In The Supreme Court of Bermuda

CIVIL JURISDICTION

2014: No. 133

IN THE MATTER OF A FIRM OF BARRISTERS AND ATTORNEYS

RULING

(in Chambers)

Date of hearing: April 30, 2014
Date of Ruling: May 2, 2014

Mr. Cameron Hill and Mr. Chen Foley, Sedgwick Chudleigh Ltd, for the Plaintiff
Mr. Jeffrey Elkinson, Conyers Dill and Pearman Limited, for the Defendant

Introductory

1. The Plaintiff (P) applied for an interlocutory injunction restraining his former attorney ("D1") and D1's firm ("D2") from acting against him on behalf of his second wife in his second divorce. The Defendants had acted for P in his first divorce in 1997-1998, a retainer which lasted for less than six months and ended sixteen years ago. Counsel apparently accepted that the *inter partes* application for interim relief would, in practical terms, determine the final outcome of this matter. Nevertheless, the present Judgment is strictly only interlocutory in nature, despite being expressed in final terms.

2. The principles applicable to an application of this nature were largely agreed; in dispute was the application of the principles to the facts and, in particular, what policy considerations should be accorded greater weight. Mr. Hill submitted the sanctity of attorney-client confidentiality tipped the scales in favour of granting injunctive relief in a case where it was clear that P had met the comparatively low threshold for obtaining injunctive relief. Mr. Elkinson invited the Court to have regard to the limited range of specialist family lawyers in Bermuda and, implicitly, the importance of litigants being able to retain the lawyers of their choice. This area of the law does not appear to have been the subject of any considered local judgments.

3. The involvement of D2 was essentially peripheral, because no evidence was filed in support of a case that even if D1 could not act, procedures had been put in place to ensure that D2 (deploying other lawyers) could properly act instead of D1 without any risk of a breach of confidence.

Findings: applicable legal principles

4. Paragraph 24 of the Barristers' Code of Professional Conduct 1981 provides as follows:

> "*24. A barrister shall not act for an opponent of a client, or of a former client, in any case in which his knowledge of the affairs of such client or former client may give him an unfair advantage.*"

5. This may be viewed as a codification of the common law rule that a lawyer should not act against a former client when he acquired confidential information from his previous retainer which may be relevant to his subsequent client's claim against the former client. This broad principle informs the more narrow principles governing when a lawyer may be restrained from acting against his former client. Lord Millett, in Prince *Jefri Bolkiah-v- KPMG* [1999] 2 AC 222, formulated the test (at page 235D-F) as follows:

> "*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. Although the burden of proof is on the plaintiff, it is not a heavy one. The former may readily be inferred; the latter will often be obvious. I do not think that it is necessary to introduce any presumptions, rebuttable or otherwise, in relation to these two matters. But given the basis on which the jurisdiction is exercised, there is no cause to impute or attribute the knowledge of one partner to his fellow partners. Whether a particular individual is in possession of confidential information is a question of fact which must be proved or inferred from the circumstances of the case.*"

6. Once a plaintiff discharges the comparatively light burden of proving that confidential information was received which is or may be relevant, the onus shifts to the defendant to show that there is no risk of confidential information being used to the disadvantage of the former client. That burden is a heavy one. Lord Millett went on in *Bolkiah* [1]to state:

[1] At 237G-238A; 239H. This was the leading judgment in the unanimous decision of the House of Lords.

"*Once the former client has established that the defendant firm is in possession of information which was imparted in confidence and that the firm is proposing to act for another party with an interest adverse to his in a matter to which the information is or may be relevant, the evidential burden shifts to the defendant firm to show that even so there is no risk that the information will come into the possession of those now acting for the other party. There is no rule of law that Chinese Walls or other arrangements of a similar kind are insufficient to eliminate the risk. But the starting point must be that, unless special measures are taken, information moves within a firm. In MacDonald Estates v. Martin 77 D.L.R. (4th) 249 , Sopinka J. said at p. 269 that the court should restrain the firm from acting for the second client "unless satisfied on the basis of clear and convincing evidence that all reasonable measures have been taken to ensure that no disclosure will occur." With the substitution of the word "effective" for the words "all reasonable" I would respectfully adopt that formulation…*

I am not satisfied on the evidence that K.P.M.G. have discharged the heavy burden of showing that there is no risk that information in their possession which is confidential to Prince Jefri and which they obtained in the course of a former client relationship may unwittingly or inadvertently come to the notice of those working on Project Gemma." [emphasis added]

7. Where the former client in two divorce matters involving the same assets, the matters occurring five years apart, expressly consented to his former counsel acting against him in a subsequent matter and lost, his belated attempt to complain about a breach of confidence on appeal was described as "*patently opportunistic*" by Lady Justice Macur in *Duncan-v-Duncan*[2013] EWCA Civ 1407 at paragraph 23. In that case, as soon as counsel realised there was a potential conflict, he sought and obtained his former client's consent to act against him in a second similar property related divorce matter.

8. This was a rare authority identified by Mr. Elkinson as an example of a case where the same lawyer was directly involved in the initial and subsequent retainer. The other cases placed before the Court mostly involved solicitors working in firms where colleagues would be acting against the former client and scrutiny focused on the risk of confidential information being disclosed as between colleagues. However, *Davies-v-Davies,* another case where the same lawyer was directly involved, was cited with approval by Bodey J in *Re Z* [2009] EWHC 3621 (Fam) at paragraph 40. In that case the Court of Appeal apparently agreed that, but for the waiver eventually obtained from the former client, the

solicitor could have been restrained from acting against a wife for whom he had briefly acted seven years previously, and consulted with only once.

9. After confirming that Lord Millett's judgment in *Bolkiah* remained the leading authority on this topic, Macur LJ (at paragraph 17 of *Duncan-v-Duncan*) summarised the principles that *Bolkiah* established as including the following:

> "*…counsel's duty of confidentiality is unqualified. The Court, if asked, will intervene unless satisfied that there is no risk of inadvertent or accidental disclosure to those with adverse interest. This is a matter of perception as well as substance*…"

10. Mr. Hill relied on the following passage in the judgment of Timothy Walker J in *Re Solicitors' Firm* [2000] 1Lloyd's Rep 31 at 34 as demonstrating the low threshold his client had to meet in terms of demonstrating that relevant confidential information had been received in the previous retainer:

> "*Having regard to the future and the past, I am prepared to draw the inference that some of the existing (or future…) information imparted by the club to the solicitors…may be relevant…I am unable to specify the precise nature of the information, or the degree of its relevance*…"

11. I agree that specificity is not a requirement at this stage of the analysis. The position is different when one is considering whether the former lawyer is able to establish that there is no risk that the potentially relevant information will in fact be used to the detriment of the former client. In this regard, it is not sufficient for the former lawyer to simply say that due to the passage of time they have forgotten the information, because:

> "*…it is well recognised in the authorities that things may happen, perhaps unexpectedly, which reawaken subconscious memories. We have all had the experience of retrieving information unexpectedly after some trigger*…." [2]

12. Where a former client raises an objection belatedly, this may constitute grounds for treating the recusal application with some scepticism: *Generics (UK) Ltd-v-Yeda Research and Development Co. Ltd. et al* [2012] EWCA Civ 726 (Sir Robin Jacob, dissenting, at paragraph 18). As regards the competing public policy considerations of protecting the sanctity of lawyer-client communications and protecting the right of litigants to have the attorney of their choice, in my judgment the former will ordinarily

[2] *Re Z*, at paragraph 38.

trump the latter, all other considerations being equal. As Lord Millet opined in *Bolkiah* [1999] 2 AC 222 at 236F-H:

> "*It is in any case difficult to discern any justification in principle for a rule which exposes a former client without his consent to any avoidable risk, however slight, that information which he has imparted in confidence in the course of a fiduciary relationship may come into the possession of a third party and be used to his disadvantage….It is of overriding importance for the proper administration of justice that a client should be able to have complete confidence that what he tells his lawyer will remain secret. This is a matter of perception as well as substance. It is of the highest importance to the administration of justice that a solicitor….should not act in any way that might appear to put that information at risk of coming into the hands of someone with an adverse interest.*"

Findings: did the Defendants receive confidential information in the first retainer which is or may be relevant to the second retainer?

Receipt of confidential information

13. It was admitted that the Defendants received confidential information from P in the course of acting for him on his first divorce. A Client Time Diary was helpfully produced which revealed time being billed form October 27, 1997 until February 27, 1998, when the divorce petition was heard. In addition to telephone calls between D1 and P, totalling almost 2 hours, there were three meetings lasting 1 hour, 2 hours and 1.3 hours on October 28, November 3, 1997 and November 7, 1997, respectively. This was not perhaps a substantial retainer, but nor was it a trifling or insignificant one.

Relevance of the confidential information received

14. D1 deposed that she had, before deciding to act against P, carefully considered the position, and formed the view that there was no relevance at all. This was primarily because;

    (a) the first divorce was a two year separation case, with no plea of unreasonable behaviour at all. The second divorce was an unreasonable behaviour petition;

    (b) the first divorce involved no ancillary relief application at all, with the parties reaching a settlement on the division of assets. The second case involved a dispute about the division of assets.

15. Mr. Elkinson submitted that any information received about P's assets in 1997-1998 was clearly irrelevant because assets before the second marriage would not be taken into account in the second divorce. He also submitted that as P was subject to a duty of full and frank disclosure in the current ancillary relief application, he could not complain if D1 was able to use any information received while acting for him in acting against him in the second divorce. He further argued that the delay in raising the complaint about his former attorneys acting against him (approximately 10 weeks) demonstrated that the complaint was wholly tactical. This argument was supported by a fulsome account of the course of the second divorce proceedings in D1's First Affidavit.

16. P asserted that the unreasonable behaviour allegations relied upon by his second wife were remarkably similar to complaints made by his first wife in the course of the break-up of their marriage. His affidavit sworn in support of his petition in his first divorce cited irreconcilable differences as the reason for the breakdown of his first marriage. Mr. Hill relied on this as evidence that P was likely to have discussed a wide range of confidential matters in the course of instructing D1.

17. I find that the confidential information received by the Defendants in the course of the first divorce proceedings may be relevant to the second divorce proceedings in the sense that, if it was disclosed, it might be of assistance to P's second wife who is now suing him for divorce. Divorce proceedings are by their very nature intensely emotional and personal. The normal inference must be when a client obtains instructions in a divorce matter, even one which is ultimately resolved by consent, that sensitive personal information will be communicated by the client to the lawyer. The potential relevance of such disclosures to a subsequent spouse in subsequent divorce proceedings is too self-evident to require particularisation; and this potential relevance cannot be negated by a technical analysis of the differences between the two sets of proceedings.

18. I reject the submissions that (a) there is no potential relevance of information about P's previous asset position, and (b) that because of the duty of full and frank disclosure, P cannot complain about his former lawyer deploying information gleaned while acting for him to discredit incomplete disclosure made in the second divorce case. The first submission ignores the possibility of disputes about what assets were generated before and after the marriage, and the possibility of commingled assets. The second submission fails to take into account the public policy dimensions underpinning the confidentiality afforded to communications between lawyers and their clients.

19. I accept entirely that the timing of the present application casts real doubt on the weight to be attached to some of the concerns articulated by P in his First Affidavit. The excuse that he delayed complaining until the issue was raised by his current attorneys because he was unaware of his right to complain is very weak. P is a man of means, surely not a simpleton. His asserted distress at the very idea of his former lawyer acting against him

and the extent of his discussions with D1 were, more likely than not, somewhat exaggerated. This is the classic sort of situation where the right to complain might be waived by some former clients. It is entirely possible that, if he had been asked to consent to the Defendants acting at the outset, before the 'temperature rose', P might well have given his consent.

20. But at this stage of the analysis, on the facts of the present case, these considerations are largely immaterial. They do not impeach altogether the validity of the inevitable finding that the instructions he gave to the Defendants in 1997-1998 likely contained information which might potentially be deployed against him in the second divorce. The fact that no complaint was advanced from the outset by P himself merely demonstrates that this was a comparatively low-level breach of confidence complaint, advanced at least partly on tactical grounds. Nevertheless, I have little hesitation in finding that P has acted unreasonably in bringing the present application so far into the Defendants' conduct of the relevant divorce proceedings.

Findings: have the Defendants proved that there is no risk of confidential information being disclosed?

21. No evidence was filed on behalf of the firm, D2, suggesting that safeguards could be put in place to enable other lawyers in the firm to handle the case in place of D1. This was understandable as D1 formed the view that P's complaint about his former lawyer acting against him was so unmeritorious that no need arose for alternative lawyers to be employed and for ethical walls to be erected between them and D1.

22. D1 appeared in person to defend the present application at the directions hearing and in support of the Defendants' own strike-out Summons, and had to be encouraged to seek independent representation by the Court. This was unfortunate because, in personally preparing an evidential response, the main plank of the defence was weakened. That plank was the appealing argument that the passage of 16 years was so long an interval between acting for P in the first divorce and acting against him in the second divorce that D1 could recollect no material instructions received in any event.

23. D1's First Affidavit filed before the first return date of the Plaintiff's Interlocutory Summons explained that P1's file had probably been destroyed, but exhibited copies of electronic records of draft correspondence sent in the course of the first divorce. This included:

    (1) a letter dated October 31, 1997 advising that "*we are in the process of taking our client's full instructions with a view to preparing and forwarding to you a full and comprehensive letter dealing with the substantive issues between our respective clients*";

(2) a four page letter dated November 10, 1997 outlining the couple's money management approach during the marriage, detailing, *inter alia*, P's assets together with his net worth, and proposing divorce on the grounds of two years separation and an agreed division of assets based on negotiations between the parties themselves.

24. Exhibiting this material was evidence that, even if D1 could not remember any confidential information when she started to act against P in the second divorce, responding to the injunction application was itself a significant memory-refreshing event. Moreover, far from this historical information being wholly irrelevant because any asset division would deal with marital assets only, the Defendants' first letter to P in the second divorce set out the wife's estimate of the value of P's pre-marital assets, noting that they "*will need to be better particularised.*"

25. More significantly still, P deposed that he discussed with D1 in the first divorce not just his then financial position but also "*my career prospects, aspirations and goals, my work habits and all aspects associated with my earnings, capital and potential in both areas*" (Second Affidavit, paragraph 9). The November 10, 1997 letter lends credulity to the assertion that these matters were disclosed. D1's Second Affidavit does not challenge the assertion that these matters were discussed, presumably on the basis that they have now been forgotten. But the Defendants were unable to provide any comfort that there is no risk of forgotten matters, in the heat of battle, being accidentally recalled. It is common ground that the ancillary relief application is at present a central and very real controversy between the parties. I am willing to assume, in the Defendants' favour that the prospects of a contested divorce are somewhat fanciful.

26. If the burden lay on P to establish a real risk that confidential information might inadvertently be misused by the Defendants, I would had considerable difficulty in concluding that a case for injunctive relief had been made out. However, the true legal position, somewhat surprisingly to anyone not versed in the applicable principles, is the reverse. The burden, and a heavy one, lies on the Defendants to show that there is no risk that confidential information they received when acting for P 16 years ago, will be used by them to his disadvantage in their current retainer acting against him in his second divorce. This evidential rule flows from the dominant public policy principle: "*It is of the highest importance to the administration of justice that a solicitor….should not act in any way that might appear to put that information at risk of coming into the hands of someone with an adverse interest*" (Lord Millett in *Prince Jeffrey Bolkiah-v-KPMG* [1999] 2 AC 222 at 236H). In all the circumstances of the present case, I find that the Defendants have not demonstrated that there is no risk of either an actual and inadvertent misuse of the confidential information and/or an appearance that such a risk exists.

27. Mr. Hill submitted colloquially and colourfully, that if you "put the right formula into the machine the right answer comes out". I have attempted to correctly apply the broadly agreed principles to the facts of the present case. I find that P is entitled to an injunction restraining the Defendants, who acted for him in his first divorce, from acting against him in his second divorce. I accept entirely that D1 attempted to act with due propriety throughout and that the legal principles upon which the present Judgment is based are probably far from clearly established as a matter of positive Bermudian law.

28. At first blush, from an access to lawyer perspective at least, it may seem somewhat startling that a leading divorce lawyer should not be able act today against a former client, who was represented 16 years ago in a non-contentious previous divorce. On the other hand, the public policy interests which the rules governing attorney-client privilege are primarily designed to protect do not necessarily become diluted with the passage of time. The reasonable bystander who is a client (or a potential client) rather than a lawyer would more likely be reassured than perturbed by the present outcome. The emotional and intimate nature of divorce cases creates a heightened risk that former clients will reasonably perceive injustice if their former lawyer is permitted to act against them in a subsequent divorce without their consent. What may be perceived by the former lawyer as a somewhat non-descript routine case which is far from memorable, will typically be viewed by the client as a professional relationship linked to a highly significant an unforgettable lifetime event.

29. Where a former attorney elects to act personally against a former client based on a unilateral (and understandably self-interested) assessment that no impediment exists, such an attorney assumes the risk that the former client may seek to restrain them from taking or continuing the subsequent retainer. To avoid facing applications for injunctions, attorneys wishing to act against former clients can, as *Duncan-v-Duncan* [2013] EWCA Civ 1407 illustrates, take protective steps, when in doubt, before undertaking the new retainer. For instance:

    (a) the former client's consent to act against him can be sought, irrespective of whether or not such consent is strictly required; and

    (b) where consent is not forthcoming, the attorney may explore the option of assigning the matter to a colleague after ensuring that recognised protective measures are put in place.

30. Former clients do, however, have a duty to raise objections to their former lawyers acting against them at the earliest opportunity. The risk of tactical applications being made in

cases such as the present (where the former client's cause for grievance is at the lower end of the scale) can generally be deterred by punitive costs orders.

Conclusion

31. The Plaintiff is entitled to an Interim Injunction in terms of paragraphs 1 and 2 of his Summons dated April 4, 2014 restraining the Defendants from representing his wife in divorce proceedings brought by her against him, in circumstances where they represented him in his first divorce, albeit 16 years ago. I will hear counsel if required as to the terms of the Order to give effect to this Judgment and to any other matters arising therefrom.

32. Unless either party applies to be heard as to costs by letter to the Registrar within 21 days, the following Order is made as to costs. This is based on the finding made herein that the Plaintiff has acted unreasonably in failing to raise what was a comparatively low-level breach of confidence complaint until 10 weeks after first learning that his former attorneys were acting against him in the second divorce. The costs penalty for this should be as follows:

    (a) I will make no order as to the costs of the present application;

    (b) the costs thrown away by instructing fresh counsel in the divorce proceedings should be borne by the Plaintiff in any event.

Dated this 2nd day of May, 2014 _____

IAN R.C. KAWALEY CJ