

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP650/2018

CATCHWORDS

Domestic building – application to restrain applicant’s solicitors which employs two lawyers who were previously employed by the respondent’s solicitor from acting for the applicant – relevant principles – onus on applicant for order - no confidential information material to the applicant and detrimental to the respondent’s interests identified — application dismissed.

APPLICANT	Gayle Francis Gledhill
RESPONDENT	Scotia Property Maintenance Pty Ltd
WHERE HELD	Melbourne
BEFORE	Deputy President C Aird
HEARING TYPE	Directions Hearing
DATE OF HEARING	20 August 2018
DATE OF ORDER	24 August 2018
CITATION	Gledhill v Scotia Property Maintenance Pty Ltd (Building and Property) [2018] VCAT 1314

ORDERS

1. The respondent’s application that the applicant’s solicitors, HWL Ebsworth, be restrained from continuing to act for her is dismissed.
2. Costs reserved. **I direct the principal registrar to list any application for costs for hearing before Deputy President C Aird for 1 hour unless the parties file Minutes of Consent Orders setting out a timetable for the filing and service of material for the application to be determined ‘on the papers’.**

DEPUTY PRESIDENT C AIRD

APPEARANCES:

For Applicant	Mr N Jones of counsel
For Respondent	Mr E Chan, solicitor

REASONS

- 1 The proceedings were commenced by the applicant owner in May 2018 alleging that she had suffered loss and damage as a result of defective building works carried out by the respondent builder. Her total claim as set out in the Particulars of Loss and Damage which have since been filed is \$55,535.10 being the cost of rectification and consequential damage.
- 2 At the first directions hearing on 3 July 2018, Mr Free, solicitor for the respondent, expressed surprise and concern that Ms Ang, of HWL Ebsworth Lawyers ('HWLE'), who attended the directions hearing on behalf of the applicant had previously been employed by his firm, and said she had knowledge of the respondent's confidential business affairs.
- 3 On 2 August 2018 the respondent filed an Application for Directions Hearing or Orders seeking orders that:
 1. The solicitors for the Applicant be restrained from acting for the Applicant on the basis they have previously acted for the Respondent.
 2. The solicitors for the Applicant be restrained from directly or indirectly assisting the Applicant in the proceeding except to the degree that is necessary to transfer the file to the Applicant's incoming solicitors.
 3. Liberty to apply.
 4. Costs.
- 4 The application was accompanied by an affidavit of David Free, principal of LFS Legal Barristers and Solicitors ('LFS') dated 31 July 2018, concerning the prior employment by his firm, and alleged conflict of interest, of two lawyers now employed by HWLE and involved in representing the applicant in this proceeding. I will discuss Mr Free's affidavit in detail later in these Reasons.
- 5 On 17 August 2018 at 6.21pm HWLE filed and served three affidavits of Gayle Gledhill (the applicant), Michelle Ang and Leila Idris.
- 6 At the commencement of the directions hearing on 20 August 2018 I confirmed with Mr Chang, solicitor for the respondent, that he had received the affidavits. Mr Jones of counsel appeared on behalf of the applicant.
- 7 For the reasons which follow I am not persuaded that HWLE should be restrained from acting on behalf of the applicant in this proceeding.

THE RELEVANT PRINCIPLES

- 8 Mr Jones referred me to the comments by Bell J in *Break Fast Investments v Rigby Cooke Lawyers & Ors [2015] VSC* where his Honour said (citations omitted):

2. There was no dispute about the governing principles, which I have had occasion to previously consider. The grounds relied upon by MST reflect the independent bases upon which a restraining order may be granted, which I explained in *Main Road Property Group Pty Ltd v Pelligra and Sons Pty Ltd*:

The court possesses jurisdiction to restrain a party from engaging lawyers, or to restrain lawyers from acting, whether they be solicitors or barristers, on any one of these three grounds: to prevent the possible disclosure or misuse of confidential information (broadly defined) obtained by them when acting for a former client, to prevent them from acting against a former client when this would be a breach of their fiduciary duty of loyalty and to protect the integrity of the judicial process.

3. In *Garde-Wilson v Corrs Chambers Westgarth*, I expanded upon that explanation of the three grounds, as follows (relevantly to the present case):

The first ground relates to a possible misuse of confidential information. The principles were stated by Nettle J in *Sent v John Fairfax Publication Pty Ltd* as follows:

Authority establishes that the court will restrain a legal practitioner continuing to act for a party to litigation if a reasonable person informed of the facts might reasonably anticipate a danger of misuse of confidential information of a former client and that there is a real and sensible possibility that the interest of the practitioner in advancing the case in the litigation might conflict with the practitioner's duty to keep the information confidential, and to refrain from using that information to the detriment of the former client.

In some cases the lawyer who obtained the information has no immediate recollection of it and may even be determined not to use it. The lawyer may still be restrained if, applying the objective test, there is a real and sensible possibility that he or she may subconsciously or inadvertently do so.

The second ground relates to a possible breach of the fiduciary duty of loyalty that a lawyer owes to their present or former client ...

The third ground relates to ensuring the due administration of justice and the protection of the integrity of the judicial process. This jurisdiction extends to restraining a lawyer from acting for a party in litigation before a court in order to ensure that justice is not only done but manifestly and undoubtedly seen to be done...

The test is objective and whether a fair-minded reasonably informed member of the public would reasonably conclude that the proper administration of justice required the lawyer to be restrained from acting.

Proper weight must be given to the fundamental principle that, in the public interest, a party to litigation in a court ... should not be deprived of the lawyer of their choice without good cause.

One aspect of this principle is that, quite apart from clients, the courts ... are entitled to receive the assistance of solicitors and counsel who are observably independent.

4. It is established that the jurisdiction of the court to restrain a lawyer from acting in a particular case is exceptional and must be exercised with caution.

9 In *Pinnacle Living Pty Ltd v Elusive Imagine Pty Ltd*¹ Whelan J succinctly summarised the applicable principles (citations omitted):

- (1) The Court will restrain a legal practitioner from continuing to act for a party to litigation if a reasonable person informed of the facts might reasonably anticipate danger of misuse of confidential information of a former client, and that there is a real and sensible possibility that the interest of the practitioner in advancing the case in litigation might conflict with the practitioner's duty to keep the information confidential and to refrain from using that information to the detriment of the former client.
- (2) The danger of misuse of confidential information is not the sole touchstone for curial intervention where a solicitor acts against a former client. There is also an independent equitable obligation of loyalty which forbids a solicitor acting against a former client in the same or a closely related matter. Intervention may also be justified on this ground in the exercise of a Court's supervisory jurisdiction over its own officers.
- (3) There is an overriding jurisdiction to intervene so as to protect the due administration of justice arising where a reasonable informed member of the public would conclude that solicitors should be prevented from acting.

10 In *Dennis Hanger Pty Ltd v Brown & Ors*² Warren CJ also set out the principles. In addition to those identified by Whelan J in *Pinnacle Living Pty Ltd v Elusive Imagine Pty Ltd*³, she observed (citations omitted):

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. Fourthly, the applicant bears the burden of identifying 'with some precision the confidential information' which is said to be held. 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.'

11 In considering the present application I need to be satisfied first, whether Ms Idris and/or Ms Ang have any confidential information of the

¹ [2006] VSC 202 at [14]:

² [2007] VSC 495

³ [2006] VSC 202 at [14]:

respondent which might be detrimental to the respondent's interests, as alleged by the respondent.

THE RESPONDENT'S POSITION

- 12 The application was accompanied by an affidavit of David Free dated 31 July 2018 in which he deposes that he is a principal of LFS Legal Barristers and Solicitors ('LFS'), lawyers for the respondent
- i from 1 June 2010 to 19 January 2018 Ms Najihah Idris was employed as a lawyer by LFS and is now employed by HWL Ebsworth ('HWLE') the applicant's solicitors;
 - ii Ms Idris was directly acting for and on behalf of the respondent;
 - iii From July 2017 to the end of her employment at LFS, Ms Idris had access to *information confidential to the Respondent*, material to the owner's interest and detrimental to the interests of the respondent;
 - iv On 1 December 2017 Ms Idris sent a letter for and on behalf of the respondent to another firm of solicitors which, from the copy letter exhibited to Mr Free's affidavit, clearly relates to a dispute about a different property.
 - v From 26 June 2015 to 3 May 2018 Ms Ang was employed by LFS.
 - vi During the period from about July 2017 to 3 May 2018 Ms Ang had access to *information confidential to the Respondent*, material to the owner's interest and detrimental to the interests of the builder.
 - vii There are no physical or information barriers at LFS.
 - viii On 29 May 2018 he wrote to HWLE advising that LFS has an open plan office and that Ms Idris was provided instructions and worked directly for the builder.
 - ix On 3 July 2018 Ms Ang appeared on behalf of the owner at the directions hearing referred to above.
 - x On 3 July 2018 he wrote to HWLE advising that LFS has an open plan office and that Ms Ang was employed by LFS to 3 May 2018.
 - xi The builder has instructed him that it is *aggrieved by HWLE, Ms Idris and Ms Ang acting against it*.
- 13 Interestingly, no affidavit has been filed on behalf of the respondent by a director of the respondent or other authorised officer, and Mr Free does not identify who, of the respondent, which is a corporate entity, has instructed him about the builder's grievances.
- 14 Mr Chan for the respondent submitted that the respondent was relying on Rule 10.2 of the Solicitors Conduct Rules 2015 which I note provide:
- A solicitor or law practice who or which is in possession of information which is confidential to a former client where that information might reasonably be concluded to be material to the

matter of another client and detrimental to the interests of the former client if disclosed, must not act for the current client in that matter UNLESS:

- 10.2.1 the former client has given informed written consent to the solicitor or law practice so acting; or
- 10.2.2 an effective information barrier has been established.

15 Mr Chan did not refer me to any authorities nor was he able to identify any specific confidential information which either Ms Idris or Ms Ang had obtained whilst employed by LFS. Rather, the respondent's position seems to be that because they had had some involvement with the respondent whilst employed by LFS they must have had access to confidential information which was material to the applicant's interests and detrimental to the respondent's interests, and that this was sufficient to support the application.

THE APPLICANT'S POSITION

16 The applicant relies on the affidavits of the two lawyers in which they both depose to their involvement with the respondent and state that they did not have access to any confidential information.

Najihah Idris

- 17 Ms Idris deposes in her affidavit dated 17 August 2018 that:
- i She was employed by LFS from May 2010 to January 2018
 - ii She commenced employment with HWLE in February 2018
 - iii Whilst employed by LFS she dealt with one file involving the respondent in relation to a different property unrelated to the applicant or to the property the subject of this proceeding ('the LFS file')
 - iv The extent of her involvement in the LFS file were in October 2017 over a one or two day period:
 - a. telephone communications with representatives of the respondent concerning a letter of demand received in relation to the unrelated property;
 - b. reviewed a handful of documents received by the respondent from the solicitor action on behalf of the property owner of the unrelated property;
 - c. prepared a letter in reply to the letter of demand
 - d. exchanged email correspondence with representatives of the respondent for instructions to proceed with the letter in reply;
 - v she has no recollection of any other involvement with matters concerning the respondent whilst at LFS and, in particular did not deal with this matter on behalf of the respondent whilst at LFS.

- 18 Ms Idris also sets out details of her involvement with this proceeding which included, under the supervision of her principal at HWLE, finalisation of and filing the application and Points of Claim, service of the application and Points of Claim on the respondent's registered office, telephone and email communications with the applicant's husband about this proceeding. Further, that since Mr Free raised his concerns about a possible conflict of interest, that Ms Idris has ceased assisting her principal in relation to this matter, and a 'Chinese Wall' has been put into effect until the question of conflict has been determined.
- 19 Ms Idris also states that if the Tribunal finds she has had access to confidential information of the respondent she is prepared to *give an undertaking to continue not to have any further involvement in this proceeding and to maintain the 'Chinese Wall'*.

Michelle Ang

- 20 Ms Ang swore an affidavit on 17 August 2018 in which she deposes that:
- i she commenced employment at LFS on 1 July 2015;
 - ii in July 2017 Ms Idris went on annual leave for approximately 6 months during which time she assisted Mr Free with the care and conduct of Ms Idris' matters;
 - iii to the best of her knowledge she did not have any interaction with any matters involving the respondent, although she says she may have had some administrative interaction including receiving phone calls from the respondent's representatives and transferring them to Mr Free;
 - iv Mr Free and Mr McLaughlin, director of the respondent have a professional relationship outside of their solicitor/client relationship. The respondent provides building repairs and maintenance services in the strata industry and Mr Free provides legal services in the strata industry. Further, that on occasion she was introduced to Mr McLaughlin by Mr Free when attending industry conferences with Mr Free as a representative of LFS;
 - v to the best of her knowledge from July 2017 to the end of her employment at LFS, LFS conducted only one matter on behalf of the respondent at the unrelated property referred to in Ms Idris' affidavit;
 - vi she commenced employment at HWLE on 8 May 2018 and has been assisting with this proceeding from the end of June 2018.
 - vii she is also prepared to *give an undertaking to continue not to have any further involvement in this proceeding and to maintain the 'Chinese Wall'*.
- 21 Mr Chan drew my attention to the following inconsistencies between these affidavits.

- 22 Ms Idris states in her affidavit that she assisted with the finalisation of and filing of the application and the Points of Claim in March 2018, yet they are both dated 9 May 2018. Further, I note that Ms Idris is identified as the contact person at HWLE for the applicant, on the application form.
- 23 Ms Ang states in her affidavit that Ms Idris was on annual leave for a period of 6 months from July 2017, which is inconsistent with Ms Idris' statement in her affidavit that her involvement at LFS with the unrelated matter was over a one to two day period in October 2017.
- 24 Accordingly, he submitted, I should reject the evidence in both affidavits as being unreliable.
- 25 Whilst I accept there seem to be some inconsistencies, I observe that Mr Chan did not request that the matter be stood down to enable Ms Idris and/or Ms Ang to attend the Tribunal for the purposes of cross-examination. Nor was any application made for the directions hearing to be adjourned to enable the filing of responsive affidavit material. Further, I note that Ms Idris' statement in her affidavit that her involvement with the unrelated matter in October 2017 is consistent with Mr Free's statement in his affidavit that she had access to confidential information of the respondent from July 2017.

DISCUSSION

- 26 The difficulty with the respondent's application is that neither the respondent nor its solicitors have identified with any specificity or at all, any confidential information which either of the two lawyers had access to which could, or even might, be to the benefit of the applicant and detrimental to the interests of the respondent. At its highest, it seems that the respondent is contending that because LFS has an open plan office, either or both of Ms Idris and Ms Ang must have been privy to unidentified confidential information. In my view, this is simply not enough to support the application.
- 27 Both Ms Idris and Ms Ang have given sworn evidence, on affidavit that they had limited involvement with the respondent whilst employed by LFS, and that they had nothing to do with the matter which is the subject of this proceeding. Both of them have stated they are only aware of one unrelated matter in which LFS acted for the respondent during their employment.
- 28 As is made clear by the authorities referred to above, it is a serious matter to deprive a party of their choice of lawyer, and a court or tribunal must exercise caution before exercising the discretion to restrain a lawyer from acting, and then must only do so in exceptional circumstances.
- 29 In the absence of any submissions from the respondent about the relevant principles, and having determined that I cannot be satisfied on the evidence before me that Ms Idris and/or Ms Ang have any confidential information of the respondent which is material to the applicant and detrimental to the respondent, it is not necessary for me to consider the other principles

enunciated in the authorities referred to above. Nor do I consider it necessary to consider the applicant's affidavit.

30 The application will therefore be dismissed.

DEPUTY PRESIDENT C. AIRD