

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

**Civil Suit No: CV0247 of 2013**

**BETWEEN**

**LINUS CURTIS MATTHEWS**

**CLAIMANT**

**AND**

**NATIONAL PETROLEUM  
CORPORATION BOARD**

**FIRST DEFENDANT**

**RUDOLPH BOVELL**

**SECOND DEFENDANT**

**RYAN BROWN**

**THIRD DEFENDANT**

**TANYA ELCOCK**

**FOURTH DEFENDANT**

*Before The Honourable Madam Justice Pamela Beckles, Judge of the High Court*

**2016: January 27**

**2017: February 1**

**Mr. Benjamin A. Drakes, Attorney-at-law for the Claimant who is present**

**Ms. Nicole Roachford, Attorney-at-law on behalf of the Third and Fourth Defendants**

**DECISION**

**Introduction**

[1] Out of this personal injury matter the following applications have been filed for determination by the court.

- [2] The attorney for the Third and Fourth Defendants is seeking to be removed from the record as their attorney after certain information was revealed to her during the course of taking instructions. However, the Claimant in challenging this application, has applied to have it denied on the premise that it would be prejudicial to the Claimant. In the alternative, if the application for withdrawal is approved, the Claimant is seeking to have Harmony General Insurance Company Limited, the insurer of the Third and Fourth Defendants joined in the action even though notice of intention to join was given outside the stipulated time frame prescribed by statute.

### **Background**

- [3] The Claimant Linus Matthews is a mason and resides at Thorne's Gap, Spring Garden, St. Michael. The First Defendant, National Petroleum Corporation Board is a statutory corporation established under the National Petroleum Corporation Act, Cap. 280 of the Laws of Barbados with its office situate at Wildey, St. Michael. The Second Defendant Rudolph Bovell is an employee of the First Defendant. The Third Defendant Ryan Brown resides at No. 465 Kingsland Terrace, Christ Church and Tanya Elcock of No. 2 Walkers Valley, St. George is the Fourth Defendant.

- [4] On February 22, 2010, a vehicular accident occurred in the vicinity of Frere Pilgrim, Christ Church involving a vehicle registration number ML355 owned by the First Defendant and driven by the Second Defendant and vehicle registration number XA4339 driven by the Fourth Defendant and owned by the Third Defendant. At the time of the accident, the Claimant was in the course of his employment and a passenger in vehicle registration number ML355.
- [5] By reason of the said accident, the Claimant alleged that he sustained personal injuries and suffering.
- [6] On February 14, 2013 the Claimant filed a claim form and statement of claim in which he claimed damages against the First, Second, Third and Fourth Defendants jointly and/or severally for the following:
- (a) General damages for pain and suffering and loss of amenities.
  - (b) General damages for past and future medical expenses, past and future domestic assistance, loss of do-it-yourself, disadvantage on the labour market.
  - (c) Special damages.
  - (d) Interest pursuant to **Section 35** of the Supreme Court of Judicature Act Cap. 117A of the Laws of Barbados.
  - (e) Attorney's fixed costs in issue.
  - (f) Court fees.
  - (g) Costs.

- (h) All such additional costs of pursuing this action to the date of payment of the sum claimed as is recoverable pursuant to the Supreme Court “Civil Procedure” Rules, 2008 (CPR).
  - (i) Such further or other relief as this Honourable Court shall think fit.
- [6] An affidavit of service was filed on February 7, 2014 which stated inter alia that the First, Second and Third Defendants were served with the claim form filed on February 13, 2013. However it must be noted that the Fourth Defendant was not served with the claim form.
- [7] The Claimant, on February 4, 2014 filed a notice of application seeking an Order that service of the claim form and statement of claim filed February 14, 2013 be affected on the Fourth Defendant by substituted service pursuant to Rule 5.14 of the CPR.
- [8] On February 26, 2014 attorney-at-law for the Third and Fourth Defendants filed a Defence – a certificate of truth was provided by the Third Defendant only. The attorney also certified in the Defence that she believes the facts stated therein to be true and that it is impractical for the Fourth Defendant to give her certificate of truth as she cannot be located. She opined that the Defence is based on information provided by Harmony General Insurance Company Limited, Ryan Browne’s insurers.

- [9] The Claimant then filed an amended statement of claim on March 18, 2014 to include among other things, the medical report of Dr. Jerry Thorne dated June 6, 2012 which was received by the Claimant on January 16, 2014. The medical report indicated that the Claimant should undergo an arthroscopy to fully ascertain the extent of the damages.
- [10] On March 26, 2014 the Claimant filed a further amended statement of claim.
- [11] A Defence was filed by the First and Second Defendants on July 2, 2014 which was certified by Michelle Smith on behalf of the First Defendant.
- [12] At paragraph 7 of this Defence the First and Second Defendants admitted that there was a collision and stated that the accident was caused solely by the negligence of the Fourth Defendant. It was further stated that the Third Defendant's insurers accepted liability and settled the claim in relation to the damage to motor vehicle registration number ML355.
- [13] On August 24, 2014 attorney-at-law for the Third and Fourth Defendants, Ms. Nicole Roachford filed a notice of application accompanied by an affidavit seeking leave to be removed from the record as attorney-at-law for the Third and Fourth Defendants.

- [14] At paragraph 2 of her affidavit, she deposed that she was appointed by Harmony General Insurance Company Limited to represent the interest of its insured, the Third Defendant and his driver, the Fourth Defendant. She continues at paragraph 3 where she pointed out that to fully and properly represent the interest of the parties, Harmony General Insurance Company Limited presented her with certain information provided to them by the parties. This information included Third Party Fire dated November 12, 2009, a Theft Proposal Form and the Motor Vehicle Accident Report Form dated February 23, 2009 in respect to motor vehicle registration number XA4339. She stated at paragraph 4 that a policy of insurance was issued pursuant to the aforementioned documents to the Third Defendant, as Harmony General Insurance Company Limited believed him to be the owner of the same vehicle.
- [15] At paragraph 6 of the affidavit, it was noted that since the Fourth Defendant could not be located, the Defence filed on February 26, 2014 was based on instructions received on that day and also on the Motor Vehicle Accident Report Form which was prepared and signed by the Fourth Defendant.
- [16] From the said affidavit, it was revealed that there was some confusion about the ownership of the vehicle. At paragraph 8 she deposed that

an answer as to the question of ownership of motor vehicle registration number XA4339 was conclusively answered and the answer presented a conflict of interest between the Third and Fourth Defendants and Harmony General Insurance Company Limited and between the Third and Fourth Defendants themselves.

[17] Due to the conflict which arose in relation to the ownership of the said vehicle, the attorney-at-law Ms. Roachford pointed out that she cannot represent any party in this matter, thus the application for leave to be removed from record as attorney for the Third and Fourth Defendants.

[18] By an application for a court order during the course of court proceedings filed on November 10, 2014, the Claimant resisted the application for the attorney to be removed from record as attorney for the Third and Fourth Defendant. However, the Claimant submitted that if the application is granted that the Court in the alternative allows Harmony General Insurance Company Limited to be added as a Defendant in the matter.

[19] In the grounds of the application, the Claimant contends that to allow the withdrawal of the attorney-at-law Ms. Roachford would result in the effective avoidance of liability by Harmony General Insurance Company Limited, which would be severely prejudicial to the Claimant since Harmony General Insurance Company Limited had

already accepted liability for the accident and injury under a policy of insurance with the Third Defendant and Harmony General Insurance Company Limited.

[20] Further, the Claimant contends that if the attorney-at-law Ms. Roachford withdraws, the only way the claim can be properly carried on against the Third and Fourth Defendants under the policy of insurance with Harmony General is to add Harmony General Insurance Company Limited as a Defendant in accordance with Rule 9.4(3)(c) of the CPR.

[21] On November 25, 2014 notice of proceedings pursuant to the Road Traffic Act, Cap 295 was given to Harmony General Insurance Company Limited. It must be noted that this is the first time since the matter began that the Claimant gave notice of the proceedings to Harmony General Insurance Company Limited.

[22] Notice of proceedings was also given to BGI Insurance Limited and ICBL the insurers for the First Defendant, for the first time in the proceedings.

### **Issues**

[23] The main issue for determination is whether in the circumstances where the Third and Fourth Defendants reveal certain information to the attorney in the course of taking instructions which could result in a

conflict of interest, the attorney should be allowed to be removed from the record as their attorney.

- [24] If this issue is resolved in the affirmation then the next issue would be whether the Claimant should be allowed at this stage of the proceedings to join Harmony General Insurance Company Limited as a Defendant considering that the time period in which service of the proceedings should have been effected has expired and the final issue would be whether there should be an Order for costs with regards to the application.

### **The Law**

- [25] It is not unusual for insurers to take over and conduct the defence of any claim against the insured which may lead to a claim on the policy. In practice what is done is that the insurers instruct lawyers to deal with the claim. Where the problem arise however is in determining the role and duty of these lawyers, namely, to what extent do they act for the insurer and to what extent do they act for the insured and what happens where certain information is obtained and the lawyer decides that they can no longer act for one of the parties, usually the insured because of a conflict of interest.

- [26] Two cases were considered which sought to deal with these issues. In *Brown v Guardian Royal Exchange Assurance PLC [1994] 2 Lloyd's*

Report 325, CA, Mr. Brown was a sole practitioner solicitor, insured under the Master Policy Scheme. A claim arose against him, and he duly notified his insurers, who instructed solicitors. As a result of a conference with counsel, at which Mr. Brown apparently made certain admissions, insurers repudiated liability, and the solicitors decided that they could no longer act for him because of a conflict of interest. The question before the Court of Appeal concerned privilege in relation to documents prepared by Mr. Brown and other parties for the purpose of advising him in the period before the solicitors withdrew.

[27] The Court of Appeal held that the matter was resolved by the wording of the policy, which specifically gave the insurers the right to receive reports prepared by the solicitors. These reports, said the Court of Appeal, could properly contain anything which the solicitors had learned about the claim (including any view which they had formed about the possibility that the insured had been fraudulent). Even where the retainer was terminated by the solicitors, insurers were still entitled to know of anything which had happened during the currency of the retainer. This decision however depended upon the particular wording of the policy.

[28] In TSB Bank PLC v Robert Irving & Burns (a firm) (Colonia Baltica Insurance Ltd., third party [2000] 2 All E.R. 826, CA, the Defendants

were a firm of valuers who had carried out a valuation for the Claimants of a property which was proposed to be used as a security for a commercial loan. The allegation against the Defendants was that the valuation had been performed negligently. The Defendant's liability insurers instructed solicitors to conduct the defence of the claim, and a meeting took place between the solicitors and a representative of the Defendants, at which the representative was questioned about the details of what had happened. Although the insurers were unconvinced that they were liable for the loss which had happened (because of doubts about the sequence of events) they received counsel's advice that they had no ground to deny liability, and their subsequent behaviour left the Defendants with the impression that liability had been accepted, though they never expressly confirmed this.

[29] At a further conference with counsel the Defendant's representative was again questioned about the sequence of events, which was critical to the issue of the insurers' liability, but no indication was ever given that the purpose of the questioning was to look for grounds on which liability might be repudiated. Following the conference the insurers did repudiate liability. The Defendants began third party proceedings against their insurers, claiming that there was liability under the

policy, alternatively that as a result of their conduct the insurers were estopped from denying liability.

[30] At first instance it was held, first, that the proper analysis of the position was that the lawyers had been retained by the Defendants and their insurers jointly, though this was not to be constructed as meaning that under no circumstances could the insurers repudiate liability if the evidence appeared to establish that they were otherwise entitled to do so. Secondly, it was said that as a general rule where solicitors are instructed by two parties with a common interest, neither can maintain a claim for privilege against the other in respect of matters within the common retainer. So that in the present case the insurers could claim privilege in relation to communications to the solicitors about the scope of the policy cover and communications made by the Defendants to the solicitors about the circumstances of the valuation were privileged against the insurers.

[31] An appeal to the Court of Appeal against this ruling failed as the Court of Appeal said that the retainer of the solicitors was clearly a joint one, and it did not matter whether there might also have been two separate retainers. But what happens in a joint retainer such as this where the parties fall out with each other or where it otherwise becomes apparent that there is an actual conflict of interest between

them? On this point the Court of Appeal stated that as a general rule neither party can maintain privilege against the other in relation to documents which have come into existence earlier in litigation. However, the terms of the implied waiver of privilege as between the parties at the outset of the litigation are such that the waiver does not extend to communications made to the solicitors after an actual conflict of interest has arisen. In the present case it was clear by the time of the conference with counsel that there was an actual conflict of interest, since the possibility of repudiating liability was being actively considered – hence the things said at that conference were privileged as against the insurers.

[32] Therefore this case illustrates that in such cases the lawyers must recognize that they act for both the insurers and the Defendants and that once it becomes apparent that a conflict of interest has arisen, then it is the duty of the lawyer to draw this to the attention of both parties and for reason of professional conduct it may also become necessary for the lawyer to stop acting for either party as well as for the insurers to decide whether to instruct separate lawyers for themselves and the Defendants.

[33] In all of the circumstances of the instant case, is it appropriate for the attorney-at-law Ms. Roachford to withdraw from the matter at this

stage after certain information was revealed to her during the course of taking instructions? She claims to have received information with respect to the ownership of the vehicle registration number XA4339 which was involved in the vehicular accident in which the Claimant suffered personal injuries and which presented a conflict of interest between the Third and Fourth Defendants and Harmony General Insurance Company Limited and between the Third and Fourth Defendants themselves.

[34] At common law, the position is that an attorney may terminate his retainer before it comes to an end once reasonable notice is given and he has reasonable grounds for refusing to act further for the client – see **Lord Esher** in *Underwood, Son Piper v. Lewis* [1891 – 94] *All E.R. 1203*.

[35] In *Re Creehouse Ltd.* [1982] 3 *All ER 659*, a solicitor, a party to litigation had his retainer withdrawn and applied to the court for his name to be removed from the record, pursuant to RSC Ord 67,r6.

**Lawton LJ.** at page 663 stated the following:

“Rule 6 deals with the situation where the party to litigation either dispenses with his solicitor, as in this case, or, as can happen, the solicitor decides that he will no longer act for the party. In those circumstances, as the solicitor is an officer of the court, it is only right that the court should investigate whether, in all the circumstances of the case, it is appropriate for the solicitor to withdraw. It maybe that the solicitor has been over-hasty in refusing

to go on acting for a client. He may by his action have put the client in difficulty and therefore it is appropriate, as I understand r 6, that the court should be apprised of the reason why the solicitor wishes to withdraw, so that the court can consider whether the reasons for withdrawal are adequate and can give protection to the client if it is necessary to do so.”

[36] Likewise in *Richard Buxton (Solicitors) v Mills-Owens [2010] EWCA*

*CW122*, it was held that:

“a retainer was an entire contract. A client instructed a solicitor as a skilled person to act for him in the action, to take all necessary steps in it, and to carry it on to the end. A solicitor might terminate his retainer before the end on reasonable notice and if he had a reasonable ground for refusing to act further for the client...”

At paragraph 41, **Mackay J.** stated:

“whether there is a good reason to terminate was a fact-sensitive question.”

[37] Based on the foregoing, the attorney must have a good reason to terminate the retainer and notice must be given to the Third and Fourth Defendants in compliance with Rule 63.3 of the CPR. In this case, notice was given to the Third and Fourth Defendants pursuant to the Rule.

[38] The reason given by attorney-at-law Ms. Roachford in seeking to be removed as the attorney-at-law on behalf of the Third and Fourth Defendants, is that a conflict of interest has arisen as to the ownership of the vehicle XA4339 and that this information was obtained after a

meeting between herself and the said Defendants. Ms. Roachford does not specifically states what exactly the information was which presented a conflict of interest, save and except that it answered the question of ownership for the vehicle XA4339.

[39] Since Harmony General Insurance Company Limited was the insurers of the Third Defendant, Ryan Browne who was referred to as the owner of the vehicle XA4339, whilst the Fourth Defendant was stated to be the driver of the said vehicle at the time of the accident, it would seem as if the information obtained at the meeting revealed that Ryan Bowne may not have been the owner of the vehicle XA4339, however whether or not Ryan Browne was the owner or whether it was the Fourth Defendant or some other person, is an issue which has to be dealt with between himself and Harmony General Insurance Company Limited.

[40] As stated before the attorney-at-law acts for both the insurer, in this case Harmony General Insurance Company Limited and the insured, in this case the Third and Fourth Defendants. What now has to be determined is whether she has a good reason which would disqualify her from continuing to act in this litigation by reason of a conflict of interest.

[41] An attorney-at-law may, pursuant to the relevant rules contained in the Legal Profession Code of Ethics, 1988, Cap 370A withdraw from employment. Rule 38 sets out various reasons for withdrawing from employment, even though the list is not exhaustive. The following reasons are stated –

- (a) where the client fails, refuses or neglects to carry out an agreement with, or his obligation to, the attorney-at-law as regards the expenses or fees payable by the client;
- (b) where his inability to work with colleagues indicate that the best interest of the client is likely to be served by his withdrawal;
- (c) where his client freely asserts to the termination of his services;
- (d) where by reasons of his mental or physical condition or other good and compelling reason it is difficult for him to carry out his services effectively; or
- (e) in cases of conflict as contemplated in Rule 29 or Rule 68.

Rule 29 provides:

- (1) “An attorney-at-law may represent multiple clients only if he can adequately represent the interest of each and if each consents to such representation after full disclosure of the possible effects of multiple representation.”
- (2) “In all situations where a possible conflict of interest arises, an attorney-at-law shall resolve all conflicts by leaning against multiple representation.”

Rule 68(1) provides:

“An attorney-at-law who withdraws his services under Rule 38 shall not do so until he has taken reasonable steps to avoid foreseeable prejudice or injury to the position and rights to his client including (a) giving due notice; (b) allowing time for retaining of another attorney-at-law (c) delivering to the client all documents and property to which he is entitled subject however to any lien which the attorney-at-law may have over the same; (d) complying with such laws, rules or practice as may be applicable; and (e) where appropriate, obtaining the permission of the court where the hearing of the matters has commenced.

[42] In terms of conflict of interests, Rule 67 provides:

- (1) Except with the specific approval of his client given full disclosure an attorney-at-law shall not act in any manner in which his professional duties and his personal interest conflict or are likely to conflict.
- (2) An attorney-at-law shall not accept or continue his retainer or employment on behalf of two or more clients if their interest are likely to conflict or if his independent judgment is likely to be impaired.

[43] Rule 63.6 of the CPR sets out the procedure to be followed where an attorney-at-law applies to be removed from the record and which has been followed in this case.

[44] Thus a perusal of the law indicates that a conflict of interest is a good enough reason not to continue a retainer especially in cases where there are multiple clients. As was stated in *Spector v Ageda* [1971] 3All ER 417 an attorney-at-law should refrain from acting for both

clients where, even with disclosure, circumstances render it impossible for the attorney-at-law to act fairly and adequately for both.

[45] If the conflict of interest has arisen in this case because of non-disclosure or misrepresentation by the Third Defendant to the insurers Harmony General Insurance Company Limited though there is nothing on file to support this – then the insurers have the right to avoid such an insurance policy if the misrepresentation or non-disclosure induced the making of the policy. This however is an issue which must be dealt with between the insurer and the Third Defendant. It was Harmony General Insurance Company Limited who retained the attorney to act on behalf of the Third and Fourth Defendants and notwithstanding that there is some disparity as to the ownership of the vehicle XA4339, if the attorney is allowed to withdraw, Harmony General Insurance Company Limited should be held responsible for ensuring that the parties to this litigation are not disadvantaged or prejudiced in any way.

### **Disposal**

[46] In her affidavit apart from stating that certain information was obtained which answered conclusively the question of ownership of the vehicle XA4339 and that the answer presented a conflict of

interest, the attorney-at-law does not state what this information is and therefore the court, not being fully apprised of the reason(s) why the attorney-at-law wishes to be removed as the attorney for the Third and Fourth Defendants, cannot satisfy itself whether the reason(s) for removal are adequate. The affidavit is phrased in very broad and general terms leaving one to speculate which is clearly not acceptable.

[47] The court is also unsure of the position of the Third and Fourth Defendants having received notification of the possible conflict of interest, namely whether or not the Defendants have already or intends to instruct separate lawyers because as was stated at page 839 of *TSB Bank plc (supra)* –

“it is only where...there is an actual conflict of interest that the waiver comes to an end and even then it will continue if, after notification of the conflict, the insured decides not to instruct separate solicitors.”

[48] Until the above issues are addressed, the court finds itself unable to deal effectively with the application for withdrawal of the attorney-at-law at this stage. The court in order to make an informed decision must be seized of all the facts to enable it to make such a decision with respect to whether there is an actual conflict of interest which necessitates the removal of the attorney-at-law and whether the Defendants intend to instruct separate lawyers.

[49] The court being ever mindful of the overriding objectives of the CPR, namely in having the matter deal with fairly and expeditiously and in saving costs, time and expense believes that these issues can be addressed through the filing of affidavits by the parties concerned, such affidavits to be filed within twenty-eight (28) days of today's date.

[50] In view of the foregoing this application is deferred pending the filing of the aforementioned affidavits addressing the issues set out above.

[51] The other two issues are also deferred pending determination of the above.

**PAMELA A. BECKLES**  
Judge of the High Court