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IN THE SUPREME COURT OF THE

TURKS AND CAICOS ISLANDS

Action No. CL 53/2020

BETWEEN:

THE HONOURABLE ATTORNEY GENERAL OF

THE TURKS AND CAICOS ISLANDS

PLAINTIFF

AND

SEAN SULLIVAN

DEFENDANT

CORAM: AGYEMANG CJ

LAURENCE HARRIS FOR THE PLAINTIFF

GEORGE MISSICK FOR THE DEFENDANT

HEARD ON: 16 FEBRUARY 2021

HANDED DOWN ON: 3RD MARCH 2021

RULING

(ON DISQUALIFICATION OF COUNSEL FOR THE PLAINTIFF)

1. The plaintiff has commenced this action against the defendant seeking the following reliefs:

1. A declaration that the Defendant is liable to account to the Plaintiff and compensate the Plaintiff for the loss caused by the TCIG Ministers' breach of fiduciary duties in respect of the Parcels which he assisted in the said breaches and in the sums referred to in Paragraph 80 above.

2. Equitable damages as assessed by the Court together with an account for the value of the Belongers' interests in the Parcels.

3. All necessary or appropriate accounts, inquiries and directions in connection with the above.

4. Alternatively, an account of profits as assessed by the Court.

5. Compound interest in equity or interest pursuant to the provisions of the Civil Procedure Ordinance (Chapter 4.01 of the Laws of the Turks and Caicos Islands), being interest on the damages at 6% above the First Caribbean International (Bahamas) Bank base rate from time to-time.

6. Costs.

BACKGROUND

2. This is what has grounded this suit in respect of which equitable relief is sought by the plaintiff: essentially, it is a claim based on the alleged dishonest assistance given by the defendant to a former Minister of the Crown: Mr. McAllister Hanchell, to sell land at North West Point at an undervalue to

Turks and Caicos Islanders (Belongers). The said purchasers then sold their parcels at a much higher price to a company whose alleged alter ego is the defendant: The River TCI Ltd (The River). It is alleged that this scheme by which the said Islanders were enabled to make ill-gotten gains was to the detriment of the Turks and Caicos Islands' Government which was allegedly deprived of its proper revenue.

PRESENT APPLICATION

3. Mr. Laurence Harris of the Law Firm of Cooley, United Kingdom (Cooley) appears as counsel for the plaintiff herein. His fitness to represent the plaintiff has been challenged in an application brought by learned counsel for the defendant in this suit: Mr. Missick, seeking his removal, as well as the removal of his colleague Mr. Maton, and their firm Cooley from representing the plaintiff in this suit.

4. Essentially, the defendant's submission on the disqualification of Mr. Harris (and also Mr. Maton) from representing the plaintiff, hangs on his allegation that he intends to call the two gentlemen as his own witnesses.

THE DEFENDANT'S CASE AND MR. MISSICK'S ARGUMENTS

5. The matters on which the defendant's decision to call Mr. Maton and Mr. Harris as witnesses and for which he wishes to have Mr. Harris removed as counsel of record (and indeed the entire firm of Cooley), are contained in a twenty-seven-paragraph affidavit in which he alleges the following matters in summary: In 2009, the defendant and a Mr. Dostie had some dealings with Mr. Maton, and Mr. Maton acted for them in it. The defendant recounted that the said Mr. Dostie, a Canadian lawyer was representing a Mr. Bouffard, a

developer who was seeking to amalgamate a site for development in Northwest Point, Providenciales for a development called "Ocean Creek". Mr. Dostie contacted the defendant because the defendant's company: The River, owned forty acres of land in that vicinity. Mr. Dostie allegedly entered into agreements with several Belongers that were issued Crown Purchase Lease offers in Block 60000, North West Point, for them to sell their land to him. While Mr. Dostie was concluding his deals, the defendant who had purchased forty acres of land in the place, received official communication informing him that the land he had acquired was in a National Park and could not be developed. It was then that the defendant, with Mr. Dostie, related with Mr. Maton, who at the time worked at the firm of Edwards Angell Palmer & Dodge, a company involved in civil recovery for the Turks and Caicos Islands Government.

6. According to the defendant, this was the extent of his relationship with Mr. Maton: *"I was contacted by Mr. James Maton from Edwards Angell Palmer& Dodge, in charge of Civil Recovery for TCI Government in 2010. Both personally and through my lawyer at that time, Mr. Robert Dostie, we communicated with Mr. Maton and answered all of his questions regarding The River's acquisition of the land in Northwest Point. Mr. Maton, now a member of the Cooley Law Firm issued no proceedings at that time and worked with me to facilitate a land swap for the land The River owned that now could not be developed …"*

7. After these dealings with the defendant in or around 2010, Mr. Maton subsequently moved to the firm Cooley as partner, and became the colleague

and partner of counsel of record, Mr. Laurence Harris. Learned counsel for the defendant avers that the two work in the same department in the firm.

8. In his affidavit in support of the present application, the defendant further alleges that Mr. Harris at some point, also related with the defendant. In the defendant's words: *"Mr Harris met with me before these proceedings were initiated and we had discussions about the Parcels in North West Point and I happily provided him with information willingly."*

9. But perhaps the matter that the defendant considers most disqualifying of Mr. Harris, is that a Mr. Andrew Mitchell QC, a holder of public office in the Turks and Caicos Islands who had a long-standing relationship with a Mr. Rhynie Campbell was introduced by Mr. Mitchell QC, to Mr. Harris. The said Mr. Campbell was once the defendant's partner in business. This relationship having gone sour, the defendant alleges that Mr. Campbell influenced the refusal by the Turks and Caicos Islands Government to grant the defendant permission to acquire and develop land at a place called Salt Cay. This Salt Cay plan for development had allegedly been encouraged and supported by Premier Robinson, and had led to the expenditure of considerable funds and energies.

10. The said refusal was also said to be tied to Mr. Mitchell QC who allegedly, unjustifiably informed the Cabinet that the defendant had issues tied to the trial of former senior Government Officials, in which Mr. Mitchell is engaged (referred to as the SIPT trial). The alleged interference was unjustified, as the problem the defendant had was in relation to a The Players Club that had had its casino licence suspended for non-payment of taxes, but which after the

SIPT investigations had had the licence restored and the taxes paid. It was the evidence of the defendant that it was Mr. Campbell who had influenced the said Mr. Mitchell QC against him.

11. The estranged partners: the defendant and Mr. Campbell having made their peace, Mr. Campbell again took up the task to persuade officialdom that the defendant be granted what he had applied for.

12. In respect of all these matters, a number of WhatsApp messages were exchanged among a number of persons; notable and relevant for our purpose were the messages exchanged between Mr. Campbell, ex-friend, ex-partner and now seeming collaborator of the defendant, Mr. Mitchell QC, and other persons. The messages show a close relationship between Mr. Campbell and Mr. Mitchell QC who on occasion, called him "little brother".

13. Before the commencement of the present proceedings, Mr. Mitchell introduced Mr. Campbell to Mr. Harris present counsel for the plaintiff. I reproduce the content of the emails by which the introduction was made:
"By this email, I introduce you one to the other so that any dialogue can take place directly between you. Seasons greetings.
Andrew Mitchell."

14. This was followed by this email which made reference to a civil recovery case regarding which Mr. Campbell wished to provide Mr. Harris with information.
"Dear Laurence.
Seasons Greetings.

We are coming to the end of term. We have many no-case submissions to respond to. (they served over 12,000 (sic) pages of them!!) But we will have served them by Monday and then have a decent break. In the meantime, Rhynie Campbell has contacted me, he is very interested in Salt Cay and Northwest Point, and in seeking to break the log jam for development agreement in both places. I said that I could not help. However, he mentioned that there was some sort of civil process being considered and he said that he wanted to talk to someone in order to get over to them what the states is a series of misunderstandings and he hopes he could clear them up. I wonder whether you would be prepared to have contact with him? If so, would you let me know? Meanwhile…"

15. Mr. Mitchell QC wrote to Mr. Campbell asking him to delete the said email.

16. There is no record of a return email from Mr. Harris to Mr. Mitchell or any evidence that pursuant to this email, there was contact between Mr Harris and Mr. Campbell.

17. Nevertheless, the defendant asserts that he intends to call Mr. Harris to examine him on these matters.

18. In response to this suit against him, the defendant denies any wrongdoing in his dealings with the land in question and has made a counterclaim against the plaintiff for causing him loss by not informing him that the land The River acquired at North West Point could not be developed, (being in a National Park), until he had already purchased it. He also alleges that the plaintiff has caused him further loss by reneging on a promise to do a land swap by way of

compensation for the belated communication that the land could not be developed. Lastly, he complains that the plaintiff having allegedly been influenced by Mr. Mitchell QC (he also having been allegedly influenced by the said Mr. Campbell), has caused him financial loss by refusing his application to develop Salt Cay. More particularly, he has made a counterclaim against the plaintiff for: monies he allegedly borrowed to finance the development of Salt Cay from Belize Bank; the difference in the actual value of the Parcels and the price paid by The River for the parcel; the cost and expenses incurred securing the Northwest Point and Salt Cay resort plans; the loss of profits that would have been generated by the Salt Cay resort; Interest on the damages at 6% above the First Caribbean International (Bahamas) Bank base rate from time to time; and costs. Learned counsel Mr. Missick asserts that for his defence of the suit against him and the prosecution of his counterclaim, the defendant intends to call the following persons as witnesses:

1. Mr. Maton – to give evidence for him to establish the following matters: That he was not aware that the parcels purchased by The River were in a National Park until 2009; that his dealings with the Turks and Caicos Islands Government were transparent, above board and without any impropriety, that the TCI Government had been willing to consider the land swap proposal, and to resolve the issue in a constructive and practical manner.

2. Mr. Harris - The defendant alleges that there is no evidence that as colleagues at Cooley, there was a firewall preventing communication between him and Mr. Maton; presumably, there was a chance that Mr. Maton would share information from when he represented the defendant. Furthermore, that

Mr. Harris' failure to disclose that he had received an "inappropriate email from Mr Mitchell which tried to influence him in respect of this case" should disqualify him.

RESPONSE BY MR. HARRIS

19. These matters have been vehemently denied by the plaintiff.

20. In his submissions, learned counsel Mr Harris has challenged the matters relied on by learned opposing counsel, and citing three cases on the subject of a legal practitioner's conflict of interest: *Geveran Trading Co. Ltd v Skjevesland [2002] EWCA Civ 1567; Bolkiah v KPMG [1999] 2 AC 222; Ladislav Hornan (Liquidator) v. Latif Group SL et al [2003] EWHC 536*, contends that the present application must fail.

21. He submits that the applicable test in the present application should be the existence of a risk that the confidence of the public in the judicial process would be impaired, should he continue to represent the plaintiff.

22. Responding to the intimation that he may be called as witness by the defendant, he asserts that no case has been made regarding any issue in the present suit in respect of which he must be called to give evidence. He contends that the absence of such an issue, must mean the absence of risk to the confidence of the public in the judicial process. He submits that it is not the case that he may be required to give evidence for his own client, he has never acted for the defendant; is not in possession of any confidential information; nor there has been any demonstration that he is in possession of material evidence necessary to resolve an issue in the suit. Citing the decision

in *Hornan*, he contends that even if there was some risk in relation to relevant evidence (which is not the case here), it would not, as was decided in *Hornan*, mean an automatic disqualification, especially if he was satisfied that there would be no conflict with his instructions by giving truthful evidence.

23. Castigating opposing counsel for bringing this application prematurely and for purely tactical reasons, he refers the court to *Geveran*, in which it was stated that the disqualification of a lawyer where there was no confidential information is involved is exceptional and must be justified.

ISSUES:

24. These are the issues to be determined in this application:

    1. Whether or not Mr. Maton's association with the defendant must mean a disqualification of present counsel and the firm of Cooley;

    2. Whether Mr. Mitchell's introduction of Mr. Campbell to Mr. Harris by email could mean his disqualification.

DISCUSSION

25. It seems to me that the answers to both questions must be negative, for which reason I shall make short work of this matter. To break down the affidavit evidence provided in this case, it is alleged that Mr. Maton who was described by the defendant as one of the "agents" of the plaintiff was involved in the defendant's negotiations for the land swap which went awry. It is also alleged that the matters that are being called into question in this suit against the defendant, are matters of which Mr. Maton involved in negotiations as one of the "agents" of the plaintiff at the time, had firsthand knowledge for which reason it may therefore be necessary to call him as a witness.

26. It may in fact be that Mr. Maton may be a material witness for the defendant in this suit, and that his evidence may be needed both in the defence of the suit and the prosecution of the defendant's counterclaim. Even so, I fail to see why Mr. Harris who became his colleague after these events, must be disqualified from representing the plaintiff.

27. Indeed, the test to be applied in this application that seeks the removal of Mr. Harris, and his law firm of Cooley is as stated: that is, a risk that the confidence of the public in the judicial process would be impaired. How is that risk assessed? Unlike a judge who must be impartial and must recuse him or herself at the slightest whiff of partiality, as was observed in *Gerveran,* there is no such expectation of a lawyer. Mr. Maton is not counsel of record in this suit, although he works in the same firm as Mr. Harris (Cooley).

28. And while there may admittedly be the possibility that Mr. Maton and Mr. Harris may share information, that possibility is remote, having regard to the fact that they are lawyers who by the ethics of the profession to which they belong, have each sworn to properly represent their clients and keep the confidence of their clients. Indeed, so sacrosanct is this principle of lawyer-client confidentiality that it is covered by privilege. Short of evidence that accuses both lawyers of impropriety in the discharge of their duties to their clients and in breach of their professional ethical rules, it will take more than a nebulous insinuation, a vague suspicion, or a fear born of a fanciful imagination, for their association as colleagues in a firm, to dent the confidence of the public in the judicial process.

29. In the absence of evidence of impropriety in their dealings with their clients, in order for their association to be a cause for the disqualification of Mr. Harris, there is so much that must be assumed for that intimation of impropriety to be made. It is noteworthy that in his first affidavit, the defendant deposed that Mr. Maton was in 2010, working for the Turks and Caicos Islands Government representing it in civil recovery, when he asked questions of the defendant and Mr. Dostie. He alleged Mr. Maton was involved in the land swap deal, as an "agent" of the plaintiff. It must be assumed that although he was involved in the negotiations for the land swap in 2010 (that is, ten years before this suit), he was in the position to provide material pertaining to the defendant's case, to Cooley which has been instructed in this case so many years after. It must further be assumed that the two gentlemen Mr. Maton and Mr. Harris have the relationship in which one would expect there to be exchange of information, including information involving Mr. Maton's dealings with the defendant, albeit in the capacity of an "agent" for the plaintiff. It seems to me, having had regard to all these matters, that while it is not impossible that the two gentlemen may be in a position to share a confidence regarding the defendant's case of 2010, it is not a very probable circumstance.

30. Yet even if that slight (and quite fanciful) supposition were to be considered, it must be considered in the light of the matters at stake. The matters alleged by the defendant, regarding the fiasco of his acquisition of land at Northwest Point and the subsequent negotiations for a land swap, (in respect of which he intends to call Mr. Maton as witness), are not contested matters. No issues appear to be joined on them, and no demonstration has been made regarding any adverse effect that the matters within the knowledge of Mr. Maton will

have on the case. Indeed on the defendant's own showing, the matters he may be calling on Mr. Maton to give evidence on, will help his case.

31. But it seems to me, that Mr. Maton himself, after this period of ten years, may not necessarily be disqualified from representing the plaintiff if the information he received so many years ago from the defendant in the said negotiations, was not confidential.

32. This matter is not of such sensitivity as the situation in ***Bolkiah v. KPMG [1998] UKHL 52; [1999] 2 AC 222; [1999] 1 All ER 517***, where there was held to be a conflict of duty with KPMG's former client. In that case, the House of Lords was faced with the question regarding the duties of the respondent accountants (KPMG) where confidential information in their possession in respect of a former client (Jefri) which might be relevant to instructions from their new client: the Brunei Investment Agency (Jefri had been its Chairman), to investigate the whereabouts of certain assets suggested to have been used by Jefri for his own benefit. In granting an injunction against KPMG, it was held that that firm bore the burden to show that there was no risk of the information coming into the possession of those within KPMG acting for the Agency. The evidence was that the two teams involved– one which had acted for Prince Jefri and the one which was acting for the Agency – *"contained large and rotating memberships of persons accustomed to working with each other"*.

33. In this case, as aforesaid, Mr. Maton who at the time was involved in negotiations with the defendant, albeit as "agent" for the plaintiff, (about a decade before the institution of this suit), belonged to a different firm, must

be held to be in possession of confidential information which will be adverse to the case of the defendant, for him to be disqualified from representing the plaintiff in this suit. No such case has been made, and even less so, regarding Mr. Harris who is counsel in this case.

34. It seems to me that the circumstance at play here (in respect of Mr. Maton) is reminiscent of ***Koch Shipping Inc v Richards Butler [2002] EWCA Civ 1280*** in which claimants in an arbitration were denied orders they sought with regard to a solicitor who having moved to the opponent's firm of solicitors, and possessing privileged knowledge of the claimant's business dealings, had offered undertakings which the claimant viewed these as inadequate. In the appeal by the respondent firm of solicitors against an order to withdraw from the action, it was held that such matter must be handled on a case-by-case basis. The court further held that there was no reason to question the professionalism, skills and integrity of the solicitor in question, and that it was fanciful to imagine the solicitor inadvertently divulging information to the detriment of the claimant. Most insightful is the dictum of Tuckey LJ which I wholly agree with and adopt in this matter: *'In these days of professional and client mobility it is of course important that client confidentiality should be preserved. Each case must depend on its own facts but I think there is a danger inherent in the intensity of the adversarial process of courts being persuaded that a risk exists when, if one stands back a little, that risk is no more than fanciful or theoretical. I advocate a robust view with this in mind so as to ensure the line is sensibly drawn.'*

35. The test, I must reiterate is that there is a real risk that the public's perception of the integrity of the judicial process will be adversely affected. It does not

appear to be so here. As was held in ***Geveran Trading Co Ltd v Skjevesland: CA [2002] EWCA Civ 1567,*** whereas a judge has a duty to be independent of the parties, in order to avoid actual or apparent bias, no such duty falls on counsel, the only relevant matter being if his representation could prejudice the administration of justice) although a court might disqualify counsel where there was a complaint as to use, or disclosure of confidential material in his possession, or other exceptional material).

36. Having reviewed the authorities, it seems to me that Mr. Harris' association with the defendant through Mr. Maton is too tenuous to have any real significance. It seems to me that the mere fact of Mr. Harris' association with Mr. Maton should not disqualify him in the present circumstances where no allegation has been made that there is in the possession of Mr. Maton, confidential information that could in very probable circumstances be used by Mr. Harris against the defendant, with whom the Mr. Maton had dealings, albeit as "agent" of the plaintiff from more than a decade ago, when he worked in a different firm.

37. I cannot agree that in the peculiar circumstances of this case, the firm Cooley or Mr. Harris owed any duty to the defendant (as intimated by Mr. Missick), to demonstrate that they had erected a firewall between Mr. Harris and Mr. Maton.

38. The second matter complained of against Mr. Harris is the allegation that before these proceedings, he spoke with the defendant about the acquisition of land at North West Point, the circumstances of which is now being called into question. In the defendant's words: *"Mr Harris met with me before these*

proceedings were initiated and we had discussions about the Parcels in North West Point and I happily provided him with information willingly."

39. The defendant does not say exactly what was discussed or the circumstances of that meeting. He does not say that he gave Mr. Harris any confidential information or any information which may be used to his detriment. But most importantly, he does not say that he gave information to Mr. Harris, while pursuing a professional relationship with him.

40. Mr. Harris has repeatedly stated that he has never acted for the defendant. In the face of that bold assertion, the defendant had to present cogent evidence that their relationship was more than a casual or social one, and that the information he gave him was of importance in this case, and could be used against him, for Mr. Harris to be disqualified for it.

THE MITCHELL-HARRIS EMAIL:

41. Mr. Missick has made much ado about an email sent by Mr. Andrew Mitchell QC to Mr. Harris in which he introduced a Mr. Rhynie Campbell to Mr. Harris. Mr. Missick asserts that the introduction was in pursuance of a nefarious design to influence Mr. Harris in the present suit. He has described the relationship between the defendant and the said Mr. Campbell to be estranged partners and former friends, by producing Whatsapp messages, from which may be gleaned a number of matters, including alleged unsavoury dealings of Mr. Campbell, a questionable relationship between him and Mr. Mitchell QC, Mr. Campbell's apparent ability to, and enterprise of influencing the refusal of a grant to the defendant to develop Salt Cay (at once insinuated and denied), an allegation at once assumed and denied that Mr. Mitchell QC's

word was what led to the refusal by Cabinet of the grant for the defendant to develop Salt Cay, among many matters that was private conversation between persons dealing in such capacity with each other. In the light of the Whatsapp messages, it is urged on this court that the introductory email must be seen in the light of impropriety that opens Mr. Harris to questions, answers to which must be obtained in the witness-box. It is for this reason that Mr. Missick insists that he intends to call Mr. Harris as witness.

42. And indeed, he may, but to what purpose, and in the resolution of which issue in this suit? It must be noted that section 4 of the Evidence Ordinance Cap 2.06 provides: *"Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue, and of such other facts as are hereinafter declared to be relevant, and of no others…"* While it is premature at this point to make any finding on the nature of the evidence sought, it seems to me that there has not been sufficient demonstration of the relevancy of the evidence in respect of which Mr. Harris assistance may be needed, in relation to the facts in issue, to aid the court in making the determination that his presence as a witness will serve any useful purpose. It is worthy of note that while the introductory email has been reproduced for the benefit of the court, there has been no answering email indicating what Mr. Harris intended to do with the introduction. But assuming that there was information to be obtained by calling Mr. Harris as a witness, why should that disqualify him from representing the plaintiff whose claim is founded on dishonest assistance, and even in the counterclaim which seeks in essence damages for the refusal of the government to grant the defendant permission to develop Salt Cay, or to complete a land swap allegedly promised him? It is unfortunate that Mr. Harris gave the impression when asked of communication between him and

Mr. Mitchell QC, that there had been none. He has since clarified with an apology that he had in fact received the email from Mr. Mitchell QC under discussion. I must take his word spoken at the Bar, that there was no subterfuge involved in the prior response.

43. In *Hornan*, it was stated (Obiter) that where a solicitor may have had to give evidence and there had been no confidential information in issue, although there need not be a demonstration of exceptional circumstances to secure the solicitor's removal, it had to be fully justified. I have grave difficulty in finding a 'full' justification to remove Mr. Harris for the reasons given.

44. Sections 17 to 23 of the Legal Profession Ordinance contains provisions to guide attorneys and in a circumstance such as this, the court in determining matters of conflict of interest. It seems to me that section 20 is the closest to the defendant's allegations in this application*: "An Attorney shall not act for an opponent of a client, or former client, in any case in which his knowledge of the affairs of such client or former client may give him an unfair advantage."* The evidence adduced however does not justify the action sought, which is removal either under the LPO or at common law.

45. I must therefore decline the invitation to remove Mr. Harris from representing the plaintiff in this suit.

46. The application by the defendant to have Mr. Harris, Mr. Maton, and the firm Cooley removed from representing the plaintiff in this suit is hereby dismissed.

47. Costs to the plaintiff.

Sgd.

M.M. AGYEMANG

CHIEF JUSTICE