IN THE HIGH COURT
OF SOLOMON ISLANDS

Civil Case Number: 386 of 2007

Civil Jurisdiction

BETWEEN: SMM SOLOMON LIMITED
J Sullivan Q.C. with R Kingmele

Claimant

AND: ATTORNEY GENERAL representing the Mines and Minerals Board
R. Teutau

Defendant

AND: ATTORNEY GENERAL representing the Minister for Mines and Energy
R. Teutau

Defendant

AND: ELLISON BAKO AND OTHERS
T. Matthews with W. Rano

Defendant

AND: JOHN FRANCIS AND OTHERS
J. D. Johnson with P. Lavery

Defendant

DECISION ON APPLICATION FOR RESTRAINT

Date of Decision: 18 June 2008

Judge: Goldsbrough J

1. These proceedings began by writ of summons filed 18 October 2007 seeking an order of certiorari with respect to a decision of the 22 August 2007 wherein the then plaintiff was refused an extension of a Letter of Intent. Since that commencement the new Civil Procedure rules have come into force and the plaintiff will now be referred to as the claimant. Leave to seek certiorari and consequential orders was granted on 25 October 2007 at the request of the then counsel for the claimant.

2. Throughout these proceedings the claimant has been represented by a firm of legal practitioners called Sol-Law. In the beginning they appeared through counsel Mr. D. McGuire. Now they appear through J Sullivan QC assisted by R Kingmele. All of these individuals are connected with Sol- Law, either in partnership or as salaried employees.

3. This application in these proceedings concerns the continuing representation of the claimant by that firm, it having been said that this continuing representation constitutes or may constitute a breach of the Legal Practitioners Rules. It is brought on behalf of the 4th defendants and supported by the 1st 2nd and 3rd defendants.

4. The relevant rules guiding the conduct of legal practitioners in this jurisdiction are the Legal Practitioners (Professional Conduct) Rules contained in legal notice 98/1995 made under the Legal Practitioners Act [Cap 16].

5. Rule 16 contains provisions relating to the conduct by counsel of cases in court. Rule 16 (14) provides:-

> A legal practitioner shall not accept instructions in a case in which he has reason to believe that he is or is likely to be a witness.

Rule 16 (15) provides:-

> A legal practitioner shall withdraw from representing a client if—
> (a) it becomes apparent to him that he is or is likely to be a witness on a material question of fact; and
>
> (b) he can withdraw without jeopardising his client's interests.

And rule 16 (16) provides:-

> Where legal practitioner—
>
> (a) does not accept instructions under paragraph (14); or
>
> (b) withdraws from representing a client under paragraph (15),
> another legal practitioner in the same firm as that legal practitioner may accept the instructions of the client provided that the conduct of the firm or a legal practitioner in the firm is not likely to become a material issue in the case.

6. These rules have their origins in rules that govern the conduct of barristers within England and Wales. It is said within this application that where an occasion arises when representation by particular counsel is questioned then the court has an inherent jurisdiction to determine whether counsel may represent or continue to represent a client. Within this application it is conceded that this authority exists. That must be so, regardless of the concession, for the rules whilst providing guidance to legal practitioners do not seek to indicate to the court what should be done where issues arise.

7. I propose to set out the nature of the original proceedings, turn to what it is that is in issue in those proceedings, consider the various authorities that govern the conduct of legal practitioners in court from other jurisdictions, and then attempt to put together the applicable law and the facts of this case. At this stage of

proceedings only submissions have been heard. I make no findings of fact on the substantive claim. Assertions contained in submissions are relied upon where necessary. Those assertions and conclusions that are made based on them should not be regarded as findings in any way on the substantive matter.

8. The Mines and Minerals Act [Cap 42] provides for the development of mining within Solomon Islands by prescribing appropriate procedures for the grant of licences, permits or leases. It establishes the Minerals Board to regulate and control mining.

9. A Letter of Intent under section 21 of Cap 42 was issued to the claimant on 17 May 2005, having been recommended by the Board on 25 April 2007. This development came after litigation. Section 21 sets out what a successful holder of a Letter of Intent must do prior to proceedings to the next prescribed step. It provides for applicants for a prospecting licence to identify and negotiate with landowners surface access agreements. It provides that a Letter of Intent can be limited in time and can include conditions. In this instance the Letter of Intent provided that surface access agreements were to be negotiated in the first instance within a period of three months expiring 17 August 2007. The Letter of Intent was expressed to make provision for two particular areas known as Area H and Area I in Isabel Province. For the purposes of this application it is not necessary to further describe the land areas.

10. When 17 August arrived the view of the claimant was that not all the necessary surface access agreements had been negotiated with landowners. It is submitted on behalf of the claimant that surface access agreements (SAA) had been negotiated with respect to 41% of Area H and 81% of Area I.

11. Subsection 6, 7 and 8 of section 21 appear to deal with the various situations that may exist at the end of a Letter of Intent period. They provide for:-

> (6) Where no agreement is reached between the applicant and the landowners at the end of the period specified in the letter of intent, the Board may—
>
> (a) where it is satisfied that bona fide attempts have been made by the applicant to negotiate with the landowners or land holding groups, extend the said period; or
>
> (b) where it is satisfied that sufficient attempts to negotiate have not been made, inform the applicant that his application is unsuccessful.
>
> (7) Where, at the end of the period specified in the letter of intent, the applicant has reached agreement with landowners in respect of part of the proposed prospecting area and there is no agreement in respect of the remainder of the area, the Board may, after consultation with the applicant—
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> (a) extend the said period; or

(b) request the applicant to amend and subdivide his application to cover—

(i) areas in respect of which agreement has been reached; or

(ii) areas in respect of which agreement has not been reached.

(8) Where there is no dispute and the applicant reaches agreement with the landowners, such agreement shall be reduced to writing and the contents of the agreement shall be prima facie evidence of—

(a) the names of the landowners or land holding groups having rights over the land in the prospecting area; and

(b) the amount of surface access fees or compensation for damage.

12. Because the claimant was of the view that not all necessary SAAs had been concluded, by letter dated 10 August 2007 written by Mr McGuire a request was submitted to the Minerals Board through the Acting Director of Mines for extension of the Letter of Intent three month period "pursuant to section 21(6)" and making an offer to appear before the Board "to provide further details of this submission as provided for by section 21 (7) if required."

13. Mr McGuire and others did appear on behalf of the claimant before the Minerals Board and did present the further details of submissions.

14. The decision of the Minerals Board was communicated to the claimant by letter dated 22 August 2007 from the Director of Mines (Supervising) and by letter dated 24 August 2007 from the relevant Minister. Both letters indicated that the application for extension of time had been rejected, the latter indicating a rejection under section 21 (6) (b). That letter continued:- "the Board was . . . unsatisfied on the number of signatories in place with reference to the meetings held and as well as objection pressures mounting from land owning groups, the Bogutu Landowners Association, Bogutu House of Chiefs and Isabel Provincial Government."

15. This is the background to the request for certiorari or, as it is now termed, a quashing order. On its face the claim suggests that the decision of the Minerals Board was wrong in law. But the claim goes further than questioning the decision of the Board and seeks further orders in relation to surface access agreements. In particular in paragraphs 7 and 8 of the original writ and repeated in the subsequent notice of motion it seeks declarations that the claimant has obtained valid surface access agreements and that the claimant has made sufficient *bona fide* efforts to negotiate.

16. The Professional Conduct Rules in force in this jurisdiction forbid a legal practitioner from accepting instructions in a case in which he has reason to believe that he is or is likely to be a witness. It cannot be the case, and it is not submitted that it is the case, that 'witness' means no more than a person giving evidence. That would disqualify most practitioners from most of their cases where evidence in sworn statements is to be submitted of a formal nature, for example, a compliance certificate under Order 14.28. It is suggested that the word in this

context means that the legal practitioner has reason to believe that he or she will be a material witness or witness in a matter of controversy. Various expressions are used elsewhere to indicate this type of evidence from a witness. "Evidence material to the determination of contested issues before the court" appears in the Queensland Law Society rules. "A material witness on issues of substance which appear to be controversial and in respect of which questions of credibility and integrity (not necessarily his own) are likely to arise" appears in *Kallinicos v Hunt [2005] NSWSC at 1181.*

17. Thus it appears the test applied in other jurisdictions where the rules are not prescribed as subsidiary legislation permits a legal practitioner to represent or continue to represent a client even if he or she is to give evidence provided that the evidence is confined to formal or non contentious matters. I believe that this should be the case in this jurisdiction, with 'witness' in section 16 (14) being given that meaning. To find otherwise would widen the scope of the restriction to an unnecessary and impractical level.

18. There is no evidence or information contained in submissions as to whether Mr McGuire, who sets out in a sworn statement what happened at the meeting of the Mines and Minerals Board, considered whether he should accept instructions to take proceedings against the defendant. He had carriage of this matter when it began and at the time of this application he no longer has carriage of the matter. There is no indication that Mr. McGuire, at any time, withdrew under the rules. There is indication that it was never intended that Mr. McGuire would act as legal practitioner in these proceedings but that it was always the intention that Mr. Sullivan Q.C. would appear in court for the claimant instructed by Mr. Kingmele.

19. Since there is no suggestion that Mr. McGuire withdrew under rule 16 (15) then the provisions of rule 16 (16) do not come into operation, given the preamble referring to a decision under the preceding rule.

20. Yet the effect of what has taken place in practice is that Mr. McGuire no longer acts for the claimant, for whatever reason, and another legal practitioner in the same firm is now acting, instructed by another legal practitioner in that same firm.

21. The rules of conduct should, in my view, assist the court in determining what order it may make when circumstances arise covered by the rules and an application is made for restraint. In general it would seem that if there appears to be conduct outside of the rules then the court is more likely to intervene and probably should intervene. To do otherwise will reduce the effectiveness of the rules. That will do nothing to enhance the administration of justice.

22. Equally the rules will only provide guidance. There may be occasions where there is no breach of the rules as such yet a court may still intervene although this will be much less likely. This again must be so as the rules only guide conduct. It also must be so that a court can take into account matters not provided for within the rules. As an example there is provision in the rules that the legal practitioner having accepted instructions may continue to act if to discontinue may jeopardize the client's interest. Rule 16(15) (b). Yet no such saving clause appears in 16(16).

It seems to me that the question of prejudice to the client should still be an issue that a court may take into account when considering a restraint order.

23. *Kallinicos* is instructive in its consideration of the position in other Common Law jurisdictions. I propose to adopt the test as described and distilled from the various jurisdictions as no such test has yet been formulated for this jurisdiction. In considering how to express the test to be applied in this jurisdiction I intend to apply the following principles:-

    i. The starting point must be that the client is entitled to choose their legal representative
    ii. The Professional Conduct Rules serve illustrate the principles that are considered appropriate for legal practitioners in this jurisdiction
    iii. Weight should be given to the prejudice that may be caused by any restraint order, taking into account the stage of the proceedings, the complexity of the issues and the availability of alternative counsel to the client
    iv. Consideration should be given to the danger of counsel asserting the need for restraint as a tactical weapon to derail proceedings
    v. The effect on the proper administration of justice, as considered by a reasonably well informed lay observer of these proceedings, in allowing a legal practitioner to continue to represent the client.

24. The test as distilled in *Kallinicos* appear to me to be whether a fair minded, reasonably informed member of the public would conclude that the proper administration of justice required that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice.

25. It is also clear to me, and I propose to include this in formulating the test for this jurisdiction, that this jurisdiction is exceptional and the power to restrain be exercised with caution.

26. I have not yet touched upon what it is that forms the basis of the 'complaint' against Sol Law. In addition to the question of Mr. McGuire being called as a material witness in an area of controversy, there are suggestions relating to the behaviour of one former and one present employee of the firm. These allegations relate to behaviour in relation to the negotiations surrounding surface access agreements. They range from what is said to be oppressive behaviour within meetings to obtaining agreement to SAAs by deception.

27. None of these issues would need to be aired were it not for the claimant seeking review not only of the decision of the Mines and Minerals Board to refuse the extension of the letter of intent but also to seek declarations in respect of the already negotiated SAA's.

28. It was said in submissions that Mr. McGuire would be required for cross examination on what happened at the Mines and Minerals Board meeting. That cross examination, it seemed to me, was more toward establishing the correctness of the legal interpretation of powers rather than controversy over what Mr

McGuire said to the Board. In any event what was said to the Board can be derived from other witnesses, and there is little to suggest that what Mr. McGuire said was anything other than what he he deposes to. I do not believe that this is sufficient material to consider exercising the power to order restraint.

29. However, these allegations aside, I believe that there is a more fundamental problem with the continuing representation by Sol Law of the claimant. Sol Law acted as the agent for the claimant in progressing the matters required by the Letter of Intent. No other persons were authorised to perform this, claimant and its employees excepted. Sol Law were the agents for this claimant company.

30. That fact, given the nature of these proceedings puts the firm of Sol Law fairly within the description contained in other authorities where the essence of the case in question is contained within the actions of the law firm itself. It is not that the client acted upon the advice of counsel and that advice is called into question. It is the actions of the law firm in seeking to achieve the desired end for the client that now is in question in these proceedings.

31. I agree with the submission of Mr Sullivan that lawyers will not always get everything correct every time, and on occasions advice from lawyers having been incorrect, a client faces action resulting from incorrect advice. That situation may not result in restraint, I agree. But I do not regard this as such a case.

32. The authority which I rely upon for the assertion that it is the actions of the law firm that form the basis of the controversy which activates the power of restraint is *Kooky Garments Ltd v Charlton* [1994] 1 NZLR 587. Therein it was said:-

> "Where the acts or omissions of the law firm, including situations where the actions of the client are based on advice given by solicitors, are at the heart of the question in issue, the firm, is, in a real sense, "defending" its actions or advice. There is, in such circumstances, a danger that the client will not be represented with the objectivity and independence which the client is entitled to and which the court demands."

33. This is illustrated in the questions raised as to the submission of draft SAA's prior to execution. That was a responsibility on the agents for the claimant and whether there had been compliance or not is in issue.

34. In this case, it seems to me, the acts or omissions of Sol Law as agents for the claimants are an integral part of the complaint. Sol Law acted to obtain the SAA's for the client and Sol Law now seek intervention by the court on behalf of their client to uphold those agreements.

35. There is no question what so ever as to the conduct of either Mr Sullivan Q.C. or Mr. Kingmele and therefore the question must be addressed as to why either of these two legal practitioners should be restrained for acting given that Mr. McGuire no longer seeks to act for the claimant.

36. This raises the issue of the fair minded reasonably informed member of the public. That person will be aware that both Mr Sullivan QC and Mr. Kingmele are part of Sol Law either by partnership or by salaried employment. That observer

does not need to know the precise details of the relationship. But he or she will regard both Mr Sullivan Q.C. and Mr. Kingmele as part and parcel of the firm Sol Law.

37. He or she will not know these lawyers as well as I do. They will not be able to confidently say, as I am privileged to be able to say, that neither Mr Kingmele nor indeed MR Sullivan Q.C. would abuse their position as lawyers and ever fail to observe their duty to this court and their privileges as counsel in this jurisdiction. All the fair minded reasonably informed member of the public will see is that the very firm whose actions are questioned in these proceedings continue to represent the firm for which they are the appointed agents under the Mines and Minerals Act. He or she will wonder whether the same firm that is responsible to the client for the work already performed for them should be the ones now defending those actions for the same client in these proceedings.

38. To that extent I disagree with the submissions on the part of the claimant suggesting that the applicant must show that Mr Sullivan Q.C. or Mr. Kingmele will fail in their duty to the court. That, in my view, is not a correct application of the test. The test applies a different standard relating to appearance of risk

39. What the observer will see is that members of the same firm, the conduct of which is in question appear in court as the legal representatives of the claimant justifying their actions. Where is appearance of independence? How can a member or employee of the same firm not have an interest in vindicating all that has been done to date on behalf of the client?

40. Putting the question in a somewhat different light, is it fair to expect any member of a firm to disregard any interest they might have in upholding the reputation and standing of their own firm? That seems to me to be what the observer will be asking themselves when considering this issue. I have little hesitation in concluding that the observer will consider that something is not right here. It is difficult enough for counsel concurrently owing a duty to protect the best interests of the client and a duty to the court without the additional imposition of a third allegiance.

41. I note that counsel for the claimant has taken a deal of trouble in exposing their client to the range of legal services within this jurisdictions as alternative counsel, with a view to demonstrating in a practical way the prejudice that may arise in seeking alternative representation. I have little difficulty in concluding that the claimant, should an order be made restraining their chosen legal practitioners from acting, will be obliged to consider seeking representation from outside. This jurisdiction is small and several other firms are or have been involved in other proceedings that disqualify them from acting.

42. That is balanced by the multinational background of the client and their ability to undertake such work as they seek to undertake within this jurisdiction. They could not even think of undertaking such an investment as they propose without substantial financial resources. Those resources must extend to getting things properly on foot or they should not be trying to do so.

43. I also take into account that the client chose to invite Sol Law to be their local Mines and Minerals Board agents. I note from the filed material that they have their own in house counsel and no doubt were in a position to have advice from that area of their organization as to what the effect of appointing their legal practitioners as such may be, in addition to the financial benefits of doing so.

44. I do not consider that the undoubted prejudicial implications to the interests of the client in this regard outweigh the importance of attempting to uphold the proper administration of justice. This is a balancing exercise, as many judicial decisions are, and in my view the balance favours the applicant for restraint.

45. Nor do I consider that proceedings have reached a stage at which it would be unreasonable to expect alternate legal representatives to be engaged. Whilst there is a timetable of events scheduled to occur, the main trial remains at a distance. The next scheduled events, if my memory is correct, are an application for strike out and further applications for joinder.

46. Further I have considered the question as to whether counsel for the applicant has mischievously chosen to use this application as a derailing tactic. It took little time to discount that as motive, given the view I have taken on the involvement of the firm Sol Law in the steps that have been taken by them on behalf of their client to arrive at today's position.

47. Then consideration is given to the notion that to take such a step as to restrain a legal practitioner is to exercise an extraordinary jurisdiction that must be used with caution. Even if other issues appear settled in favour of restraint, an order should not be made unless it is absolutely and unequivocally indicated. I have not overlooked the importance of that part of the test which I believe should be applied.

48. It is important that people can choose their own legal representatives, but it is equally important, if not more important, that the proper administration of justice is seen to be upheld. Given that the view I take is that the actions of Sol Law in the client arriving at today's position are so intrinsically and inseparably linked to the subject matter of the action, not with reference so much to the legal powers of the Board in making its decision but in the vindication of the SAA's so far obtained and their effect on decision to be made under the Act, I feel bound to make an order that Sol Law be restrained from further acting in these proceedings as legal practitioners for the claimant company.

49. The question earlier raised of an undertaking as to damages I determined was too inextricably linked to the application itself to be considered separately. I note that it has been said that an application such as this could be approached in one of two different ways, either as a separate matter or as an interlocutory within the existing proceedings. Convenience suggests that the latter course is preferable and that is how this application has proceeded. That, in my view, does not indicate that the order for restraint that I shall make is an interlocutory order requiring in the normal course the usual undertaking as to damages to be provided by the applicant. This is an administration of justice matter. It is not an order stopping the claimant from doing anything whilst these proceedings are determined and

individual rights defined. I doubt whether it is indeed an interlocutory order but whether it is or it is not I consider that it would be inappropriate in these circumstances to require an undertaking and I shall make the necessary order under Rule 7.35 of the Civil Procedure Rules dispensing with the requirement for the applicant to give the usual undertaking as to damages.

50. I have heard counsel on the question of costs. The costs of this application incurred by all defendants will be paid by the claimant on the standard basis. Consideration was given to making an order for payment by Sol Law but I believe that this can be left as between the client and their lawyers. It was after all the client which made the specific request for Mr. Sullivan Q.C. and Mr. Kingmele to defend this application. Costs are to be agreed or taxed by the Registrar.

51. Given that an order will issue as described above, it would be quite wrong for any further steps in these proceedings to be take until a reasonable period of time has elapsed within which the claimant can secure alternate representation. I am not going to be persuaded otherwise. I will hear counsel on the question of what that reasonable time period might be and that question alone.

52. Having heard counsel I order that proceedings in this matter are stayed until Tuesday 19 August 2008 when the matter will come before the court again for mention at 2.00 pm. Liberty to restore is included in the order for stay to allow for exigent circumstances.

Mr. Justice Goldsbrough