



The Court of Appeal for Bermuda

CIVIL APPEAL No 7 of 2015

Between:

**GEORGIA MARSHALL &
RACHAEL BARRITT**

Appellants

-v-

A

Respondent

**Before: Baker, President
Bell, JA
Bernard, JA**

Appearances: Mr. Cameron Hill and Mr. Chen Foley, Sedgwick Chudleigh Limited, for the Appellants
Mr. David Kessaram, instructed by MacLellan and Associates, for the Respondent

Date of Hearing: 12 November 2015

Date of Judgment: 20 November 2015

JUDGMENT

Bell, JA

Introduction

1. This appeal concerns an allegation of conflict of interest on the part of the first named Appellant ("Mrs. Marshall"), in connection with issues arising in proceedings ("the Second Proceedings") taken against the Respondent's present

husband (“the Husband”) by his former wife (“the Former Wife”) in relation to certain proceedings between them, with reference to their children. Specifically, the Respondent to this appeal (“the Wife”) alleges that as a result of Mrs. Marshall having acted for her in her own matrimonial proceedings (“the First Proceedings”), she was in possession of confidential information about the Wife’s financial circumstances which could be adverse to the Husband’s, and hence to her interests, arising in the Second Proceedings. Accordingly, the Wife sought an injunction restraining Mrs. Marshall and her firm (“the Law Firm”) from acting any further in the Second Proceedings.

2. The learned judge gave his ruling on 31 March 2015, in which he granted the relief sought, and made an order restraining both Appellants from acting any further in the Second Proceedings. Between paragraphs 7 and 13 he set out the governing legal principles. Between paragraphs 15 and 21 he detailed the relevant confidential information which it was alleged by the Wife had been breached by Mrs. Marshall, and he did this in part by reference to the time sheets which had been exhibited to an affidavit sworn by the managing director of the Law Firm, which showed that a total of 147.7 hours had been recorded in relation to work undertaken on the Wife’s file, of which only 5.5 hours had been recorded by Mrs. Marshall. Consequently, the judge inferred that Mrs. Marshall had not had day-to-day conduct of the case. However, as the judge noted, she had prepared for and attended a hearing relating to requests for information made pursuant to Rule 77 of the Matrimonial Causes Rules 1974, in August 2008, and had subsequently drawn up the appropriate order. There were nominal periods of time recorded subsequently, and then in November 2010 there had been a meeting between Mrs. Marshall and the Wife, following which an associate from the Law Firm had drafted a letter to be sent to the Wife’s former husband. That letter had been reviewed by Mrs. Marshall. The learned judge held that in order for Mrs. Marshall to have given the advice which had led to the letter in question being sent, it would have been necessary for her to review the terms of the consent order (“the Consent Order”) which

had been made in the First Proceedings in October 2008, and which had resolved the ancillary relief proceedings between the Wife and her former husband. Specifically, having read the Consent Order, the learned judge expressed himself satisfied that Mrs. Marshall (whom he had found had also read the Consent Order) would have been in possession of confidential information that was likely to be relevant to the Wife's present financial circumstances.

3. In March 2011, attorneys acting for the Husband wrote to the Law Firm, noting that Mrs. Marshall had acted for the Wife, and making an allegation of conflict of interest. Although the basis of this is not detailed in the judge's ruling, the letter was exhibited in the evidence, and referred in terms to the fact that Mrs. Marshall was acting (the letter used the present tense) for the Wife "which in itself would appear to be a conflict of interest".
4. Then in September 2014, Mrs. Marshall and the second Appellant wrote to the Husband's current attorneys with a number of Rule 77 requests, raised in the Second Proceedings. Included in these was a request for some specific pieces of information about the Wife's current financial affairs. There were competing arguments between counsel as to whether the precise terms of the request were based upon confidential information which had come into Mrs. Marshall's possession as a result of the meeting in November 2010. The judge found that whereas the request might unconsciously have been influenced by confidential information in Mrs. Marshall's possession, its terms were not so specific that he could safely conclude that that was the case.
5. Between November 2014 and January 2015, there were orders made relating to the disclosure required by the Husband of the Wife's financial circumstances, and the proceedings that led to the ruling were issued in January 2015.

6. The judge set out the evidence filed in the proceedings, and dealt with an issue which had arisen regarding delay. He concluded that the Wife was entitled to the Court's protection from any avoidable risk that her confidential information would be disclosed or used.
7. The judge then declared himself satisfied that as a result of the Wife's attendance at the November 2010 meeting with Mrs. Marshall, the latter was in possession of information which was confidential to the Wife, in respect of which the Wife had not consented to disclosure. The judge expressed himself satisfied that the information might be relevant to the proceedings between the Husband and the Former Wife. He indicated in terms that the requests made by Mrs. Marshall in the relevant September 2014 letter did not allay his concerns. The judge further expressed himself satisfied that the interests of the Husband effectively coincided with those of the Wife, so that what was adverse to his interests could properly be regarded as adverse to hers. He carried on to find that if the confidential information were to be used to the Husband's financial disadvantage, that was likely to have an adverse impact on his financial situation and thus upon the Wife's.
8. The judge therefore granted the injunction referred to above, restraining Mrs. Marshall and her director colleague, Ms. Barritt, from acting any further in the Second Proceedings.

The Notice of Appeal

9. There are some nine grounds of appeal contained in the notice of appeal, covering the following broad topics:
 - i. That the judge was in error in his finding that Mrs. Marshall had advised the Wife in relation to the enforcement of the Consent Order. In regard to this ground the notice appears to attach weight to the absence of enforcement proceedings;

- ii. The second ground merely expands upon the first ground and gives further detail;
- iii. That the judge had failed to identify the relevant confidential information which would have been disclosed in any discussion between the Wife and Mrs. Marshall;
- iv. That the judge had failed to identify the relevant issue as between the Husband and the Wife in the Second Proceedings;
- v. That the judge had not identified the information which would have been provided by the Wife relevant to the issues;
- vi. That the judge had erred in his finding that the confidential information had been disclosed to Mrs. Marshall relevant to the proceedings between the Husband and the Former Wife;
- vii. That the judge had erred in his conclusion that Mrs. Marshall, in advising the Wife in relation to the enforcement of the Consent Order, had disclosed confidential information;
- viii. That the judge had erred in finding that the Wife had not consented to Mrs. Marshall and the Law Firm continuing to act for the Former Wife, either expressly or by necessary implication; and
- ix. That the judge had erred in finding that the Wife was not estopped from raising the issue of the potential disclosure of confidential information, when Mrs. Marshall and the Law Firm were under the impression that the Wife was aware of the potential disclosure of confidential information, such that Mrs. Marshall and

the Law Firm had continued to act for the Former Wife to their and her detriment.

The Judge's Note

10. Following the filing of the Notice of Appeal, the judge drafted a note for the assistance of this Court, which dealt with the terms of the Consent Order, with particular reference to the third ground of appeal. He noted that paragraph 21 of his ruling had indicated that he had read the Consent Order, and was satisfied that Mrs. Marshall had similarly done so, and so would have been in possession of confidential information that was likely to be relevant to the Wife's present financial circumstances. He referred in particular to two paragraphs of the Consent Order, both of which concerned future events or obligations, and so were likely to be relevant to the Wife's present financial circumstances. He then referred to a section of the colloquy which had taken place at the hearing of 9 March 2015. That section has been transcribed and now forms part of the record. It shows that the judge had been concerned by the two paragraphs of the Consent Order identified, and their possible relevance. Counsel for the Appellants submitted to the judge that the questions being asked in the Rule 77 requests were not being asked on the basis of confidential information, and further suggested that the information in question had ceased to be confidential. It is not clear to me from the transcript what was the evidential basis for this contention, and the judge was clearly concerned that there was no evidence before him from which he could conclude that the information contained in the relevant paragraphs was in fact no longer confidential.

The Submissions of Counsel

11. Counsel on both sides filed full submissions. On behalf of the Appellants, Mr. Hill submitted that the dispute had arisen when the Former Wife had sought financial disclosure from the Husband, to test the veracity of statements which had been made by him in response to a request for variation of his

maintenance obligations for the children. Mr. Hill referred to the fact that the Wife had said in her evidence that she had become aware towards the end of September 2014 that the Former Wife was asking the Husband about her (the Wife's) current financial circumstances. Mr. Hill submitted that these requests had essentially remained unchanged since first made in May 2014, and also that they were anodyne, insofar as they spoke of nothing specific in regard to the Wife's financial affairs in 2008, or any matter which might have been shared in confidence at that time. In essence, he said that the disclosure sought from the Husband, as it related to the Wife, sought clarification in relation to a recent change in circumstances.

12. Mr. Hill's submissions then set out the relevant legal principles, with particular reference to the principles laid down in the case of *Bolkiah -v- KPMG* [1999] 2 AC 222. Lord Millett delivered the leading judgment, and at page 235 put matters in the following terms:

“Accordingly, it is incumbent on a plaintiff who seeks to restrain his former solicitor from acting in a matter for another client to establish (i) that the solicitor is in possession of information which is confidential to him and to the disclosure of which he has not consented and (ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own.”

13. Mr. Hill accepted that the confidential information contained in paragraphs 7 and 12 of the Consent Order did contain information which was confidential to the Wife, and it was not in issue that there had been no express consent in relation to the disclosure of the relevant information. It was the second part of the test enunciated by Lord Millett, namely the relevance of this information to the new matter on which Mr. Hill relied. In his ruling at paragraph 21, the judge dealt with the two matters together succinctly, in the following terms:

“I have read the Consent Order and am satisfied that as a result of having done so the Defendant (Mrs. Marshall) would have been in possession of confidential information that is likely to be relevant to the Plaintiff’s (the Wife’s) present financial circumstances.”

14. Mr. Hill referred to the question of relevance with reference to the Rule 77 requests which had been written by Mrs. Marshall in a letter dated 3 September 2014. This letter asked for the following information, along with documentary support:

- “(a) Proof of your client’s wife’s income and the expenses paid in relation to her children;
- (b) Proof that your client’s wife did not receive any insurance proceedings (sic) or other amounts from her ex-husband’s estate in relation to the children.”

15. The relevant provisions of the Consent Order which had been identified by the judge during the course of the proceedings before him covered, firstly, the Wife’s entitlement to a share of her former husband’s deferred compensation plan, which was payable in five annual instalments, and which would have been payable in consequence of his death; the second relevant clause was one providing that the Wife’s former husband should take out a life insurance policy for the benefit of the children of the family, in a given amount. So it can be readily seen that the provisions of the Consent Order related to amounts which the Wife might expect to receive from her late former husband’s estate, and specifically insurance proceeds for the benefit of the children.

16. Mr. Hill sought to argue that the questions asked were of a type that any attorney would ask when making the appropriate enquiry to test the veracity of what the Husband had said. Even if that could be said to be true, it does not seem to me to detract from the application of the second part of the *Bolkiah* test, namely whether the confidential information in Mrs. Marshall’s possession

was **or might be** relevant to the new matter. And the answer to this question is, with all respect to Mr. Hill, obvious. It clearly was, and is no doubt the reason why the judge felt that he could deal with that aspect of matters in a single sentence.

17. One other matter that Mr. Hill referred to was the relatively small “pool” of lawyers practising within the family area, which he put at some three or four firms. As I pointed out during the course of argument, many senior practitioners who do not practise regularly in the field of family law have acted in that field on occasion, and these include Mr. Kessaram, who appeared before the Court on behalf of the Wife in this matter. But the real point is the one identified by Mr. Kessaram in his argument in reply, namely that the size of the pool of lawyers practising family law cannot lead to any “leakage” of the principles established by *Bolkiah*. I agree with that submission.

Delay

18. Mr. Hill started from the position that attorneys who had acted for the Husband in March 2011, before the Husband and the Wife were married, had suggested that Mrs. Marshall’s position represented a conflict of interest. Mr. Hill suggested that the Wife should have acted at that time, but there was no evidence that the subject matter of the letter in fact ever came to the Wife’s attention. On the other hand, it is reasonable to assume that Ms. Barritt, to whom the letter was addressed, would have brought a matter as serious as an allegation of conflict of interest to Mrs. Marshall’s attention, and if it goes to any point, the terms of the letter demonstrate that Mrs. Marshall should have been alive to the possibility of conflict of interest from this point forward.
19. In fact, on the evidence, the delay could only have occurred beginning with a point towards the end of September or beginning of October 2014, when the Wife indicated that she had learned from her husband that the enquiries in question had been raised. The Wife said in her evidence that she had not

considered the matter further after she had been informed by her husband that the judge had not made orders requiring disclosure of her financial affairs at that point. The Wife's evidence was that the matter resurfaced in early January 2015, and it was at this point that the Wife took the view that Mrs. Marshall was "abusing our solicitor/client relationship and using the information that she had obtained from that to assist her current client, and against my interests" - see paragraph 8 of the Wife's affidavit of 19 January 2015. The judge found in terms that this is what had prompted the Wife to seek injunctive relief (paragraph 31 of the ruling).

20. The judge dealt with the issue of delay in the following terms, at paragraph 35 of the ruling:

"I am satisfied that the Plaintiff cannot fairly be criticised for not having commenced these proceedings earlier. Litigation is a troublesome and expensive business. The Plaintiff, who is not a party to the Second Proceedings, was not required to speculate as to their future conduct. She acted reasonably in waiting until the Court, at the Defendant's behest, made an order for the production of financial information about her before seeking injunctive relief."

21. That finding on the part of the judge was criticised by Mr. Hill, who said that it was wrong for the judge to say that the Wife was entitled to 'wait for the result' and that the delay meant that the Wife had not acted as quickly as possible, as was required. It seems to me, with all respect to this argument, that the judge was right to recognise the potential difficulties of litigation. And accepting the dates as I have referred to them above, I do not regard the period of delay from late September/early October 2014 until early January 2015 as being unreasonable in the circumstances, given the Wife's understanding that no order had been made in consequence of the Rule 77 requests, and no doubt her feeling at that point was that the matter was at an end. The delay in

where there was a delay of at least eight months before an injunction application was made. It is hardly surprising that in that case the court looked at matters with scepticism. This case is not in that category, and in my view the judge was entirely right to look at the issue of delay as he did.

Express Consent and Estoppel

22. These are the eighth and ninth grounds of appeal, but the subjects were not addressed in either the written or oral submissions. For the avoidance of doubt, I saw no evidence to suggest that the Wife had in fact consented to Mrs. Marshall's continuing to act for the Former Wife, or that the Wife did anything to give Mrs. Marshall or the Law Firm the impression that she did not wish to complain of the potential disclosure of confidential information. Indeed, the evidence is entirely to the contrary.

Anonymisation

23. This subject arose because the judge's ruling was headed and constructed in a manner which concealed the identity of all the parties. This was not a matter which had been the subject of submissions to the judge, and when it appeared that the issue was contentious, the judge understandably took the view that since the matter was shortly to come before this Court, the judgment would remain on the Judiciary website in anonymised form, until such time as the Court of Appeal had been able to consider the issue.
24. Kawaley J, as he then was, considered the general question of anonymisation in a trust context in the case of *Guardian Limited v Bermuda Trust Company Limited* [2009] Bda LR 65. In his ruling in that case, Kawaley J set out the terms of a Practice Direction which had been issued by Ground, CJ in May 2006. That Practice Direction advised that, subject to the directions of the judge in any particular case, the published version of any judgment or ruling concerning, inter alia, the maintenance or upbringing of any person under the age of 18 should be edited by substituting letters for the identities of all

persons involved, and by removing any information which might tend to identify the young persons concerned. Counsel were agreed that in this case, that meant that the parties to the different pieces of matrimonial litigation should not be identified, because any such identification would obviously lead directly to the identification of the children involved.


25. However, in relation to the identity of the lawyers concerned, there was no such agreement. Mr. Kessaram submitted that there was no private interest to be protected. And although Mr. Hill suggested that identifying Mrs. Marshall and the Law Firm could lead to identification of the children, this argument could clearly not be sustained, and was not pursued with any enthusiasm. In the event, I would follow the provisions of the Practice Direction in relation to the parties, where naming them might lead to the identification of the children involved, but there is no question of any such danger operating in relation to Mrs. Marshall or her firm, and I would accept Mr. Kessaram's argument in this regard.

Conclusion

26. I would therefore dismiss the appeal.



Bell, JA

I agree


Baker, P

I agree


Bernard, JA