# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

## 2021: No. 413

**IN THE MATTER OF a Consent Order filed on 14 February 2018 (the First Consent Order) (SC 2016:196) which there was no agreement, on terms for conditions upon signing. There was negligent case management from the Courts to ensure parties were on equal footing. As mortgagor was a Litigant in person.**

**AND IN THE MATTER OF a Consent Order filed on 15 October 2018 (the Second Consent Order) which was signed by AMICUS Law Chambers without engagement, knowledge or sight of the case that was ensuing in the Bermuda Supreme Court; with Amicus continually acting in bad faith thereafter.**

**BETWEEN:**

**(1) WANDA BOOTH**
**(2) SHADDI SOMERSALL**
**(3) EMPRESS SOMERSALL**

**Plaintiffs**

**-and-**

**(1) HSBC BANK BERMUDA LIMITED**
**(2) MARSHALL DIEL & MYERS LIMITED**
**(3) THE COMMISSIONER OF POLICE**
**(4) AMICUS LAW CHAMBERS LIMITED**

**Defendants**

## RULING

*(Application to restrain barrister from representing a client, Court's inherent supervisory jurisdiction over members of the Bermuda Bar, exceptional circumstances, nature of connections*

*between a barrister and other barristers or parties, tactical purposes causing inconvenience and delay)*

**Date of Hearing:** **17 January 2023**
**Date of Ruling:** **26 January 2023**

**Appearances:** **Vaughan Caines, Forensica Legal, for Plaintiffs**

**Dantae Williams, Sean Dunleavy, Marshall Diel & Myers Limited for the First and Second Defendants**

**RULING of Mussenden J**

**Introduction**

1. This matter appears before me on the Plaintiffs' Summons dated 25 August 2022 wherein they seek an order that Marshall Diel & Myers Limited ("**MDM**") be prevented from acting as the attorneys for HSBC Bank of Bermuda Limited ("**HSBC**") (the "**Restraint Application**"). There were other applications in the Summons but it was appropriate to deal with this particular application first.

2. The substantive application in this case seeks to set aside various consent orders signed by one or more of the Plaintiffs, declarations that they were obtained unlawfully or contrary to the Bermuda Constitution Order 1968, other declarations and damages. Each Defendant in this case seeks to strike out the action (the "**Strike-Out Applications**").

**The Evidence**

3. Lavonne Brown, Credit Recovery Manager of HSBC swore two affidavits in this matter. She stated that on 18 August 2006 Ms. Booth and her Father John O'Connor entered into a mortgage of $520,000 with HSBC (the "**Mortgage**") with a charge over the property located at 25A SoFar Lane, St. David's (the "**Property**"). In 2009 the Mortgage fell into arrears and legal action in respect of those arrears was discontinued once the arrears were paid up. In 2014 the Mortgage fell into arrears again and legal action commenced again.

After many discussions and meetings and unsuccessful promises to pay, the Mortgage was still in arrears in 2018 and HSBC took steps to proceed with the action. On 2 February 2018, having been asked by Ms. Booth to give her another chance to retain the Property, MDM acting for HSBC, sent her email correspondence agreeing to give her one more chance if she would enter into a consent order. That correspondence advised Ms. Booth to seek legal advice. There was further correspondence between them on the subject including about construction works due to commence.

4. On 14 February 2018 Ms. Booth entered into a Consent Order (the "**Consent Order**") which terms were: (a) a money judgment was granted to HSBC for Ms. Booth to pay $694,400.32, as the amount owed under the mortgage and interest; (b) the mortgage may be enforced by sale of the Property; and (c) Ms. Booth shall deliver to HSBC possession of the Property immediately.

5. On 23 May 2018 John Hindess, Senior Associate, MDM sent Ms. Booth a letter setting out the formal arrangement (the "**MDM Letter Agreement**") with a list of construction works, and information about current and future tenants. It stated that an agreed monthly payment of $2,560 must be paid on time, otherwise HSBC would seek vacant possession of the Property. In September 2018 Ms. Booth defaulted again. After various steps in legal proceedings in this matter that are not necessary to be set out here, on 21 March 2021 Ms. Booth and the other Plaintiffs were evicted from the Premises.

6. Ms. Booth swore an affidavit dated 18 August 2022 in support of the Restraint Application. In general, the Plaintiffs assert that MDM coerced and/or induced Ms. Booth to enter into the Consent Order, while she was a litigant in person, by promising to complete construction at the Property. Further, she asserts that there was a loan from HSBC, rather than a mortgage, for the purpose of assisting in completion of the Property. Consequently, Ms. Booth asserts that she was put out of possession of the Property and thus she and her children have been wrongfully dispossessed of their rightful home by the wrongful actions of HSBC with the assistance of the remaining Defendants.

7. Ms. Booth exhibited a number of documents which included:
    a. An HSBC document entitled "*Offer to Finance*" dated 2 May 2006 ("**Offer to Finance**"), addressed to Ms. Booth and John O'Connor for a Construction Mortgage facility of $520,000 which stated purpose was for "*Assistance to finish building and new additions to 25 SoFar Lane, St. David's.*" The Offer to Finance was signed by Ms. Booth and John O'Connor dated 21 August 2006;
    b. Ms. Booth and John O'Connor bank statements for the period 3 January 2018 to 30 November 2018;
    c. Email correspondence between John Hindess, Senior Associate of MDM and Ms. Booth for the period 1 February 2018 to 15 February 2018 (the "**Emails**");
    d. The Consent Order; and
    e. The MDM Letter Agreement.

**The Plaintiffs' Submissions**

8. Mr. Caines made several submissions in support of the Restraint Application. First, he stated that the Emails showed that there was an urgency by Mr. Hindess to get the Consent Order signed. However, the Emails also showed that Ms. Booth was nervous about signing the Consent Order and that she wanted the construction to get started. He argued that the indication of the commencement of the construction was a major reason why Ms. Booth signed the Consent Order. Thus, she relied on the statements of Mr. Hindess. Further, Mr. Hindess knew she was desperate to start and complete the construction so that she could secure tenants to help generate revenue to repay the loan.

9. Second, Mr. Caines initially relied on the case of *American Cyanamid Co. v Ethicon Ltd. [1975] UKHL 1* to found the Restraint Application. However, at the hearing he made submissions about the cases provided by MDM that: (a) the *Bolkiah* test as set out in *Bolkiah v KPMG* [1988] UKHL 52 did not apply; and (b) he now relied on the *Geveran* test as set out in the leading case of *Skjevesland v Geveran Trading Co Ltd* [2002] EWCA Civ 1567 where the Court of Appeal accepted that that the circumstances in which an

advocate may be retrained by the Court from acting as an advocate in litigation were likely to be very exceptional.

10. Third, Mr. Caines submitted that the present case was very exceptional as Mr. Hindess met with Ms. Booth but he should not have told her that construction will start. As a result of such statements, he argues that Ms. Booth, as a litigant in person, was induced to sign the Consent Order. Thus, he submits that Mr. Hindess was an agent of MDM, in their control and MDM is vicariously liable for his actions. He argued that the Court should reject MDM's argument that Mr. Hindess was no longer working on the matter as he was no longer working for MDM.

11. Fourth, in respect of the nature of the connection element as set out in *Geveran*, Mr. Caines submitted that Mr. Hindess was a representative for HSBC and interacted with Ms. Booth as a litigant in person. He argued that as an officer of the Court, Mr. Hindess should have recognised that Ms. Booth was confused and thus should have ensured that she sought legal advice to clear up her confusion, despite the statement in the Emails advising her to seek legal advice. Further, he submitted that both HSBC and MDM have benefitted to the detriment of Ms. Booth who has lost her home, despite the fact that she received the Mortgage funds. In any event, Mr. Hindess's actions were a breach of good faith between the parties.

12. Fifth, in respect of the conflicts of facts element as set out in *Geveran*, Mr. Caines argued that Ms. Booth was confused as to why the action was taking place as she was making payments, she was keen for the construction to start and she was voicing concerns about the circumstances. Thus, it was not proper for Mr. Hindess to induce Ms. Booth to sign the Consent Order.

**The First and Second Defendant's Submissions**

13. Mr. Dunleavy submitted that the Restraint Application should be refused for several reasons. First, he submitted that *American Cyanamid* was irrelevant to the application to restrain a barrister from acting for a client.

14. Second, there were a line of English and Bermuda cases that had dealt with the point. The leading English Court of Appeal case of *Bolkiah v KPMG* [1998] UKHL 52 dealt with the barrister's duty to protect confidential information and therefore was not relevant to this application. He noted that the Bermuda Court of Appeal had applied the *Bolkiah* test on numerous cases, for example in *Marshall & Barritt v A* [2015] Bda LR 101, and the Supreme Court in *Re a Firm of Barristers and Attorneys* [2014] Bda LR 46; *A v B (Director of C Ltd)* [2015] Bda LR 85; *MJM Limited v Apex Fund Services Ltd* [2019] Bda LR 101; and *Marshall Diel & Myers Limited v Hill* [2020] Bda LR 46, all of which involved a former client seeking to restrain a barrister from acting adverse to them, in order to avoid disclosure of confidential information.

15. Third, the case of *Geveran* was applicable in the present case which set out the principle that a Court may restrain a Barrister under its inherent jurisdiction to prevent abuse of procedure in very exceptional circumstances. However, there were no exceptional circumstances in this case, nothing to create any reasonable lay apprehension of unfairness, and nothing to indicate that MDM's participation would lead to an order being set aside. Further, he argued that: (a) there were no personal issues between Ms. Booth and Mr. Hindess or other MDM counsel; and (b) throughout the proceedings, MDM have and will continue to rebut the Plaintiffs' complaints and criticisms both objectively and dispassionately. Thus there was no reason to restrain MDM from continuing to represent HSBC.

16. Fourth, Mr. Dunleavy submitted that even if the Plaintiffs had set out a case for exceptional circumstances then *Geveran* noted that a Court should not too ready accede to an application by a party to remove the advocate for the other party as the objection could be for tactical reasons that could cause inconvenience and delay. To that point he noted that Bell JA of the Court of Appeal of Bermuda had stated in *R v Wallington* that [2022] Bda LR, a case that involved the issue of recusal of a magistrate who had heard two cases for the same appellant, that the Court had identified a troubling trend in Bermuda of litigants making applications for recusal for a litigation advantage when the underlying

circumstances did not call for such recusal. Mr. Dunleavy argued that that sentiment could be applied to cases involving restraining counsel. Further, Mr. Dunleavy argued that any objection should have been made without delay.

17. Fifth, Mr. Dunleavy submitted that the Barristers' Code of Professional Conduct 1981 (the "**Code**") Rule 29(2) allowed for a firm to represent a party in a matter where a professional colleague is likely to be called as a witness. He also argued that in any event, MDM was a party to the action and thus it made no sense to restrain them from representing HSBC.

**The Law on Restraining a Barrister from Acting for Party**

18. In *Geveran*, Lady Arden stated as follows:

> *"39. We accept that the circumstances (other than those where he has relevant confidential information) where an advocate may be restrained by the court from acting as an advocate in litigation are likely to be very exceptional. However, such circumstances have occurred in the past.*
>
> *41. ... The case law demonstrates that in exceptional circumstances an advocate can be prevented from acting even where he does not have such information.*
>
> *42. ... The court has an inherent power to prevent abuse of its procedure and accordingly has the power to restrain an advocate from representing a party if it is satisfied that there is a real risk of his continued participation leading to a situation where the order made at trial would have to be set aside on appeal. The judge has to consider the facts of the particular case with care...*
>
> *42. ...In many cases it will be sufficient that there is a reasonable lay apprehension that this is the case because as Lord Hewart CJ memorably said in R v Sussex Justices ex parte McCarthy [1923] 1 KB 256, it is important that justice should not only be done, but seen to be done.*
>
> *42. ... But we stress that the judge must consider all the circumstances carefully. A connection, for instance, between counsel for one party and a witness on the other side*

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

*43. A judge should not too readily accede to an application by a party to remove the advocate for the other party. It is obvious that such an objection can be used for purely tactical reasons and will inevitably cause inconvenience and delay in the proceedings. The court must take into account that the other party has chosen to be represented by the counsel in question.*

*47. If a party objects to the advocate for the other party, he should make that clear to the other party without delay."*

19. In *Brown v Asphall* [2006] Bda LR 3, which involved an appeal from the Magistrates' Court, Kawaley J (as he then was), in concluding that the principles elucidated in *Geveran* are applicable in the Bermuda law context, stated:

*"3. ...Counsel for the Appellant raised a preliminary objection to the Respondent being represented by the same Counsel who, in his previous capacity as a Magistrate, had made the decision which was subject-matter of the present appeal.*

*10. Although there is no formal application presently before the Court for an injunction restraining the Respondent's Counsel from continuing to act, this Court undoubtedly possesses an inherent supervisory jurisdiction over members of the Bermuda Bar, who are officers of the Court. This jurisdiction in my view embodies the power to restrain a barrister and attorney acting in a matter before the Court from acting in circumstances where his continuing to act would breach any duty owed to the Court.*

*11. The scope of this jurisdiction, which is distinct from the jurisdiction to prevent the breach of any duties owed by a lawyer to past or present clients, has been described,*

*in a passage recently approved by the New South Wales Supreme Court [Kallinicos v Hunt [2005] NSWSC 1181], as follows:*

> *"If there are circumstances which are likely to imperil the discharge of these duties to a court by a legal practitioner acting in a cause, whether because of some prior association with one or more of the parties against whom the practitioner is then to act, or because of some conduct by the practitioner, whether arising from associations with the client or a close interest which gives rise to the fair and reasonable perception that the practitioner may not exercise the necessary independent judgment, a court may conclude that the lawyer should be restrained from acting...."*

**Analysis of the Plaintiffs' Applications**

20. In my view, the Plaintiffs' Restraint Application should be refused for several reasons. First, I agree with Mr. Dunleavy that the proper test in these circumstances is as set out in *Geveran*, not *American Cyanamid* which deals with injunctions or *Bolkiah* which deals with confidential information which is not the issue in the present case.

21. Second, in my view, the circumstances of this case do not meet the *Geveran* test. In *Geveran*, the Court gave examples where a barrister might be restrained from representing a client where there was a connection between the barrister and another person in the case including: (a) In *R v Winston Smith* (1975) 61 Cr App R128 where a pupil barrister met the accused and discussed his case with him then subsequently sat behind the prosecutor; (b) In *R v Batt* [1996] Crim. L.R. 910, CA when a husband and wife or other cohabitating partners appeared as advocates against each other in a contested criminal matter; and (c) in *Re L (children) (care proceedings: cohabitating solicitors)* [2011] 1 W.L.R. 100 when the solicitor for the local authority in care proceedings cohabitated with the solicitor for the family. In the present case, Mr. Hindess was acting in his capacity as counsel for HSBC and, as Ms. Booth was a litigant in person, he dealt with her on the issues in the matter. His correspondence more than once stated that Ms. Booth should seek legal advice. In my view,

I must reject Mr. Caines's submission that the communications between Mr. Hindess and Ms. Booth formed a kind of personal connection identified in *Geveran* to warrant restraining MDM. On the contrary, the connection between Mr. Hindess and Ms. Booth in no way amounts to such a personal connection.

22. Third, in my view, I reject Mr. Caines's arguments that there is a conflict of the facts that warrant restraining MDM from acting for HSBC. The substantive case is a well documented case which can be adequately ventilated at the appropriate time. The parties may well take different views of the facts but that hardly warrants restraining MDM when all the correspondence in the form of letters and Emails are examined by the Court at the appropriate hearing.

23. Fourth, as set out in *Geveran*, I have considered that restraining MDM could lead to inconvenience and delays in this matter in that new counsel would have to be instructed and bring themselves up to speed on all aspects of the case. I note that there are other applications on the present Summons and several Strike-Out Applications filed in this matter and the hearings on those applications are already delayed. Also, HSBC has given an undertaking that it will not proceed with a sale of the Property whilst these matters are pending. Thus, any delay would cause inconvenience to HSBC if they are indeed entitled to sell the Property and to Ms. Booth is she is entitled to her claims. Whilst I have not detected any actual tactical reason by Mr. Caines to have MDM restrained from representing HSBC as set out in *Geveran*, there is the practical consideration that MDM is a party to the proceedings in any event. In my view, this is the kind of case Bell JA spoke of in *Wallington,* albeit in that case he was speaking of recusal of magistrates. It makes no practical sense to restrain MDM from acting for HSBC when they will be acting for themselves on the same issues. I consider the actual and potential delay to be a significant factor to refuse the Restraint Application.

24. Fifth, MDM is a firm of barristers and Mr. Hindess no longer works there. Thus other counsel will have conduct of this case going forward who will have a duty to represent their clients and accordingly have and will continue to rebut the Plaintiffs' complaints and criticisms both objectively and dispassionately. Also, I have considered it significant that

HSBC has chosen to retain MDM as counsel of its choice in this matter, a choice which should be rarely interfered with. Thus, even if Mr. Hindess still worked at MDM, in my view MDM could still represent HSBC as the Code Rule 29(2) expressly provides that:

> *"A barrister may properly appear as counsel in a matter in which a partner or employee or employer of his, or a registered associate employed in a practice to which they both belong, is likely to be called as a witness, unless his so appearing would involve a breach of some other provision of the Code. "*

25. Sixth, this Restraint Application has been brought by Summons dated 25 August 2022. The Consent Order was signed on 14 February 2018 and the eviction took place on 21 March 2021. In my view, there is an inordinate delay in bringing the application four years after the date of the Consent Order or more gratuitously, one and a half years since the date of the eviction. Again, *Geveran* states that an objection to an advocate should be made clear to the other party without delay. There has been no reason provided for the delay in filing the Restraint Application in this matter. I consider the delay to be a significant factor to refuse the Restraint Application.

26. Seventh, I have considered all the circumstances in this application, in particular that Mr. Hindess was interacting with a litigant in person in written correspondence. Mr. Hindess had a duty to communicate with Ms. Booth. His emails included a statement advising her to seek legal advice. In my view, for the reasons already stated, there are no circumstances in the evidence for this application to create any reasonable lay apprehension of unfairness as against Ms. Booth, which leads me to the further conclusion that there is nothing to indicate that MDM's participation would lead to an order being set aside in further proceedings of this matter.

**Conclusion**

27. For the reasons above, I refuse the Plaintiffs' application to exercise my inherent supervisory jurisdiction to restrain MDM from representing HSBC going forward in this matter.

28. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall follow the event in favour of MDM against the Plaintiffs on a standard basis, to be taxed by the Registrar if not agreed.

Dated 26 January 2023


**HON. MR. JUSTICE LARRY MUSSENDEN**
**PUISNE JUDGE OF THE SUPREME COURT**