BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 5 of 2017

IN THE MATTER OF THE APPLICATION OF NICOLE ROACHFORD TO WITHDRAW AS COUNSEL FOR THE THIRD AND FOURTH DEFENDANTS

AND IN THE MATTER OF CLAIM NO. 247 OF 2013

LINUS CURTIS MATTHEWS	**Claimant**
AND	
NATIONAL PETROLEUM CORPORATION BOARD	**First Defendant**
RUDOLPH BOVELL	**Second Defendant**
RYAN BROWNE	**Third Defendant**
TANYA ELCOCK	**Fourth Defendant**

Before: The Hon. Sir Marston C. D. Gibson, KA, Chief Justice, The Hon. Andrew D. Burgess and The Hon. Kaye C. Goodridge, Justices of Appeal

2017: May 24, July 25, October 31

2018: January 25

2019: January 31

Ms. Margot Greene QC and Mrs. Peta-Gay Lee-Brace for Ms. Nicole Roachford, the Appellant

Mr. Benjamin Drakes and Ms. Safiya Moore for the Claimant

Ms. Alicia Archer for the First and Second Defendants

DECISION

GOODRIDGE JA:

INTRODUCTION

[1] This appeal arises out of an application made pursuant to ***CPR 63.6*** by Ms. Nicole Roachford (Ms. Roachford), attorney-at-law, for leave to withdraw as counsel for the third and fourth defendants in Claim No. 247 of 2013. Ms. Roachford seeks to challenge **Beckles J's** decision to defer the application and order the parties concerned to file affidavits within 28 days.

BACKGROUND

[2] The following circumstances gave rise to this matter.

[3] On 22 February 2010, an accident occurred in or about Frere Pilgrim, Christ Church, between the motor vehicle bearing the registration number ML355 and the motor vehicle bearing the registration number XA4339.

[4] At the time of the accident, the motor vehicle ML355, which was owned by the first defendant, National Petroleum Corporation Board (the Petroleum Board), was being driven by Mr. Rudolph Bovell, the second defendant. The claimant, Mr. Linus Matthews, was a passenger in that vehicle. Messrs. Matthews and Bovell are both employees of the first defendant and were, at the material time, acting within the course of their employment.

[5] The motor vehicle XA4339 was owned by Mr. Ryan Browne, the third defendant, and driven by Ms. Tanya Elcock, the fourth defendant.

Mr. Browne was issued a policy of insurance for that vehicle by Harmony General Insurance Company Limited (Harmony General) in or around 2009.

THE PROCEEDINGS IN THE HIGH COURT

The Claim

[6] On 14 February 2013, Mr. Matthews instituted proceedings in the High Court against the defendants jointly and/or severally, seeking damages for personal injury, loss and damage that he allegedly sustained in the accident.

[7] Harmony General retained Ms. Roachford to represent the interests of its insured, Mr. Browne, and also Ms. Elcock, in the proceedings. On 26 February 2014, Ms. Roachford filed a defence on their behalf.

[8] On 2 July 2014, a defence was filed by the Petroleum Board and Mr. Bovell. In that defence, it was contended that the accident was caused solely by the negligence of Ms. Elcock. It was further contended that Mr. Browne's insurer had accepted liability and settled the claim in relation to the damage caused to motor vehicle ML355.

Ms. Roachford's Application

[9] On 21 August 2014, Ms. Roachford filed a notice of application in the High Court seeking an order that leave be granted to her to be removed from the record as attorney-at-law for the third and fourth defendants.

[10] The grounds of the application were: "Based on certain instructions provided by the Third and Fourth Defendants to the said Nicole C. Roachford, Attorney-at-Law the said Nicole C. Roachford can longer *(sic)* represent their interests."

[11] The application was supported by an affidavit wherein Ms. Roachford deposed that Harmony General had furnished her with information and documentation which it had received from the third and fourth defendants. A defence was then prepared, based on the documentation and the instructions from Harmony General.

[12] Subsequent to the filing of the defence, and on locating the fourth defendant, a meeting was held with Ms. Roachford and the third and fourth defendants so that Ms. Roachford could obtain further instructions in the matter. As a result of the information received at this meeting, Ms. Roachford concluded that a conflict of interest had arisen not only between the parties and Harmony General but also between the parties themselves. This situation led to Ms. Roachford making her application to the High Court.

The Cross-Application of the Claimant

[13] On 4 December 2014, Mr. Matthews filed an amended notice of application seeking the following orders:

> "(a) That the Application of the Attorney-at-Law filed herein on the 21st day of August 2014 requesting leave to be removed

from the record as Attorney-at-Law for the Third and Fourth Defendants be denied.

(b) In the alternative to (a) above that the Claimant is permitted to add Harmony General Insurance Company Limited as a Defendant in this matter.

(c) That the Claimant is permitted to enlarge the time for service of the notice of commencement of proceedings herein on Harmony General Insurance Company Limited to the 26th day of November 2014 *(sic)*."

[14] The grounds of Mr. Matthews' application were as follows:

"1. The Attorney-at-Law for the Third and Fourth Defendants has been appointed under a policy of insurance with the Third Defendant and Harmony General Insurance Company Limited (Harmony General) under which liability has already been accepted for the accident and injury to the Claimant.

2. If the Attorney-at-Law acting for the Third and Fourth Defendants is allowed to withdraw the only way that the claim can properly be carried on against the Third and Fourth Defendants under the policy of insurance with Harmony General is to add Harmony General as a Defendant in accordance with Rule *(sic)*.

3. The application for leave to be removed from the record as Attorney-at-Law should be denied if it is not made on an occasion of Attorney-Client privilege.

4. Having already admitted liability to the claimant under the policy of insurance of the Third Defendant, Harmony General Insurance Company Limited is obligated to pay any damages awarded to the Claimant in this matter and has by its conduct waived any right to repudiate liability.

5. Harmony General Insurance Company Limited has not suffered any prejudice from the late service of the notice of commencement of proceedings. However the Claimant

> would suffer severe prejudice if the time for service of the notice is not enlarged."

The Judge's Decision

[15] The applications were heard by **Beckles J** on 27 January 2016. She delivered a written decision on 1 February 2017.

[16] At **paras [23]** to **[24]** of her decision, **Beckles J** outlined the issues that were to be determined before her as follows:

> "[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 (sic) 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."

[17] According to **para [46]** of the decision, **Beckles J** found that:

> "... 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".

[18] The judge further stated that she was unsure of the position of the third and fourth defendants, having received notification of the possible conflict of interest, as to whether they had already instructed or intended to instruct separate attorneys-at law.

[19] **Beckles J** then stated at **paras [48] to [51]** of her decision:

> "[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(sic) 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 aforemention *(sic)* affidavits addressing the issues set out above.
>
> [51] The other two issues are also deferred pending determination of the above."

THE APPEAL

The Notice of Appeal

[20] On 14 February 2017, Ms. Roachford filed a notice of appeal against the order of **Beckles J**. The details of the order appealed from were:

> "(i) The refusal of the judge to allow Ms. Roachford to be removed from the record as the attorney-at-law for the third and fourth defendants in the court below; and
> (ii) The judge ordering Ms. Roachford to prepare affidavits on behalf of the third and fourth defendants within twenty-eight days of the delivery of the decision".

[21] The grounds in the notice of appeal are:

> "a) The Judge held that
>
> i) That no conflict, real or otherwise as (*sic*) presented in the Affidavit filed on the 24th day of August 2014
>
> ii) That it (*sic*) was unsure of the position of the Third and Fourth Defendants who were at all material times present and before the Court, the 3rd and 4th Defendants having stated orally that there was no objection to the removal from the record
>
> b) The Judge erred in law and/or in fact in not holding:
>
> i. That there was a conflict of interest as between the 3rd and 4th Defendants and the Attorney-at-Law and the 3rd and 4th Defendants and Harmony General Insurance Company
>
> ii. That the 3rd and 4th Defendant (sic) and Harmony General Insurance Company Limited were capable of terminating the contractual relationships existing between and the Attorney-at-Law (sic)

iii. That there was no prejudice to the Claimant in the removal of the Attorney-at-Law in this stage of the proceedings."

[22] Accordingly, Ms. Roachford sought the following orders:

"a) An Order quashing the decision of the learned Judge.
b) An order that Nicole C. Roachford, Attorney-at-Law, be removed from the record
c) Costs of the Appeal and the Application below."

Matters preliminary to the hearing of the appeal

[23] When the appeal first came on for hearing on 24 May 2017, Ms. Roachford appeared on her own behalf in association with Mr. Michael Yearwood. On that date, the Court granted an adjournment to 25 July 2017, to allow Mr. Yearwood to file further written submissions on pertinent issues which had not been addressed.

[24] On 25 July 2017, Mr. Yearwood sought an order for leave to be removed from the record as counsel for Ms. Roachford, and there being no objection to the application, the order was duly granted. The matter was further adjourned to 31 October 2017.

[25] On 31 October 2017, Ms. Margot Greene QC, appeared as counsel on behalf of Ms. Roachford in association with Mrs. Peta-Gay Lee-Brace. On that date, Ms. Greene QC made an oral application for an adjournment to file written

submissions in the matter. This application was granted and the Court adjourned the hearing of the appeal to 25 January 2018.

ISSUES IN THIS APPEAL

[26] The substantive issue for our determination is whether the judge had a discretion, and if she had, whether she had correctly exercised that discretion, to defer the application under ***CPR 63.6*** and order the filing of additional affidavits.

Preliminary Issues

[27] Before dealing with this issue, however, we must advert to a number of preliminary points raised by Mr. Benjamin Drakes in his written submissions. The first is that there was no determination by the judge of Ms. Roachford's application to be removed from the record. The second is that since the appellant is an attorney-at-law and not a party to the action, she had no legal capacity to appeal the judge's order. The third is that the appellant did not obtain leave to appeal the order and so the notice of appeal was incompetent. The fourth is that the grounds in the notice of appeal should be struck out on the basis that they are vague and in general terms and disclose no reasonable grounds of appeal.

[28] We will deal with the preliminary issues before proceeding to the substantive issue.

Issue 1

[29] Mr. Drakes, in his written submissions filed on 24 February 2017, stressed that **Beckles J** made no determination of Ms. Roachford's application. Rather, the judge clearly deferred that application, along with the cross-application of the claimant, and ordered the filing of additional affidavits.

[30] This issue was resolved when Ms. Greene QC, in her oral submissions to the Court, conceded that there was no order refusing Ms. Roachford leave to be removed from the record. Counsel acknowledged that the appeal is solely against the order of **Beckles J** that the parties concerned file additional affidavits.

Issues 2 and 3

[31] We consider it convenient to deal with the second and third issues together.

[32] On the second issue, Mr. Drakes submitted that it is a fundamental principle of law that only a party to the proceedings can initiate an appeal from a decision of a lower court. He also submitted that there is no provision in ***CPR*** for an attorney-at-law, not being a litigant in the court below, to appeal in his or her personal capacity.

[33] As to the third issue, in his written submissions dated 24 February 2017, Mr. Drakes contended that the appeal was incompetent, in that no leave was

granted by the judge or by this Court to pursue the appeal as required by **section 54** of the **Supreme Court of Judicature Act, Cap. 117A** (**Cap. 117A**).

[34] However, on 31 October 2017, Mr. Drakes informed the Court that he had been served with a filed order entered on 6 July 2017, which stated that Ms. Roachford had been granted leave to appeal by the judge. In the face of that order, counsel conceded that the appeal was properly before the Court.

[35] In response, Ms. Greene QC, accepted that Ms. Roachford was not a party to the action, but submitted that Ms. Roachford's application was an ancillary application within the proceedings in the court below. Counsel contended that a non-party to proceedings has a right of appeal so long as an order or judgment has been made by the High Court.

[36] **Section 52(1)** of **Cap. 117A** provides that "Except as otherwise provided in this or any other enactment, the Court of Appeal has jurisdiction to hear and determine, in accordance with the rules of court, appeals from any judgment or order of the High Court or a judge thereof".

[37] **Section 2** of **Cap. 117A** defines judgment to include order, decision or decree and defines order to include decision and rule. Broadly speaking, so long as a judgment or order is made in the High Court or by a judge thereof, jurisdiction resides in this Court to hear and determine an appeal against that

judgment or order. Of course, this does not mean that an individual who is not affected by the proceedings in the High Court, can appeal any judgment or order made in any proceedings.

[38] This Court's jurisdiction to hear appeals is subject to the qualification "except as otherwise provided in this or any other enactment". Of particular relevance is **section 54(1)(g)** of **Cap. 117A** which provides that no appeal lies to this Court against any interlocutory order or judgment without the leave of the judge or of this Court.

[39] In this case, Ms. Roachford who was not a party to the proceedings, but was counsel for some of the parties, made an application to the judge, and an order was made by the judge in respect of that application. Thus, this Court, in accordance with **section 52**, is empowered to hear Ms. Roachford's appeal against that order, counsel having obtained the requisite leave to appeal the judge's order.

Issue 4

[40] Here, Mr. Drakes has asked this Court to exercise its power under ***CPR 62.4(6)*** to strike out the grounds of appeal on the basis that they are vague and in general terms and disclose no reasonable ground of appeal.

[41] In its recent decision of **Erskine Kellman v Granville Bovell**, **Civil Appeal No. 13 of 2015**, (**Kellman v Bovell**), this Court discussed the principles relating to the question of striking out a statement of case under ***CPR 26.3 (3)(b)*** on the ground that it discloses no reasonable ground for bringing an action. There, this Court distilled two principles based on the CCJ decision in **Barbados Rediffusion Services Limited v Asha Mirchandani and McDonald Farms Ltd, CCJ Appeal No. CV 1 of 2005**, which a court dealing with an application to strike out a statement of case should apply. These principles are "(i) when it is necessary to achieve fairness; and (ii) when it is necessary to maintain respect for the authority of the court's order."

[42] In our opinion, although the issue in **Kellman v Bovell** was concerned with the striking out of a statement of case under ***CPR 26.3(3)(b),*** the same principles should apply to applications to strike out an appellant's grounds of appeal under ***CPR 62.4(6)***.

[43] We have examined the grounds of appeal and do not consider that they are vague to the extent that no response could be made to them, or that this Court would be unable to identify the issues raised therein, or that they would inevitably fail as a matter of law. We therefore hold that the grounds of appeal should not be struck out under ***CPR 62.4(6)***.

SUBSTANTIVE ISSUE

[44] We now turn to the substantive issue which has been raised in this appeal, that is, whether the judge erred when she determined that further evidence was required to satisfy her inquiry as to whether there was an actual or potential conflict of interest. In effect, this Court is being asked to interfere with the exercise by **Beckles J** of her discretion.

[45] Before proceeding further, we consider it important to remind ourselves of our jurisdiction in this regard. In numerous decisions including **Locke v Bellingdon Limited, Civil Appeals Nos. 31 and 34 of 2001, Toojays Limited v Westhaven Limited, Civil Appeal No. 14 of 2008**, and **Cellate Caribbean Limited et al v Harlequin Property (SVG) Limited, Civil Appeal No. 3 of 2011,** this Court accepted and applied the statement of law by Lord Woolf MR in the English Court of Appeal decision of **Phonographic Performance Ltd v AEI Rediffusion Music Ltd [1999] 1 WLR 1523-D** on the appellate function in respect to an appeal against the exercise of a discretion by a trial court that:

> "Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or has taken into account, some feature that he should, or should not have considered, or that his decision was wholly wrong because the court is forced to the conclusion that he has not balanced the various factors in the scale."

[46] Bearing the above in mind, we turn next to the submissions made by counsel.

SUBMISSIONS OF COUNSEL

[47] Ms. Greene QC, in her oral arguments, contended that the decision of **Beckles J** to defer the matter and require further affidavit evidence was an improper exercise of her discretion. Counsel submitted that when an attorney makes an application to the court under ***CPR 63.6,*** it is not to seek the court's permission to be removed from the record, but simply to be polite to the court. Counsel cited in support of her submission, the British Columbia Supreme Court decisions in **Re Leask and Cronin (1985), 3 W.W.R. 152, 18 C.C.C. (3d) 315 (BCSC)** and **Boult Enterprises Ltd. v Bisset (1985) 21 DLR (4th) 730**.

[48] Ms. Greene QC highlighted the use of the word "may" in ***CPR 63.6*** to support her argument that the application made by Ms. Roachford to be removed from the record was not mandatory in nature, but was discretionary. Counsel referred to **section 37** of the **Interpretation Act, Cap 1**, which provides that the expression "may" shall be construed as permissive and empowering.

[49] Ms. Greene QC further argued that once the application was made, the court had no discretion to refuse leave to the attorney to withdraw or to enquire further into the attorney's reasons for withdrawing. Counsel however conceded that only in an extreme case where the affidavit "makes no sense" can the court make further inquiries. Ms. Greene QC hastened to add that this

was not the case with Ms. Roachford's affidavit, which in her view was sufficiently detailed to allow the judge to pinpoint that a conflict of interest had arisen which demanded immediate removal from the record.

[50] Ms. Greene QC stated that it was unfortunate that the matters deposed to in Ms. Roachford's affidavit have now been disclosed since the affidavit evidence should only have been viewed by the court. Moreover, counsel submitted that to divulge further information to the court would be in breach of client/attorney privilege. Ms. Greene QC also submitted that in circumstances where Ms. Roachford formed the opinion that there would be a conflict of interest, the relevance of requiring further information from the parties was doubtful.

[51] In response, Mr. Drakes submitted that under ***CPR 63.6***, an attorney-at-law must first apply and obtain an order of the court to be removed from the record and that the power of the court to grant such order is discretionary. He further argued that the application must be supported by affidavit evidence and that the court must satisfy itself as to whether the application and supporting evidence have merit. Counsel submitted that the question of whether a conflict of interest arose in this case is a question of fact, on which the judge had not yet decided.

[52] Mr. Drakes contended that **Beckles J** was entitled to request further evidence on aspects of the application from the parties to the matter. Citing ***CPR 26.1 (2) (p),*** Mr. Drakes submitted that, even if oral statements were made by the parties that they were not objecting to Ms. Roachford's removal from the record, the judge was fully within her powers to require written evidence.

[53] Mr. Drakes also cited ***CPR 26.2 (u)*** in support of his argument that the court in all circumstances maintains control of its process in aid of the administration of justice and deemed it erroneous that an attorney seeking to be removed from the record does so out of sheer politeness.

[54] Counsel contended that the judge, in ordering that further affidavit evidence be provided, gave the parties a reasonable opportunity to make representations without making a pronouncement, to achieve fairness in the litigation process as a matter of law and proper practice. Counsel submitted that it is not every assertion of conflict that may rise to the level of providing a legal basis for withdrawal. In addition, **Beckles J** also had before her a cross-application and had to consider the totality of the information which was before her.

[55] Finally, Mr. Drakes submitted that an attorney-at-law's duty to the court, supercedes his duty to his client.

DISCUSSION

[56] It is important, in our opinion, to remind ourselves that Ms. Greene QC's argument is not that a judge has no discretion to require further affidavit evidence *simpliciter*, but that a judge has no discretion to require further affidavit evidence in the specific instance where an application has been made by an attorney-at-law pursuant to ***CPR 63.6.***

[57] The main reasoning behind Ms. Greene QC's argument, as we understand it, is that the court must presume that an attorney-at-law is adhering to ethical standards. Therefore, when an attorney-at-law has formed a professional opinion to terminate his contractual relationship with his client, inquiry by a judge into these reasons should be prohibited, or, alternatively, constrained.

[58] We consider it useful to examine ***CPR 63.6*** within the context of ***CPR 63***.

[59] According to ***CPR 63.2***, a party to any cause or matter who sues or defends by an attorney-at-law may change his attorney-at-law without an order for that purpose. However, unless and until notice of the change is filed and copies of the notice are served in accordance with this rule, the former attorney-at-law shall, subject to ***CPR 63.5*** and ***63.6***, be considered the attorney-at-law of the party until the final determination of the cause or matter, whether in the High Court or the Court of Appeal. The new attorney-at-law must file a notice

of change of attorney stating certain details and serve that notice on every other party and the former attorney-at-law.

[60] Likewise, under ***CPR 63.3***, where a person has previously acted in person and instructs an attorney-at-law, that attorney-at-law must file a notice of that change and serve a copy of the notice on every party.

[61] Under ***CPR 63.4***, where a party who has previously been represented by an attorney-at-law decides to act in person, that party must file a notice including certain details of that party and serve a copy of the notice on every other party and on the former attorney-at-law. The former attorney-at-law must also file a notice that he has ceased to act and serve a copy of that notice on every other party and on his former client.

[62] ***CPR 63.5 (1)*** states that where an attorney-at-law is unable to represent his client for various reasons, any other party may apply to the court for an order declaring that the attorney-at-law in question has ceased to act. The application must be supported by evidence on affidavit and must be served on the attorney-at-law, if practicable, and personally on his client. Any order made must be served by the applicant on the attorney-at-law or former attorney-at-law, if practicable, and personally on his client. Thereafter, the applicant must file a certificate of service of the order.

[63] ***CPR 63.6 (1)*** makes provision for an attorney-at-law who wishes to be removed from the record as acting for a party. The attorney-at-law may apply to the court for an order that he be removed from the record. Notice of the application must be served on the client or former client and all other parties. The application must be supported by evidence on affidavit which must be served on the client but must not be served on any other party to the proceedings. Any order made must be served by the applicant on the other parties' attorneys-at-law and on the former client. Thereafter, the applicant must file a certificate of service of the order.

[64] As can be seen from the above, under ***CPR 63***, there is a difference between the requirements where a party is the person seeking a change of attorney-at-law, where a party seeks a change of attorney-at-law for another, and where an attorney-at-law seeks to be removed from the record. In the first instance, there is no requirement to obtain a court order through the filing of an application supported by affidavit evidence. However, in the second and third instances, an application must be made to the court, supported by affidavit evidence and an order must be obtained by the applicant.

[65] It was Ms. Greene QC's initial argument that an attorney-at-law retains a discretion to file an application for an order to be removed from the record and files such application as a matter of courtesy. We disagree.

[66] In our opinion, the use of the word "may" in ***CPR 63.6*** empowers and permits an attorney-at-law who wishes to be removed from the record to do so. This interpretation is consistent, in our view, with the use of the word "may" in ***CPR 63.2(1)*** and ***63.5(1)***.

[67] A party has the right to choose who he/she wishes to represent him/her in legal proceedings. Having exercised that right, a party is entitled to believe that counsel will pursue his/her interests with vigour. It is of course open to a party to terminate that relationship at any time, but it is not open to counsel to cease acting as counsel without more. The obtaining of the court's permission is not as counsel argues a mere matter of courtesy.

[68] Further, ***rule 68*** of the ***Legal Profession Code of Ethics 1988***, ***(Code of Ethics)*** provides:

> "(1) An attorney-at-law who withdraws his services under Rule 8 shall not do so until he has taken reasonable steps to avoid foreseeable prejudice or injury to the position and rights of his client including:
>
> (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 matter has commenced."

[69] We have therefore concluded that Ms. Greene QC's initial argument that the court had no discretion to refuse an application made under ***CPR 63.6*** is unsustainable.

[70] Ms. Greene QC, in conceding that the court has a discretion to refuse an application when the affidavit evidence "made no sense" presented an alternative argument to the Court.

[71] The alternative argument is that where an attorney-at-law produces affidavit evidence that "makes sense", the court must approve of the application and grant an order to that effect. Ms. Greene QC maintained that Ms. Roachford, in deposing that a conflict of interest had arisen, provided sufficient evidence to satisfy the judge that the order should be granted. Instead, the judge required further evidence from the parties, which Ms. Greene QC described as being inconsequential to the question which the judge had to answer.

[72] Therefore, in our view, the considerations which the judge took into account or failed to take into account, assume prime significance to the resolution of the issue.

[73] In her decision, **Beckles J** extensively set out the provisions in the ***Code of Ethics*** relating to the attorney/client relationship, and at **para [41]**, she stated that 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.

[74] At **para [48]**, **Beckles J** stated that "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 that removal of the attorney-at-law and whether the Defendants intend to instruct separate lawyers."

[75] The question therefore is, was the judge in exercising her discretion, correct in attempting to ascertain whether the reasons for Ms. Roachford's application amounted to a conflict of interest or whether it was sufficient without more for Ms. Roachford to state that a conflict of interest had arisen.

[76] This question is a thorny one and we have not been able to unearth any authorities in our regional jurisdictions on this point.

[77] However, the decision of the Supreme Court of Canada in **R. v. Cunningham, 2010 SCC 10, [2010] 1 S.C.R. 331 (Cunningham)** is of some guidance in the resolution of the issue raised in this appeal. It is important to note that **Cunningham** is distinguishable in that the issue raised in that appeal was the role of a court when defence counsel, in a criminal matter, wishes to withdraw because of non-payment of legal fees.

[78] In **Cunningham**, Rothstein J stated at *para [9]*:

> "An accused has an unfettered right to discharge his or her legal counsel at any time and for any reason. A court may not interfere with this decision and cannot force counsel upon an unwilling accused... Counsel, on the other hand, does not have an unfettered right to withdraw. The fiduciary nature of the solicitor-client relationship means that counsel is constrained in his or her ability to withdraw from a case once he or she has chosen to represent an accused. These constraints are thoroughly

> outlined in the rules of professional conduct issued by the provincial or territorial law societies…This appeal raises the issue of whether a court's jurisdiction to control its own process imposes a further constraint on counsel's ability to withdraw."

[79] In examining the court's jurisdiction, Rothstein J also dealt with the question of counsel's ability to withdraw in any matter generally. He stated at *para [18]*:

> "Superior courts possess inherent jurisdiction to ensure they can function as courts of law and fulfil their mandate to administer justice (see I. H. Jacob, "The Inherent Jurisdiction of the Court" (1970), 23 Curr. Legal Probs. 23, at pp. 27-28). Inherent jurisdiction includes the authority to control the process of the court, prevent abuses of process, and ensure the machinery of the court functions in an orderly and effective manner. As counsel are key actors in the administration of justice, the court has authority to exercise some control over counsel when necessary to protect its process."

[80] *At para [20]* Rothstein J stated that "Applications regarding withdrawal or removal of counsel, whether for non-payment of fees, conflict of interest or otherwise, are the types of matters that fall within the necessarily implied authority of a court to control the conduct of legal proceedings before it."

[81] Of particular interest are *paras [47]* to *[50]* where the Supreme Court of Canada set out the principles which should guide a court in the exercise of discretion in an application by counsel for leave to withdraw:

> "[47] If counsel seeks to withdraw far enough in advance of any scheduled proceedings and an adjournment will not be necessary, then the court should allow the withdrawal. In this situation,

> there is no need for the court to enquire into counsel's reasons for seeking to withdraw or require counsel to continue to act.
>
> [48] Assuming that timing is an issue, the court is entitled to enquire further. Counsel may reveal that he or she seeks to withdraw for ethical reasons, non-payment of fees, or another specific reason (e.g. workload of counsel) if solicitor-client privilege is not engaged. Counsel seeking to withdraw for ethical reasons means that an issue has arisen in the solicitor-client relationship where it is now impossible for counsel to continue in good conscience to represent the accused. Counsel may cite "ethical reasons" as the reason for withdrawal if, for example, the accused is requesting that counsel act in violation of his or her professional obligations… If the real reason for withdrawal is non-payment of legal fees, then counsel cannot represent to the court that he or she seeks to withdraw for "ethical reasons". However, in either the case of ethical reasons or non-payment of fees, the court must accept counsel's answer at face value and not enquire further so as to avoid trenching on potential issues of solicitor-client privilege.
>
> [49] If withdrawal is sought for an ethical reason, then the court must grant withdrawal (see *C. (D.D.)*, at p. 328, and *Deschamps*, at para. 23). Where an ethical issue has arisen in the relationship, counsel may be *required* to withdraw in order to comply with his or her professional obligations. It would be inappropriate for a court to require counsel to continue to act when to do so would put him or her in violation of professional responsibilities.
>
> [50] If withdrawal is sought because of non-payment of legal fees, the court may exercise its discretion to refuse counsel's request."

[82] As we see it, under ***CPR 63.6***, when faced with an application for leave to be removed from the record, the judge must be satisfied that it is reasonable to grant such a request. However, the judge has the power to refuse to grant an

application for leave to withdraw as counsel, but the power to refuse leave should be sparingly exercised.

[83] In this case, the attorney-at-law sought removal from the record on the basis that a conflict of interest which gave rise to an ethical issue had arisen and in such a case, the court should have exercised its power to grant leave without further inquiry. In our opinion, the judge fell into error when she ordered further affidavit evidence in relation to whether there was an actual conflict and whether the defendants intended to instruct separate lawyers. The judge failed to take into account the relevant considerations such as client/ attorney privilege or the presumption that should be given to an attorney-at-law asserting a conflict of interest.

[84] Having regard to our findings, we have concluded that the appeal should be allowed and the matter remitted to the judge to determine the claimant's application.

COSTS

[85] There are two applications before us for costs.

[86] The first application was that made by Mr. Drakes on 31 October 2017. On that date, Mr. Drakes pointed out that on 25 July 2017, former counsel for Ms. Roachford was granted an order to be removed from the record and Ms. Roachford therefore had three months to retain new counsel who had time

to file submissions in the matter. However, when Ms. Greene QC appeared as counsel for Ms. Roachford, she made an application for an adjournment to file her own legal submissions.

[87] Mr. Drakes also submitted that he had written to Ms. Roachford on 19 October 2017, inquiring whether she had retained new counsel. He received no response from counsel. Mr. Drakes further submitted that the sum of $1200.00 was reasonable in the circumstances.

[88] The second application relates to the costs of this appeal. In her notice of appeal, Ms. Roachford asked this Court to grant her the costs of the appeal and the costs in the court below, if successful.

[89] According to ***CPR 64.6(1)*** in deciding which party, if any, should pay costs, the general rule is that the court will order the unsuccessful party to pay the costs of the successful party. However, ***CPR 64.6(2)*** gives this Court a discretion to depart from the general rule and make no order as to costs. We have carefully considered the submissions of counsel on this point and having regard to all the circumstances, have determined that the appropriate order is for each party to bear their own costs of the appeal.

DISPOSAL

[90] The order of the Court is as follows:

1. The appeal is allowed. Ms. Roachford is removed from the record as attorney-at-law for the third and fourth defendants.

2. The matter is remitted to the judge to determine the claimant's application.

3. Each party shall bear their costs.

Chief Justice

Justice of Appeal

Justice of Appeal