[2015] JMCCD 16

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2013CD00146

(NO 3)

BETWEEN	**JMMB MERCHANT BANK LIMITED**	**CLAIMANT**
AND	**WINSTON FINZI**	**FIRST DEFENDANT**
AND	**MAHOE BAY COMPANY LIMITED**	**SECOND DEFENDANT**

IN CHAMBERS

Caroline P. Hay for the Claimant

Hugh Wildman and Dr Christopher Malcolm for the defendants

July 28 and 30, 2015

ATTORNEY/CLIENT – APPLICATION BY FORMER CLIENT TO REMOVE ATTORNEY AND FIRM FROM REPRESENTING BANK – WHETHER ATTORNEY CAN BE PREVENTED FROM ACTING AGAINST FORMER CLIENT

SYKES J

[1] Mr Winston Finzi and Mahoe Bay Company Limited have applied to have Mr Michael Hylton QC and his firm barred from representing JMMB Merchant Bank Limited (JMMB) in the substantive litigation which is a dispute between JMMB on the one hand and Mr Winston Finzi and Mahoe Bay Company Limited on the other about whether Mr Finzi is liable to pay the sums demanded in respect of three loans made between 2006 and 2009. An additional issue is whether Mahoe Bay Company Limited is liable as the guarantor of the loans.

[2] Mr Hugh Wildman submitted that the facts and circumstances of this case are such that it is necessary for the court to make this order. What are those facts and circumstances? It is common ground that Mr Hylton was a member of and ultimately partner in the firm of Myers Fletcher and Gordon ('MFG'). It is common ground that that firm did conveyancing for and on behalf of Mr Finzi and his companies. Therefore there is no doubt that the relationship of attorney/client existed between Mr Finzi, his companies (those that the firm acted for in various transactions) on the one hand and MFG on the other. It is agreed that at some point Mr Hylton conducted litigation on behalf of one of Mr Finzi's companies.

[3] In this context, it must have been the case that the MFG, in the course of the representation of Mr Finzi and his companies, have acquired confidential information and in all likelihood privileged information. Mr Finzi wishes to take advantage of Lord Hope's observation in **Bolkiah v KPMG** [1999] 2 AC 222, 227:

> *Particular care is needed if the solicitor agrees to act for a new client who has, or who may have, an interest which is in*

> *conflict with that of the former client. In that situation the former client is entitled to the protection of the court if he can show that his solicitor was in receipt of confidential information which is relevant to a matter for which the solicitor is acting, against the former client's interest, for a new client*

[4] Under cross examination Mr Hylton stated that Mr Norman Minott, who was a senior partner at the firm during the attorney/client relationship with Mr Finzi, was the main attorney at law who had conduct of Mr Finzi's conveyancing matters. In all probability he was assisted by an associate.

[5] Mr Hylton also agreed that he did act for Mr Finzi in the late 1980s and companies controlled by him in court proceedings relating to land in Montego Bay. He, too, was assisted by other attorneys in the representation of Mr Finzi. Mr Hylton said that did represent companies Mr Finzi controlled but not Mahoe Bay Company Ltd in particular. Learned Queen's Counsel recalled that he advised Mr Finzi that when he was purchasing property it was prudent to have a properly drafted agreement for sale. Queen's Counsel accepted that while representing Mr Finzi he would have received confidential information. Mr Hylton accepted that there was discussion of Mr Finzi's matters from time to time between the partners. He also said that while he knew that Mr Minott was doing the conveyancing transactions he did not have knowledge of the details.

[6] In his affidavit, Mr Hylton stated that he practised at MFG between 1976 and 2000 when left to join the public service and later to establish his own firm. He said that he ceased representing Mr Finzi in the late 1980s and has not acted for Mr Finzi or his companies since that time. It was also his evidence that Mr Finzi, his companies and MFG ceased the attorney/client relationship in or about 1990.

[7] As an example of what may happen, Mr Finzi says that the statement in Mrs. Bartley Thompson's affidavit to the effect that Mr Hylton was told by one of Mr

Finzi's present attorneys (who represent him in the substantive action and not this application) that the purchaser of one of his properties was the mother of his child or children makes the point. Mr Finzi's case is that that statement did not come from any of Mr Finzi's attorneys but must have come during the time MFG represented Mr Finzi and his companies. Mr Hylton denied this and insisted that he was given that information by one of Mr Finzi's attorneys in 2015. Mr Hylton added that he did not know or know of the lady before this year.

[8] The court should state that it took account of affidavits filed just before judgment was delivered. These were affidavits from Mr Paul Beswick and Miss Georgia Buckley, attorneys at law, Mr Winston Finzi and Mr Jordan Finzi. Having read them they do no assist the applicant in clearing the legal hurdle of showing the relevance of the acquisition of the properties to the present claim.

[9] In these circumstances, Mr Finzi says that there is a conflict of interest. He also believes that there is or may be a breach of confidence in that he is of the view that it would be wrong for his former attorney who had received confidential information from him during the time he was represented by Mr Hylton to appear now for JMMB in this litigation. He believes that there is a risk that the confidential information may be used or has been used to his disadvantage. This application is forestall the risk actually coming to pass or if it has happened, to prevent it from continuing.

The applicable law

[10] The law in this area is counter intuitive. To many it may seem that there is something inherently wrong in an attorney representing a client in one matter and then representing another client against the first client in a subsequent case. But what does the law actually say? The legal position is that there is nothing inherently wrong with an attorney representing someone in a matter against his former client. One of the first cases to deal with this is the case of **Rakusen v**

Ellis, Munday & Clarke [1912] 1 Ch 831. In that case, Mr Munday and Mr Clarke were the only two partners in a firm of solicitors. For all practical purposes they operated independently of each other. The operated as if they were separate practices and neither knew the clients of the other. Mr Rakusen had consulted Mr Munday in relation to a claim for wrongful dismissal he wished to bring against a company. For some reason he did not follow up with Mr Munday. He retained new solicitors, issued his claim and the matter was then referred to arbitration. While the consultation with Mr Munday was taking place, Mr Clarke was away on vacation and knew nothing of the consultation. Mr Clarke was eventually appointed to act, in the arbitration, for the company Mr Rakusen had sued. He was appointed under the name of the firm. Mr Rakusen sought an injunction restraining the firm from acting for the company. He was granted his injunction at first instance. There was an appeal and injunction was removed.

[11] At page 835 Lord Cozens Hardy MR had to consider this submission:

> *It is said that in addition to the absolute obligation not to disclose secrets there is a general principle that a solicitor who has acted in a particular matter, whether before or after litigation has commenced, cannot act for the opposite party under any circumstances; and it is said that that is so much a general rule and the danger is such that the Court ought not to have regard to the special circumstances of the case.*

[12] His Lordship continued:

> *I do not doubt for a moment that the circumstances may be such that a solicitor ought not to be allowed to put himself in such a position that, human nature being what it is, he cannot clear his mind from the information which he has*

> *confidentially obtained from his former client; but in my view we must treat each of these cases, not as a matter of form, not as a matter to be decided on the mere proof of a former acting for a client, but as a matter of substance, before we allow the special jurisdiction over solicitors to be invoked, we must be satisfied that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act.*

[13] In the first of these two passages we see a strong submission being made to the court to take an absolute position, that is to say, at no time is an attorney at law permitted to represent a subsequent client against a former client. Counsel for Mr Rakusen was suggesting that the rule to be adopted should be absolute and its application should be such that the circumstances of the case would be irrelevant. Once it could be shown that the lawyer had acted for the client he should be barred from acting against that client regardless of circumstances.

[14] However, as can be seen from the second passage, his Lordship was not keen on that position. The Master of the Rolls indicated that before the special jurisdiction of the court to remove an attorney is exercised the court must be satisfied that 'real mischief and real prejudice will in all human probability result if the solicitor is allowed to act.' So the absolute rule advocated was not adopted.

[15] The Master of the Rolls observed that had it been the case that Mr Munday was appointed for the company then the granting of the injunction would follow. His Lordship said at page 836:

> *But what are the facts here? The communications all took place with Mr. Munday. At that time Mr. Clarke was away for his vacation out of the country and he knew nothing about it. He had never seen Mr. Rakusen. He had not had any communication with him, and was really a complete stranger*

> *to the matter. Before the writ was issued, Messrs. Ellis, Munday & Clarke had ceased to be solicitors for Mr. Rakusen, and in those circumstances is there any reason why Mr. Clarke, who was allowed to watch and attend proceedings in the arbitration (for I ought to say the action was referred to arbitration) and was allowed to attend on behalf of a shareholder before the arbitrator for some days—is there any reason why he should not be allowed to act as and to appear as solicitor for the company? In my opinion there is no substance whatever in the objection. There is no prejudice, there is no mischief, and having regard to the undertaking which was offered that although the solicitors on the record for the company are now Ellis, Munday & Clarke that should be changed and Mr. Clarke should alone be the solicitor on the record, I can see no ground for granting the injunction.*

[16] Note that the Master of the Rolls engaged in an intense scrutiny of the facts in order to arrive at his decision. His Lordship then sought to correct the approach taken by the first instance judge. At pages 838 – 839, the Master of the Rolls held:

> *Warrington J. has said, and it has been admitted on both sides here, that we are dealing with solicitors of the highest position and whose honour and integrity are beyond any imputation. No possibility of the disclosure of secrets has ever been suggested, but Warrington J. merely bases his judgment on this, that it has been frequently said in this Court that a solicitor is an officer of the court and cannot be allowed to put himself into a position in which his duty to his present client may conflict with his duty to his past client.*

With great respect to Warrington J. I think that goes a great deal too far. Many busy solicitors in this country would find it impossible to carry on their business at all if that was the true rule. I think solicitors of the highest honour and integrity may frequently be perfectly able to act in the same matter for a new client, and at the same time may be perfectly able to avoid disclosing secrets without putting any strain upon their memory, conscience, or integrity.

[17] Fletcher Moulton LJ also examined the facts of the case and concluded that on the evidence presented there was no risk to Mr Rakusen. The Lord Justice had this to say at pages 841:

As a general rule the Court will not interfere unless there be a case where mischief is rightly anticipated. I do not say that it is necessary to prove that there will be mischief, because that is a thing which you cannot prove, but where there is such a probability of mischief that the Court feels that, in its duty as holding the balance between the high standard of behaviour which it requires of its officers and the practical necessities of life, it ought to interfere and say that a solicitor shall not act. Now in the present case there is an absolute absence of any reasonable probability of any mischief whatever. It is an attempt to induce the Court to move, on the most purely technical grounds, in a matter in which it ought to deal with realities. The client consulted Mr. Munday only and nobody acquired any knowledge of any communication confidential or otherwise to Mr. Munday other than that gentleman himself. Mr. Clarke, his partner, was away at the time, and it is admitted that he did not even know that Mr. Munday had been consulted, and a fortiori knew nothing whatever of the communications which were

made to him, and he is willing to undertake not to make any inquiries or obtain any information from his partner with regard to the matter. Nobody pretends that this gentleman will not act up to that undertaking, and if we were to say that he—not his firm, but that he—was not to act, in my opinion we should be abusing the power that we certainly possess of directing what the officers of the Court should and should not do. For these reasons, though I think that it was a mistake to suggest that the name of the firm should formally appear on the proceedings as the solicitors of the company, I see no reason whatever why Mr. Clarke should not act for them, and I am satisfied that no mischief whatever will come from it.

[18] Buckley LJ held at page 842 – 843:

There is no general rule that a solicitor who has acted in a particular matter for one party shall not under any circumstances subsequently act in that matter for his opponent. Whether he will be restrained from so acting or not depends on the particular circumstances. Of course he will be restrained from communicating confidential information, but the respondents contend that when there is no danger of this happening the solicitor will still be restrained from acting. Further they maintain a still larger proposition and assert that this extends to the partner (who knows nothing of the matter) of the solicitor who from his previous employment does know something.

In my opinion neither of these propositions can be maintained. In some of these cases the injunction sought

> *has been an injunction to restrain the new client from employing the solicitor and an injunction to restrain the solicitor from acting. In the present case the injunction is asked only against the solicitor, but it must not be forgotten that such an injunction if granted has just the same effect so far as the client is concerned as if the injunction were granted against him also. He cannot obtain the services of that solicitor. The question then involves the consideration of the circumstances under which a client is to be prevented from obtaining the services of a particular solicitor. The circumstances I think are these: the jurisdiction is a jurisdiction to restrain the solicitor from giving the new client any assistance against the old client by reason of knowledge acquired as solicitor for the old client. If to ensure that result it is shewn to be reasonably necessary to restrain the employment of the solicitor by the new client the injunction will be granted, but on no other ground could such an injunction be granted as against the client*

[19] Some further observations must be made about this case. First, the fact that solicitor consulted was in the same firm as the solicitor appointed for the company did not lead to an automatic bar. Indeed if ever there was a case where an automatic bar or a very stringent application of the law could reasonably be expected, this was the case. Second, there was no presumption that because one solicitor was consulted it followed that he would necessarily communicate with the other solicitor in the firm. Third, the court actually examined the evidence presented and made findings and applied the law. Fourth, it is not sufficient to make the allegation of conflict of interest - it has to be established by admissible evidence. Fifth, whether the solicitor will be removed depends on the particular circumstances.

[20] These applications were not uncommon in the nineteenth century in England and Wales but it is clear is that over time, the principle emerged that removal of counsel is an extraordinary step and that should not be done lightly.

[21] The next case of importance is that of **Prince Jefri Bolkiah v KPMG** [1999] 2 AC 222. In that case, Prince Bolkiah was in charge of an investment agency in Brunei. The activities of the agency were secret. During the time of his stewardship the Prince was engaged in major litigation concerning his financial affairs. He retained an accounting firm to provide forensic accounting services and litigation support in his case. That case was settled. During the course of the litigation the firm provided services normally provided by solicitors and also had access to very confidential information concerning the Prince's financial affairs. As is common in politics, fortunes wane, ill winds blow and tides rise. The Prince came under suspicion of being a less than perfect steward of the financial resources of the agency. His financial affairs were being investigated by the same firm of accountants that represented him in his litigation. The Prince sought and obtained an injunction barring them from acting for the agency in the investigation of his affairs. His submission was that the firm had in fact acquired very confidential information about his affair and there was the risk of breach of confidence.

[22] The defendant took steps to prevent any disclosure but the first instance judge held that those steps were inadequate. The judge was reversed by the Court of Appeal but restored by the House of Lords. Lord Millett delivered the leading judgment which was concurred in by the other Law Lords. Even though the matter involved a firm of accountants the court treated the matter as if it also applied to lawyers.

[23] Interestingly, the Prince contended, initially, for an absolute rule but resiled from that position. Lord Millett, with his customary clarity of thought and expression, put the matter this way at page 235:

Where the court's intervention is sought by a former client, however, the position is entirely different. The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.

Accordingly, it is incumbent on a plaintiff who seeks to restrain his former solicitor from acting in a matter for another client to establish (i) that the solicitor is in possession of information which is confidential to him and to the disclosure of which he has not consented and (ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own. Although the burden of proof is on the plaintiff, it is not a heavy one. The former may readily be inferred; the latter will often be obvious. I do not think that it is necessary to introduce any presumptions, rebuttable or otherwise, in relation to these two matters. But given the basis on which the jurisdiction is exercised, there is no cause to impute or attribute the knowledge of one partner to his fellow partners. Whether a particular individual is in possession of confidential information is a question of fact which must be proved or inferred from the circumstances of the case. In this respect also we ought not in my opinion to follow the

jurisprudence of the United States.

[24] Lord Millett continued at pages 235 – 236:

> *Whether founded on contract or equity, the duty to preserve confidentiality is unqualified. It is a duty to keep the information confidential, not merely to take all reasonable steps to do so. Moreover, it is not merely a duty not to communicate the information to a third party. It is a duty not to misuse it, that is to say, without the consent of the former client to make any use of it or to cause any use to be made of it by others otherwise than for his benefit. The former client cannot be protected completely from accidental or inadvertent disclosure. But he is entitled to prevent his former solicitor from exposing him to any avoidable risk; and this includes the increased risk of the use of the information to his prejudice arising from the acceptance of instructions to act for another client with an adverse interest in a matter to which the information is or may be relevant.*

[25] And at page 237:

> *I prefer simply to say that the court should intervene unless it is satisfied that there is no risk of disclosure. It goes without saying that the risk must be a real one, and not merely fanciful or theoretical. But it need not be substantial.*

[26] In the circumstances of that case. Lord Millett concluded that the firm had not discharged the ‘heavy burden of showing that there is no risk that information in

their possession which is confidential to Prince Jefri and which they obtained in the course of a former client relationship may unwittingly or inadvertently come to the notice' of those working for the agency in the matter against the Prince.

[27] The decision to grant the injunction in favour of the Prince is not surprising. The financial affairs of the Prince were directly relevant to the investigation into whether the Prince, during his time in charge of the agency, had mishandled the agency's money.

[28] Lord Millett emphasised that simply making the allegation against a lawyer is not sufficient. The former client must establish that the solicitor is in possession of information which is confidential to him and has not consented to the disclosure and that it is relevant to the new matter. The burden is not heavy. Once the former client meets this standard then there is a heavy burden on the lawyer to show that there is no risk that the confidential information may unwittingly or inadvertently be disclosed. The comment that has to be made here is that the lawyer is asked to prove a negative. As a practical matter, the lawyer will always have confidential information from a client and unless there is some way of erasing all memory then it will not be hard to infer that the lawyer has confidential information. It seems to this court that once the lawyer has the information there will always be the risk of inadvertent disclosure simply because inadvertent or accidental disclosure is just that – inadvertent or accidental. This perhaps explains why the law requires that the information should be relevant to the case in which the lawyer is now acting.

[29] The other important point to emerge from Lord Millett was that the intervention of the court in favour of a former client was founded on the need to protect the confidentiality of the client and not on the basis that the lawyer was still in fiduciary relationship with the client. According to his Lordship once the lawyer/client relationship ended the fiduciary obligations ended but that obligation of confidentiality continued.

[30] An important case in the post **Bolkiah** era is the case of **Geveran Trading Co Ltd v Skjevesland** [2003] 1 WLR 912. In that case, during the hearing of a bankruptcy petition against a debtor, his wife discovered that she knew the petitioner's lawyer. He was someone she had become acquainted with socially while the proceedings were going on. The debtor sought to have the petitioner's lawyer removed from the case. The Court of Appeal rejected that application. The most important point of the decision for our purposes is the following from Arden LJ. Her Ladyship stated, at paras 42 – 43 that:

> *The court has an inherent power to prevent abuse of its procedure and accordingly has the power to restrain an advocate from representing a party if it is satisfied that there is a real risk of his continued participation leading to a situation where the order made at trial would have to be set aside on appeal.* ***The judge has to consider the facts of the particular case with care****: see the words of Lord Steyn in Man O' War Station Ltd v Auckland City Council [2002] UKPC 28 at [11]. However, it is not necessary for a party objecting to an advocate to show that unfairness will actually result. We accept Mr Jones's submission that it may be difficult for the party objecting so to do. In many cases it will be sufficient that there is a reasonable lay apprehension that this is the case because, as Lord Hewart CJ memorably said in R v Sussex Justices, Ex p McCarthy [1924] 1 KB 256 , it is important that justice should not only be done, but seen to be done. Accordingly, if the judge considers that the basis of objection is such as to lead to any order of the trial being set aside on an appeal, as in R v Smith 61 Cr App R 128 , he should accede to an order restraining an advocate from acting.* ***But we stress that the judge must consider all the circumstances carefully****. A connection, for instance,*

between counsel for one party and a witness on the other side may be an important factor where the evidence is of fact but, depending on the nature of the connection, it may be less important where the evidence is of an expert nature and the cross-examination is likely to be on questions of technical expertise. The judge should also take into account the type of case and the length of the hearing, and any special factor affecting the role of the advocate, for instance, if he is prosecuting counsel, counsel for a local authority in care proceedings or as a friend of the court.

43 A judge should not too readily accede to an application by a party to remove the advocate for the other party. It is obvious that such an objection can be used for purely tactical reasons and will inevitably cause inconvenience and delay in the proceedings. The court must take into account that the other party has chosen to be represented by the counsel in question. Moreover, an advocate is subject to the cab-rank rule. If the court too willingly accedes to applications to remove advocates, it would encourage advocates to withdraw from cases voluntarily where it was not necessary for them so to do and the cab-rank rule would be undermined.

[31] Again we see that Arden LJ was stressing the importance of looking at all the facts and circumstances of the particular case. The case restated the idea that it is not necessary to prove actual disclosure or that unfairness will actually result.

[32] The Lady Justice was alive to the principle of equality of arms and the right of a litigant to have counsel of his choice. The court was cautioned against being too hasty to accede to the application for removal of counsel. It must be noticed that her Ladyship suggested that the court can properly have regard to the nature of

the evidence, the type of case, the length of the hearing and any special factor affecting the role of the advocate. A judge should also take into account the possibility that acceding to the request for removal of counsel may result in a litigant not having representation or having inadequate representation.

[33] It appears that this matter has not come up frequently in the Jamaican courts. The first known judgment (there may well be others) is **Olint Corp Ltd v National Commercial Bank** Claim No 2008HCV00118 (unreported) (delivered March 6, 2008). In that case the claimant sought to remove the attorney and his firm from acting for the bank. Mr Smith was operating an investment scheme, under the name of the company Olint Corporation Ltd ('Olint'),which had run into difficulties. The regulator took the view that the scheme ought to be regulated. Mr Smith disagreed and thereafter the regulator took all possible steps to bring the scheme's operation to an early end. A cease and desist order was granted by the Supreme Court on the application of the regulator. The regulator raided the offices of the scheme and removed computers and records. Mr Hylton was the Solicitor General and a Commissioner of the regulator at the material time. In that context Mr Hylton, it was said, would have had and did have access to confidential information about the company which was operating the scheme.

[34] Having now moved into private practice Mr Hylton was now representing the bank in a dispute with Olint. The application was refused. One of the primary reasons given was that the information alleged to be confidential was already in the public domain. Another significant reason was that the information was not relevant to the issues joined between the parties in the claim. A third significant reason was that the claimant had not disclosed 'the nature of the information contained in the document shown to or given to Mr Hylton QC nor have they indicated the nature and contents of the documents seized by the FSC' (para. 57). The result was that the court 'was unable to assess the relevance the confidential information contained in those documents to the issues in this case' (para 57). Here we see Jones J examining the evidence closely. Jones J reminded that removal of counsel interferes with the right of a litigant to counsel

of his choice and therefore an attorney should not be barred without a proper basis.

[35] Jones J, at paragraph 16, formulated the three issues to be decided are:

a. whether confidential information was disclosed to counsel and there was no consent for its disclosure;

b. whether the information is relevant to the current litigation;

c. whether there was a real risk that the confidential information would be disclosed.

[36] From my reading of the **Olint** case I would observe the following. First, neither Mr Smith nor his company was a client of Mr Hylton and therefore the relationship of attorney/client never arose. Second, the public offices held by Mr Hylton meant that he never had an interest that was anything other than adverse to the interest of Mr Smith. Third, the trial judge was rather generous in analysing the matter in terms of whether Mr Hylton could take a client with an interest adverse to Mr Smith when the reality of the circumstances was that at no time was Mr Hylton ever aligned with Mr Smith's interest. Mr Hylton's position was that of a government official who was part of an operation to shut down the unregistered scheme. It was the regulator of which Mr Hylton was a Commissioner and later its Chairman that raided the offices where the scheme operated and then shut it down via court order. Fourth, when looked at in this way, the die was cast and the outcome could only be one way,that is dismissal of the application.

[37] The only hope for Olint was to rely on the secrecy provisions in the statute governing the regulator. That would arise not because of any duty to Mr Smith but because a statute said so. Mr Hylton had no relationship with Olint that would

impose a duty of secrecy. Mr Hylton's secrecy obligation arose because he was a Commissioner and later Chairman of the regulator and if anything it was to that institution he would owe any duty of confidentiality even in the absence of the statutory provision.

[38] From the cases cited above the following is established:

a. there is no absolute or automatic rule preventing an attorney at law from acting for a subsequent client against a former client;

b. the Supreme Court has an inherent power over attorneys at law and on that basis, in a proper case, can restrain an attorney, by an injunction, from representing a current client against a former client;

c. before making such an order barring the attorney from representing the current client, the court must be mindful of the fact that such an order has the consequence of depriving a litigant of his right to choose the attorney he or she wishes to represent him or her;

d. if a court shows itself to ready to grant such an order it may encourage attorneys to withdraw from cases where it was not necessary for them to do so and undermine the 'cab-rank rule' which was developed to ensure that unpopular persons or persons representing unpopular causes were able to secure legal representation;

e. the burden is on the applicant to show that (a) the attorney is in possession of confidential information and that he or she has not consented to its disclosure and (b) the information is or may be relevant to the current matter;

f. the burden on the applicant is not heavy while the burden on the attorney once the applicant crosses the threshold is heavy;

g. the exercise of the power requires the court to consider all the facts and circumstances including the nature of the case and the nature of the evidence;

h. the applicant should inform the other side, without delay, as soon as the applicant has the information that would give rise to the application;

i. it is irrelevant how long before the representation of the former client ceased because once confidential information is given then the attorney is under an obligation to maintain that confidence to his or her grave unless the client gives consent for the disclosure;

j. the power to remove an attorney in a case is a special power which should not be exercised lightly;

k. once the applicant makes the case for disclosure and the attorney has not rebutted the evidence or has not demonstrated that the risk is non-existent or very, very remote then it appears that the order should be made.

Application to facts

[39] This court starts from the position that Mr Hylton QC received confidential information while he represented Mr Finzi and some of the companies controlled by him. Mr Hylton accepted that he did receive confidential information during his representation of Mr Finzi and the companies.

[40] As a practical matter the court can understand why Lord Millett said the burden on the applicant was not heavy. The reason appears to be that the applicant still wants his information remain confidential and that is the raison d'être for the application. The court accepts that the applicant must give some idea of what the information is and its relevance to the present claim. However, the court must be

sensitive to the fact that requiring the applicant to spell out in great detail the precise nature of the information would be self defeating.

[41] It is not surprising that Lord Millett places a heavy burden on the attorney at law. This is consistent with the stance taken by the law whenever there is a dispute between the attorney and a client – the law starts out favouring the client over the attorney. The law embraces the client with a velvet glove and grips the attorney with an iron fist.

[42] In his affidavit of July 14, 2015, Mr Finzi spoke to the transactions involving the land that has been sold by the mortgagee and Mr Hylton's representation of him. These are the paragraphs from Mr Finzi's affidavit that are material to this application. They are paragraphs 4, 5 and 6 respectively of his affidavit dated July 14, 2015.

> *Michael Hylton, who is the founding partner of Hylton Powell, was my attorney at law for over 10 years, and his previous firm of Myers, Fletcher and Gordon represented Mahoe Bay for over 40 years.*
>
> *During the course of his representation, Michael Hylton became intimately involved with my affairs and was involved in my acquisition of Mahoe Bay*
>
> *The transaction involving Mahoe Bay had its complications, and the lands involved in this very litigation are lands that touch and concern the very transactions that Michael Hylton advised on and in relation which litigation (sic) he could be called as a witness. In particular, there is ongoing litigation involving Avalon lands at Mahoe Bay, wherein Michael Hylton acted for me in the acquisition of the property, and in*

which the claimant is party where Michael Hylton may be required to give evidence on my behalf.

[43] Mr Hylton in his affidavit stated that he does not recall representing Mr Finzi in any conveyancing or commercial matter although he forwarded documents prepared by other MFG attorneys to Mr Finzi. Queen's Counsel specifically recalled handling two matters for Mr Finzi: one involving the eviction of squatters and the other was a dispute involving a former business associate. The affidavit continues by saying that those matters are unrelated to the present litigation between JMMB and Mr Finzi.

[44] Mr Finzi has simply said that Mr Hylton became intimately involved with his affairs. The present claim is essentially about debt collection and not about how the land was acquired. Apparently, Mr Finzi borrowed money from JMMB's predecessor. There has been a default. The action is about enforcement of the security given to support the mortgage. That type of litigation is largely document driven. It is really a step by step process which is as follows:

a. was money borrowed?

b. was it secured by property?

c. has the debtor defaulted?

d. has the power of sale arisen?

e. if the power of sale has arisen, is the lender exercising it properly?

f. if yes, then no liability; if no, then depending on the stage that the debtor comes to court, can and should the mortgagee be restrained from exercising the power of sale?

g. if the debtor comes to court too late, then the further issue is whether the mortgagee properly and fairly took reasonable steps to get the best price?

h. if yes, then no liability; if no, what loss has the claimant suffered and what is the quantum?

[45] In disputes of this nature there is oftentimes a flurry of letters between debtor and creditor. There is oftentimes charge and counter charge about who said what, when, where and who was present and the effect of whatever was said.

[46] The current claim as this court understands it involves a dispute between the bank and Mr Finzi and loans made to Mr Finzi, guaranteed by the Mahoe Bay Company Limited. These loans were made around 2006/2009. The dispute, as far as this court has been able to grasp, is focused more on the loans and what happened after the loans were granted. The court does not understand that the litigation involved transactions that occurred in the 1980s and 1990s. There is no suggestion that the dispute involved any loan of any kind made when the properties were acquired.

[47] From what has been said it is not easy to see what type of confidential information acquired at the time of the acquisition could be relevant to the present claim. The properties in question were acquired in the 1980s and 1990s - over twenty years ago. No issue has arisen in the present claim in relation to the acquisition of the properties. No one is alleging, for example, that the properties were acquired by fraud and that Mr Hylton is representing the person who is making such a claim.

[48] The court has some difficulty in appreciating what it is in the purchase of the properties could possibly be an issue in a case where the issue is in relation to a debt contracted for over twenty years later. There is no evidence that the debt owed arose in connection with the acquisition of the properties.

Disposition

[49] Application dismissed with costs to respondents to be agreed or taxed.