**IN THE DISTRICT COURT
AT NELSON**

**I TE KŌTI-Ā-ROHE
KI WHAKATŪ**

**CIV-2020-042-000069
[2020] NZDC 27022**

BETWEEN	BEECHNEST (2014) LIMITED Applicant
AND	LEIGHTON WATSON MARSHALL AND ALEXANDRA UNTERBERGER AND NELSON TRUSTEES NO. 8 LIMITED First to Twenty-Ninth Respondents

Hearing:	19 November 2020
Appearances:	D M O'Neill for the Applicant F McDonald for the First, Fifth, Sixth, Eighth and Nineteenth Respondents
Judgment:	24 December 2020

**RESERVED JUDGMENT OF JUDGE A A ZOHRAB
[as to an application by Mr McDonald/Hamish.Fletcher Lawyers to continue acting]**

Introduction

[1] Beechnest (2014) Limited ("Beechnest") took over an uncompleted subdivision in the St Anaud township with a view to completing the subdivision. By that stage, most of the lots had been subdivided, formed, and mainly sold. There were two lots left to be subdivided, which were lots 20 and 55.

[2] However, Beechnest was unaware that a covenant had been registered against the entire subdivision, including lots 20 and 55, restricting further subdivision. Beechnest went ahead with the subdivision, creating 10 sections, thinking that it could undertake such a subdivision and sell off the remaining 10 lots.

[3] Beechnest only discovered the existence of the covenant when a prospective purchaser brought to Beechnest's attention the fact that there was a covenant registered against the entire subdivision restricting further subdivision of any particular lot.

[4] Once the existence of the covenant was identified, Beechnest made an application under s 317(1) of the Property Law Act 2007 ("the PLA") to modify or extinguish the registered covenant preventing further subdivision of any particular lot.

[5] The case in broad terms for Beechnest is that the two lots (20 and 55) had been noted as future development lots in March 2009. It was always intended that those lots be subdivided as part of the development of the Beechnest subdivision. Tonkin + Taylor, a firm of environmental and engineering consultants, prepared a report in March 2009 ("the Tonkin + Taylor report") which noted that lots 20 and lot 55 had been set aside for further subdivision.

[6] Furthermore, that spatial map in the Tonkin + Taylor report noted lots 20 and 55 as future development lots.

[7] A number of property owners have opposed the application made under the PLA by Beechnest, a number have done nothing, and some have consented.

[8] Mr Fran McDonald, a solicitor with Hamish.Fletcher Lawyers ("HFL"), acts for several respondents who oppose Beechnest's application.

[9] Leighton Watson Marshall ("Mr Marshall") and Alexandra Unterberger in Nelson Trustees No. 8 Limited ("Ms Unterberger"), are trustees of the Portixol Family Trust of 75 Main Road, RD2, Nelson, and they as first respondents have lodged an objection to Beechnest's application.

[10] Mr Marshall and Ms Unterberger have filed affirmations confirming they as trustees own two sections at 24 and 26 Beechnest Drive (lots 53 and 54) which they purchased in 2016. Before Mr Marshall and Ms Unterberger purchased those sections, they were told by Mr Burke, a real estate agent with Ray White, that covenants meant that only one house could be built on lots 20 and 55. They also understood from

discussions with a council officer that the local council had disallowed the final phase of the subdivision of lots 20 and 25.

[11] Mr Marshall's sister, Ms Emma Marshall from HFL, acted as lawyer for Mr Marshall and Ms Unterberger on the purchase of the sections, and a search of the titles confirmed their understanding that there were covenants on all the sections preventing any further subdivision. Mr Marshall and Ms Unterberger say that if they had known that lot 55 was to be subdivided into seven titles, they would never have purchased 24 and 26 Beechnest Drive.

[12] Ms Marshall has filed an affirmation in support of Mr Marshall and Ms Unterberger's opposition, confirming amongst other things, that a search of the titles confirmed that there was a covenant preventing further subdivision of the two large lots across the road from the two sections her brother and sister-in-law were intending to purchase. She also confirmed that she went through the covenant and discussed it with her clients.

[13] By way of letter dated 12 August 2020, the applicant's solicitors objected to Mr McDonald continuing to act as counsel for the respondents on the basis that the respondents had filed an affirmation from Ms Marshall, another lawyer in the firm he worked for. The letter from the applicant's solicitors referred to r 13.5.3 of The Lawyers and Conveyancers Act (Lawyers: Conduct and Client Care) Rules 2008 ("the Rules"), which prohibits a lawyer from acting "in a proceeding if the conduct or advice of a lawyer or of another member of the lawyer's practice is in issue in the matter before the Court". It was also claimed that Ms Marshall's evidence was of a contentious nature, and that she would be required for cross-examination at trial.

[14] As a result of this objection, Mr McDonald has made application for he and HFL to continue acting for the respondents, and that is the application I am required to rule on.

Applicant's submissions

[15] Mr McDonald submitted that:

(a) Ms Marshall's evidence was background narrative, and was not contentious.

(b) *Li v Liu* is authority for the proposition that the Court should only exercise its inherent jurisdiction to disqualify counsel or solicitors from acting where, to do so, would impair the integrity of the judicial process, and that the Court should not lightly interfere in a party's fundamental right to counsel of their choice.[1]

(c) The Rules do not form an independent basis for the Court to act, but may inform the Court's exercise of its inherent powers *(Black v Taylor)*.[2]

(d) The jurisdiction to remove counsel can be exercised where counsel has sworn an affidavit on a contentious matter in the proceeding, or be witness at trial, and the evidence must be "of a truly contentious nature, to the extent necessary to justify disqualification". Even where there are some areas of contention in the evidence, counsel may be permitted to continue to act if the areas of contention are minimal in the extent of the overall dispute.

(e) The courts have noted that the "ethical obligation to withdraw with it becomes apparent that existing counsel may be required as a witness does not operate inflexibly".

(f) The jurisdiction to remove counsel can be exercised where another member of counsel's firm is a witness in the case.

(g) Rule 13.3.3 of the Rules precludes a lawyer from acting "in a proceeding if the conduct or advice of the lawyer or of another member of the lawyer's practice is in issue in the matter before the Court".

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[1] *Li v Liu* [2018] NZCA 528.
[2] *Black v Taylor* [1993] 3 NZLR 403 (CA).

(h) However, it was noted in *George v Auckland Council* "that r 13.5.3 is probably drafted too widely" and that "in the absence of clear evidence that a solicitor's advice is pivotal, disqualification should not follow".[3]

(i) It was also recently observed by Associate Judge Johnston in *Anderson v De Marco* that the Court should adopt a pragmatic approach in such matters.[4]

(j) Ms Marshall's affirmation is not of a contentious nature, and is largely background evidence. Its primary purpose is to exhibit various relevant documents in HFL's files and set out the relevant facts to make sense of them. Apart from the documents and background, there is nothing in Ms Marshall's affirmation that is not in other affidavits filed by the respondents.

(k) Ms Marshall's affirmation does not address any of the primary issues raised by the application which will need to be considered by the Court under the PLA, such as whether there has been any change of circumstances justifying the extinguishment of the covenant, and the effects of extinguishing the covenant on the respondents' properties.

(l) Whilst it seems that the applicant seems to be suggesting that Ms Marshall, given that she had the Tonkin + Taylor report, should have looked behind the covenant restricting subdivision and contemplated that it might be an error and discussed that with her clients, Mr McDonald submitted that it would not be relevant to the issues, given that it is not disputed that the covenant was duly registered and there to be seen by the purchasers and those acting for them. Rather, the application was likely to turn on matters such as the effects of extinguishing the covenant and whether there had been a relevant change in circumstances.

[3] *George v Auckland Council* [2012] NZEmpC 83.
[4] *Anderson v De Marco* [2020] NZHC 837 at [33]-[34], [38].

(m) There is no “clear evidence” that (Ms Marshall’s) advice is pivotal.

(n) Despite the relevant reference to r 15.3.3, the application does not put in issue Ms Marshall’s conduct or advice, and it is difficult to see how this could be relevant to an application to extinguish the covenant, as opposed to the assertion about the lack of advice of the applicant’s claims.

The respondent’s submissions

[16] It was submitted that:

(a) The procedure and guidance for lawyers in New Zealand is provided by the Rules, and more particularly r 13.5 which deals with independence in litigation. A lawyer engaged in litigation must maintain his or her independence at all times. In particular:

(i) A lawyer must not act in proceedings if the lawyer may be required to give evidence of a contentious nature (r 13.5.1).

(ii) If, after a lawyer has commenced acting in a proceeding it becomes apparent that the lawyer, or a member of that lawyer’s practice is to give evidence of a contentious nature, the lawyer must immediately inform the court and, unless the Court directs otherwise, cease acting (r 13.5.2).

(iii) A lawyer must not act if the conduct or the advice of the lawyer or another member of the firm is in issue before the Court.

(b) Ms Marshall will be required by the applicant for cross-examination. More particularly, Ms Marshall has confirmed that her usual practice is go to through documents such as covenants, ensure each restriction is understood and accepted, and she discussed with Mr Marshall and Ms Unterberger the restrictive land covenant to check her understanding of which sections had the restrictions registered against them. She said

that her clients relied on the fact that their views could not be built out because there were no restrictions on further subdivision because there were restrictions on further subdivision of the land.

[17] She deposed that they thought there was a real possibility the Beechnest land might not be built on at all, because it was part of the wetlands.

[18] Of significance from the applicant's perspective is that Ms Marshall was advising the purchasers, and she had access to all of the documents that had been supplied by the land agent, including the Tonkin + Taylor report, which refers to lots 20 and 55 as being set aside for future development.

[19] It is submitted that this was clearly at odds with the covenant, and in those circumstances it would suggest that the covenant was an error.

[20] The Rules are relevant not determinative of the application. The Rules are not a source of jurisdiction, but afford guidance as to relevant public policy concerns.

[21] It is accepted that the Court must have regard to the public interest that a litigant should not be deprived of his or her choice of counsel without cause. However, the Court must also ensure that the public is confident in the judicial system, and where there is a conflict between counsel's duty to the Court and his or her duty to the client's self-interest, then there is no limit on the conduct that may qualify.

[22] It is submitted therefore that, as was said in *Li v Liu*, the test is whether Mr McDonald, appearing in a matter where his partner will be giving evidence and be cross-examined, creates an appearance of injustice to such an extent that neither he nor his firm should be permitted to act further.

[23] It is incumbent on any solicitor and counsel to ensure that they do not appear in a matter in which they have an actual or potential conflict of interest.

[24] Ms Marshall has failed to advise her clients of a potential problem in relation to lots 20 and 55. The future development of lots 20 and 55 was clearly marked in the Tonkin + Taylor report which Ms Marshall had access to. It is submitted that the

inescapable conclusion is that she has failed to carefully advise her clients, as she claims she has done, despite reading the covenants, and failing to read the Tonkin + Taylor report carefully. Ms Marshall is in a position where her co-principal will be, on the one hand, wishing to advance his client's cause independently, but, on the other, striving to protect his firm from any potential liability that might arise out of cross-examination. It is submitted that Ms Marshall is therefore regarded as having given evidence of a contentious nature.

Discussion and decision

[25] The power to disqualify counsel was discussed by the Court of Appeal in *Li v Liu* as arising from the Court's inherent jurisdiction to protect the integrity of the judicial process. As a creature of statute the District Court does not have inherent jurisdiction. However, the power to disqualify counsel may equally be described as an inherent power of the Court within the meaning described by the Supreme Court in *Siemer v Solicitor-General.*[5]

> [113] All courts in New Zealand have inherent powers. While these powers have in the past sometimes been described as part of the "inherent jurisdiction" of the courts, we think that the term "inherent powers" more aptly describes them. "Jurisdiction" and "power" are two distinct concepts. The jurisdiction of a court is its substantive authority to hear and determine a matter Jurisdiction may be inherent in a particular court or it may be conferred by statute. But every court has inherent powers which are incidental to or ancillary to its jurisdiction, whether that jurisdiction is inherent or statutory.
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> [114] …The courts' inherent powers include all, but only, such powers as are necessary to enable a court to act effectively and uphold the administration of justice within its jurisdiction. Their scope extends to preventing abuse of the courts' processes and protecting the fair trial rights of an accused.

I am satisfied that the District Court has the power to make an order disqualifying counsel as part of its inherent power to uphold the administration of justice.

[26] Mr McDonald submitted that in "the absence of clear evidence that a solicitor's advice is pivotal [to the issues], disqualification should not follow". In my view, this

[5] *Siemer v Solicitor-General* [2013] NZSC 68.

test "sets the bar too high". I note that Mr McDonald is reliant upon the Employment Court decision of *George v Auckland Council* and this test seems not to have been adopted by our New Zealand Court of Appeal or High Court.

[27] As agreed between counsel, the Rules are relevant, but not determinative of this application. The real issue is whether or not, as was said in *Li v Liu*, whether Mr McDonald appearing in a matter where Ms Marshall will potentially be giving evidence and being cross-examined, creates an appearance of injustice to such an extent that neither he nor his firm should be permitted to act further.

[28] As a general proposition it is incumbent on any solicitor and counsel to ensure that they do not appear in a matter in which they have an actual or potential conflict of interest. However, as noted by Associate Judge Johnston in *Anderson v De Marco* the courts adopt a pragmatic approach to such matters. The real question is will Mr McDonald and HFL be able to "bring the necessary degree of objectivity and independence to the matter that the Court expects?".

[29] Firstly, I need to consider the matters at issue in the substantive hearing, as that will assist in determining the relevance of Ms Marshall's evidence. The application will focus on the matters relevant to s 317 of the PLA as outlined in *New Zealand Industrial Park Ltd v Stonehill Trustee Ltd* [2019] NZCA 147. The focus will be on whether there has been any change of circumstances justifying the extinguishment of the covenant and the effect of extinguishing the covenant on the respondents' properties.

[30] It is not disputed that there is a covenant restricting subdivision of the lots, and the first respondents were well aware of that even prior to Ms Marshall's advice as to the existence of the covenants. The applicant says that it will require Ms Marshall to give evidence and be available for cross-examination, and that is their right. However, any cross-examination will need to be relevant to the matters at issue.

[31] It is the applicant's intention to challenge Ms Marshall about the fact that whilst there is a covenant in place, given the contents of the Tonkin + Taylor report which she had, she as a reasonable and prudent solicitor should have contemplated the

likelihood that the covenant had been created in error. The logical development of this argument is that, notwithstanding the existence of the covenant on the titles, she should then have examined the instrument creating the actual covenant, examined what was happening on site, and then presumably have contacted the parties creating the covenant, Taylor + Tonkin, and Beechnest, to enquire whether or not the parties to the covenant had intended that such a restriction take place. At the very least, it would be suggested to Ms Marshall that she had failed to advise her clients that their views could have been built out because a house within the District Plan could be built across the entire subdivision.

[32] Essentially, the applicant will be submitting that, given the contents of the Tonkin + Taylor report, Ms Marshall has failed to advise her clients with respect to the potential problem in relation to lots 22 and 55, given the contents of the Tonkin + Taylor report, and that a reasonable and prudent solicitor would have done so. The applicant submits that Mr McDonald will be seeking to advance the interests of his clients, the first respondents, whilst striving to protect HFL from any potential liability that might arise from cross-examination of Ms Marshall.

[33] In my view, Ms Marshall's evidence could properly be characterised as background evidence. Furthermore, my instinctive reaction to the suggestion that she should have looked behind the covenant and considered that it might have been created in error is holding her to too high a standard. She and her clients were entitled to rely on the Land Register, and are not required to "second guess it". However, her acts or potential omissions are not of any relevance to the matters in issue in the substantive matter under the PLA, and therefore cannot truly be characterised as contentious. Given what will be at issue, the purported conflict does not appear to give rise to any actual or appearance of injustice.

[34] I note that Mr McDonald is acting for a number of other respondents, and that the acts or omissions of their lawyers will not be at issue, and nor will the acts or omissions of other lawyers acting for other respondents.

[35] In the circumstances, I am content to permit Mr McDonald and HFL to remain acting for the first respondents as to do so will not give the appearance of injustice.

[36] I invite the parties to resolve the issue of costs between them. If costs cannot be resolved, submissions are to be filed within 28 days of the date of this decision.

A A Zohrab
District Court Judge