In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015: No 18

BETWEEN:-

A

Plaintiff

-v-

B
(Director of C Ltd)

Defendant

RULING

(In Chambers)

Date of hearing: 9th March 2015
Date of ruling: 31st March 2015

Ms Nancy Vieira, MacLellan & Associates, for the Plaintiff
Mr Chen Foley, Sedgwick Chudleigh Limited, for the Defendant

Introduction

1. The Defendant is a director of C Ltd, a legal services provider. Its predecessor law firm represented the Plaintiff in her divorce proceedings ("the First Proceedings") in which the Defendant was the partner responsible for the Plaintiff's file. For ease of reference, I shall use the acronym "LSP" to refer to both the legal services provider and the predecessor law firm.

2. The outstanding issues in the divorce ("the First Proceedings") including ancillary relief were resolved by a consent order made in October 2008 ("the Consent Order").

3. The Defendant now acts for the wife ("the Wife") in divorce proceedings pending before this Court ("the Second Proceedings"). The outstanding issue in the Second Proceedings is the children's education and how it is to be funded.

4. The Plaintiff remarried in May 2011. Her new husband is the husband in the Second Proceedings ("the Husband").

5. The Plaintiff alleges that as a result of acting for her in the First Proceedings the Defendant is in possession of confidential information about her financial circumstances which would be adverse to the Husband's and hence her interests in the Second Proceedings.

6. The Plaintiff therefore seeks an injunction restraining the Defendant and the LSP from acting any further in the Second Proceedings.

The law

7. There was no dispute as to the applicable principles, which were stated authoritatively by Lord Millett, giving the leading speech in Bolkiah v KPMG [1999] 2 AC 222 HL(E) at 233G – 238A:

"*The basis of the jurisdiction*

. . . . .

... 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. ...

The extent of the solicitor's duty

Whether founded on contract or equity, the duty to preserve confidentiality is unqualified. It is a duty to keep the information confidential, not merely to take all reasonable steps to do so. Moreover, it is not merely a duty not to communicate the information to a third party. It is a duty not to misuse it, that is to say, without the consent of the former client to make any use of it or to cause any use to be made of it by others otherwise than for his benefit. The former client cannot be protected completely from accidental or inadvertent disclosure. But he is entitled to prevent his former solicitor from exposing him to any avoidable risk; and this includes the increased risk of the use of the information to his prejudice arising from the acceptance of instructions to act for another client with an adverse interest in a matter to which the information is or may be relevant.

Degree of risk

I prefer simply to say that the court should intervene unless it is satisfied that there is no risk of disclosure. It goes without saying that the risk must be a real one, and not merely fanciful or theoretical. But it need not be substantial.

The adequacy of the protective measures

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 Estate v. Martin 77 D.L.R. (4th) , 249, 269 Sopinka J. said 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."

8. These principles have been discussed and applied in a number of cases subsequent to Bolkiah, including by this Court in In the Matter of a Firm of Barristers and Attorneys [2014] Bda LR 46. The principles which they have elucidated include the following, which are of particular relevance to this case.

9. First, in In the Matter of a Firm of Barristers and Attorneys Kawaley CJ stated that: "*specificity is not a requirement at this stage of the analysis*". I would rather say that the party seeking to restrain an attorney from acting must state with the specificity appropriate to the circumstances of the case the nature of the confidential information which is at risk of being disclosed or used against her. The degree of specificity required may be greater or lesser depending upon the particular circumstances, and in some cases may not be very specific at all. The point was expressed thus by Lightman J in Re a Firm of Solicitors [1997] Ch 1 at 10 E – F:

"*On the issue whether the solicitor is possessed of relevant confidential information: … it is in general not sufficient for the client to make a general allegation that the solicitor is in possession of relevant confidential information if this is in issue: some particularity as to the confidential information is required: see Bricheno v. Thorp, Jac. 300 and Johnson v. Marriott (1833) 2 C. & M. 183. But the degree of particularity required must depend upon the facts of the particular case, and in many cases identification of the nature of the matter on which the solicitor was instructed, the length of the period of original retainer and the date of the proposed fresh retainer and the nature of the subject matter for practical purposes will be sufficient to establish the possession by the solicitor of relevant confidential information.*"

10. Second, although an attorney may have no present recollection of relevant confidential information that was once in her possession, that does not preclude the possibility that she has retained such material in her unconscious memory, and that her recollection may be triggered by some future event or that it may influence her conduct of the case without her conscious awareness. Thus in Re a Firm of Solicitors at 13B, Lightman J recognised:

> "… the need to protect the clients in respect of information in the former partner's mind of which he is presently unaware, but recollection of which may subsequently be triggered …"

11. Third, the court should be alive to the possibility of an opportunistic objection to an attorney continuing to act, made for tactical reasons and without a genuine belief that there is any real risk that if she continues to act she will disclose any relevant confidential information. But even if an objection is made for tactical reasons, that goes merely to the weight to be given to it: the primary question is whether the conditions for upholding the objection have been made out, not the former client's motive for raising those objections.

12. Thus in In the Matter of a Firm of Barristers and Attorneys the plaintiff obtained an order restraining his former attorney from acting against him, and on behalf of his second wife, in his second divorce. This was notwithstanding that Kawaley CJ found at para 20 of his judgment that the plaintiff had acted unreasonably in bringing his application so far into the attorney's conduct of the relevant divorce proceedings and that it was advanced at least partly on tactical grounds.

13. Kawaley CJ accepted at para 19 of his judgment that the timing of the plaintiff's application cast real doubt on the weight to be attached to some of the concerns which the plaintiff had articulated. But the learned Judge held at para 20 that this did not impeach altogether the validity of the Court's inevitable finding that the instructions given by the plaintiff to the defendant attorney in his first divorce likely contained information which might potentially be deployed against him in the second.

Letter of engagement

14. The Plaintiff signed a letter of engagement with the LSP dated 14th November 2007 in which the Defendant was identified as the "*Responsible Partner*".

The relevant confidential information

15. The managing director of the LSP ("the Managing Director") has sworn an affidavit exhibiting the time sheets produced by the LSP in relation to work carried out for the Plaintiff. 147.70 hours were recorded against the Plaintiff's file, of which only 5.50 hours were recorded by the Defendant. Thus the Defendant did not have the day to day conduct of the case.

16. It is possible with the aid of the timesheets to identify with some precision the work which the Defendant carried out, and hence the ambit of the confidential information to which she was likely privy.

17. Over 11th and 12th August 2008 the Defendant prepared for and attended a Rule 77 hearing on outstanding matters, and drew up the order afterwards. The order required the Plaintiff's former husband ("the Former Husband") to produce certain information and documentation relating to his financial affairs. The time which the Defendant is recorded as having spent was 2.75 hours. However as the Defendant's attendance at court was recorded as 0.00 hours and not billed for it is reasonable to infer that in attending court she spent some additional time which was not recorded.

18. On 15th August 2008 the Defendant spent 0.30 hours conducting a preliminary review of a social inquiry report.

19. On 28th October 2010, ie roughly two years after the Consent Order was signed, the Defendant spent 0.20 hours perusing a letter from a firm of attorneys other than the firm which represented the Former Husband. It is not clear to what that letter related.

20. Significantly, on 17th November 2010 the Defendant met the Plaintiff for one hour. Following the meeting, an associate spent 0.80 hours drafting a letter to the Former Husband's attorneys, which the Defendant spent 0.30 hours reviewing and finalizing. The Plaintiff has given affidavit evidence stating that she met with the Defendant in 2011 in order to get advice about enforcing her divorce settlement, which I take to mean the Consent Order of October 2008. I am satisfied that the Plaintiff is mistaken about the date and that the meeting to which she refers is the meeting which took place on 17th November 2010. The Defendant did not meet with the Plaintiff after that date, and I find that the Defendant's statement of her reason for meeting the Plaintiff credible: why else would she meet the Plaintiff with respect to her divorce almost two years after the outstanding issues in the divorce were resolved by a Consent Order?

21. If, as I find that she did, the Defendant advised the Plaintiff about enforcing the Consent Order, then in order to do this the Defendant must have reviewed the Consent Order. Indeed the Plaintiff's evidence is that the Defendant read each line of the Consent Order and advised her. I have read the Consent Order and am satisfied that as a result of having done so the Defendant would have been in possession of confidential information that is likely to be relevant to the Plaintiff's present financial circumstances.

Subsequent developments

22. By a letter dated 30th March 2011 the Husband's then attorney wrote to the LSP stating that the Plaintiff, who was at that time the Husband's fiancée, was not responsible for making financial provision for the Husband or the children of the family. She stated that upon remarriage the Plaintiff would forfeit periodical payments from the Former Husband and would only receive maintenance for her two children. She further stated that the Husband and the Plaintiff had agreed to bear household expenses equally between them. The letter stated that the Defendant acted for the Plaintiff –

although she had in fact ceased to do so – and noted that this would appear to be a conflict of interest.

23. Events moved on. The Plaintiff married the Husband. Sadly, the Former Husband died unexpectedly after a short illness. By an affidavit of means in the Second Proceedings dated 19th August 2014 the Husband stated the total amount of his expenses and continued:

> "*I am responsible for all these expenses as the father of my wife's children died during the year and the maintenance he was paying ceased and my wife became responsible for all her children's expenses including their private school fees.*"

24. By a letter dated 3rd September 2014 the Defendant and a fellow director at the LSP ("the Second Director") wrote to the Husband's current attorneys with a number of Rule 77 requests. They noted what the Husband had said in his affidavit of means about the death of the Former Husband. They stated that it was unclear from the Husband's affidavit whether the Plaintiff had any income remaining after she paid her children's expenses. In order to confirm the Husband's position, the letter requested some specific pieces of information about the Plaintiff's financial affairs.

25. The Plaintiff's counsel, Ms Vieira, contends that the precise terms of the request indicate that it was based in part, whether consciously or unconsciously, upon confidential information which came into the Defendant's possession as a result of the meeting on 17th November 2010. The Defendant's counsel, Mr Foley, retorts that the terms of the request were such as might have been framed by any reasonably prudent attorney with no prior knowledge of the Plaintiff's financial affairs. There is force in both contentions. I find that whereas the request may unconsciously have been influenced by confidential information in the Plaintiff's possession its terms are not so specific that I can safely conclude that in fact it probably was.

26. The Defendant and the Second Director wrote a chasing letter to the Husband's attorneys dated 22nd September 2014 seeking information about

the Plaintiff's financial affairs as they might impact upon the Husband's ability to satisfy an order for ancillary relief. The requests were in similar but not identical terms to the requests made in the previous letter.

27. On the same date, on the Defendant's application, I made an order in the Second Proceedings that the Husband should disclose to the Wife (i) details of the Plaintiff's contribution towards his household expenses prior to the death of the Former Husband and (ii) the date on which she ceased making such contribution. I declined to make any further order for disclosure by the Husband of the Plaintiff's financial affairs.

28. By a letter to the Defendant and the Second Director dated 13th November 2014 the Husband's attorney, whose firm also represents the Plaintiff in these proceedings, responded to the 22nd September 2014 order. She merely referred them to a household account which the Husband had already provided.

29. At a further hearing on 12th January 2015 the Defendant renewed the Wife's application for disclosure. Following the citation of authority which had not been provided to the Court on the previous occasion, I made an order that the Husband provide more extensive disclosure of the Plaintiff's financial circumstances along the lines requested by the Defendant and the Second Director previously in correspondence.

30. On 22nd January 2015 the Plaintiff issued the present proceedings. On 28th January 2015, pending their determination, I suspended the disclosure order which I had made on 12th January 2015 insofar as it covered matters in relation to which the Defendant might have confidential information.

Delay

31. The Plaintiff gave affidavit evidence as follows. It was not until towards the end of September/early October 2014 that the Husband advised her that the Defendant was making enquiries into her financial circumstances. She

stated that she did not really register this as she was preoccupied with her personal position and her children. She was aware of the 22nd September 2014 letter, but gave it no further thought. On the evening of 12th January 2015 the Husband told her of the Court's order requiring him to produce financial information about her. The Plaintiff was angry that, as she saw it, the Defendant was seeking to misuse confidential information which she had obtained as a result of their attorney/client relationship in order to assist her current client and against the Plaintiff's interests. That is what prompted her to seek injunctive relief.

32. The Defendant has not given evidence. This was so as not to risk undermining her defence by acquiring confidential information, or bringing to mind confidential information which she had forgotten, while reviewing the Plaintiff's file. She was no doubt mindful of the facts of In the Matter of a Firm of Barristers and Attorneys, in which Kawaley CJ noted at para 22 that: "*in personally preparing an evidential response, the main plank of the defence was weakened*".

33. The Managing Director referred in his affidavit evidence to the section of the letter of engagement headed "*conflicts*". This read in material part:

> "*To ensure that we do not inadvertently become engaged in a matter adverse to the Client's interests, we will be relying upon you to inform us on an ongoing basis of the identity of any person whose interests are adverse to the Client with respect to our representation of you.*
>
> . . . . .
>
> *In retaining us, you have consented and agreed that (a) we may represent other clients … on matters which may be adverse to the Client or its interests so long as we have not been engaged by the Client on the specific matter in respect of which the other client seeks representation, (b) the Client will not assert that our representation of the Client constitutes a basis for disqualifying us from representing another client in any matter whether or not adverse to the interests of the Client, subject to our professional obligation not to disclose any confidential information or to use such information for any other party's benefit, …*"

34. The Managing Director suggested that the letter of engagement placed the Plaintiff under a contractual obligation to supply the LSP with the name of any individuals whose interests might be adverse to her own. He further suggested that the LSP was entitled to assume that as the Plaintiff had not raised a complaint in a timely manner she had (i) consented to the Wife instructing the Defendant and the LSP, and (ii) waived any right she might have to object to them doing so.

35. 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.

36. As to the letter of engagement, the first paragraph quoted above does not impose a contractual obligation on the Plaintiff to do anything. Even if it did, that obligation would have come to an end when the Plaintiff ceased to be a client of the LSP. Based on the time-sheets, I find that she ceased to be a client in 2008, and was briefly a client again in 2010.

37. As to notifying the LSP of a potential conflict, the Plaintiff gave uncontradicted evidence, which I accept, that when she met with the Defendant in (what I am satisfied was) 2010, she told her that she was engaged to the Husband. That was sufficient to put the LSP on enquiry as to the possibility that confidential information which it had obtained from the Plaintiff might be relevant to the Second Proceedings, in which it was by then instructed by the Wife. The LSP, which is staffed by attorneys, was in a better position than the Plaintiff, who is not an attorney, to recognise and assess that risk.

38. Irrespective of what the Plaintiff told the Defendant at the meeting in 2010, there is nothing in the letter of engagement to suggest that she has waived

her right to object to the LSP acting for the Wife. To be effective, any such waiver would have to be in the clearest terms. Indeed under item (b) of the above extract from the letter the LSP expressly acknowledges its professional obligation not to disclose any confidential information or to use such information for any other party's benefit. Under Bolkiah, the Plaintiff is entitled to the Court's protection from any avoidable risk that her confidential information will be disclosed or used.

Disposition

39. By reason of the facts and matters set out above, I am satisfied (i) that, as a result of her attendance at the meeting on 17th November 2010, the Defendant is in possession of information which is confidential to the Plaintiff and to the disclosure of which she has not consented and (ii) that the information is or may be relevant to the Second Proceedings in which the interest of the Wife is or may be adverse to her own. I am not satisfied that there is no real risk of disclosure. The terms of the Defendant's requests in the letter of 3rd September 2014 do not allay that concern.

40. It is irrelevant that, as Mr Foley submits, the information may in time be disseminated via the heirs of the Former Husband to an expanding circle of recipients to the point where it ceases to be confidential. It is also irrelevant that any attorney instructed by the Husband in future is likely to pursue a similar line of enquiry to that which the Defendant has pursued. The Court is required to deal with the here and now, and for now the information is confidential to the Plaintiff.

41. The information is or may be relevant to the current proceedings in two ways. First, the Husband falls within the Plaintiff's immediate circle of concern: due to the close personal relationship between them, in the context of an application like this, what is adverse to his interests is properly to be regarded as adverse to hers. Second, if the confidential information is used

to the Husband's financial disadvantage, that is likely to have an adverse impact upon his financial situation and so the Plaintiff's.

42. I shall therefore issue an injunction restraining the Defendant and the Second Director from acting any further in the Second Proceedings. I restrain the Second Director because, as is apparent from the correspondence, she has assisted the Defendant with this case and may reasonably be supposed to have discussed it with her. I consider that there is a real risk that she is in possession of relevant confidential information. It is necessary to restrain her to ensure there is no risk that the confidential information will be used inappropriately. I wish to make clear that in so ordering I cast no aspersions upon the probity of either of these attorneys, who are both well respected by the Court.

43. The Managing Director has given affidavit evidence that upon being served with these proceedings he took steps to prevent any possible dissemination of the confidential information. The physical file had been destroyed. However certain materials had remained upon the LSP's hard drive. These were placed in a secure digital file which cannot be accessed by the Defendant or the Second Director. The LSP has also established an ethical wall prohibiting anyone in the office from discussing the Plaintiff's previous retainer with either the Defendant or the Second Director. The two attorneys who previously had primary carriage of the file have both left the LSP, and one of them has emigrated.

44. I am satisfied from this evidence, which I find clear and convincing, that effective measures have been taken to ensure that no disclosure will occur. There is therefore no good reason for me to restrain any attorney in the LSP other than the Defendant and the Second Director from acting for the Wife in the Second Proceedings, and I decline to do so. That aspect of the Plaintiff's application is therefore dismissed.

45. In summary, I grant an injunction restraining the Defendant and the Second Director from acting any further in the Second Proceedings. I decline to grant an injunction restraining the LSP from doing so.

46. I shall hear the parties as to costs.

DATED this 31st day of March, 2015

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Hellman J