Indeed, the information provided by Mr Gunther was directed towards casting blame on Dome not upon himself or the first respondent. That is not inconsistent with the Respondents' interests in the present litigation.

27 Mr Lithgow submitted that, although Mr Gunther was never charged for the form of indemnity that Mr Hassall prepared, it was prepared for his benefit and, that arguably, there was a solicitor client relationship between them. I do not accept that submission. Either there was a solicitor client relationship or there was not and the evidence does not establish that there was. The purpose of the preparation of the indemnity appears to have been to satisfy the requirement of a witness in order to secure his co-operation. It was in the interests of the Applicants to obtain Mr Gunther's evidence and to give him the indemnity that he sought. The fact that the document would, if it had been executed, have conferred a benefit upon Mr Gunther is not enough in itself make him Mr Hassall's client.

28 Applying the principles set out by the Chief Justice in *Dennis Hammer*, it is not established that there is any confidential information in the possession of Mr Hassall that might be used against the Respondents. The information given by Mr Gunther in his capacity as a prospective witness was not privileged nor given on a confidential basis. It was given for the purpose of being incorporated into a witness statement which would then be filed in proceedings before this Tribunal and relied upon when Mr Gunther was called to give evidence if the matter had proceeded to trial.

29 I am not satisfied that if Mr Hassall continues to act there is a real and sensible possibility of the misuse of any confidential information or that the interests of justice otherwise require that Mr Hassall be restrained from acting. Indeed, when the parties entered into their contractual relationship it was contemplated by them that they might fall into dispute and it was agreed that in that event no objection would be taken to Mr Hassall acting for the Applicants.

Mr Devries

30 It does not appear that Mr Devries has ever appeared on behalf of Mr Gunther or advised him. There was a suggestion by Mr Gunther that there was an intention to brief Mr Devries to appear on his behalf on one occasion some years go but it appears that never eventuated.

31 The application to restrain Mr Devries from acting rests on the interview that Mr Devries had with him for the purpose of drawing the witness statement. Again, the information that he imparted on that occasion was given by a prospective witness. It was not given on a confidential basis or otherwise privileged. The "getting to know you" factors are even slighter than in the case of Mr Hassall.

Conclusion

32 *Prima facie*, a party is entitled to the solicitor or barrister of his choice unless there is some reason why the law should interfere with that in the interests of justice. That has not been demonstrated in the present case.

SENIOR MEMBER R. WALKER