



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015 No: 268

BETWEEN:-

G

Plaintiff

-and-

G

Defendant

EX TEMPORE RULING

(In Chambers)

Date of Hearing: 6th October 2015

Ms Nancy Vieira, Maclellan & Associates, for the Plaintiff

Mrs Georgia Marshall, Marshall Diel & Myers Limited, for the Respondent

Introduction

1. By an application originally made *ex parte* on notice dated 28th September 2015, and amended on 2nd October 2015, the Defendant husband (“the Husband”) seeks orders restraining the Plaintiff wife (“the Wife”) from further examining, using, or disclosing to third parties,

allegedly confidential information which is said to belong to the Husband and to have been obtained unlawfully by the Wife.

2. The Husband seeks the return of the documents in which that information was contained (“the Questioned Documents”), including a CD and laptop computer on which some of the documents were stored, and the destruction or return of any copies.
3. The Husband further seeks orders striking out certain passages in and exhibits to affidavits filed by the Wife dated (i) 13th August 2015 in support of her application for sole custody, care and control of the couple’s two year old daughter; and (ii) 25th August 2015 with respect to her application for ancillary relief (together, “the Questioned Affidavits”), on the grounds that they contain confidential information.
4. Further, the Husband seeks orders that the Wife be enjoined from continuing to instruct her attorneys in the proceedings, and that an order for the preparation of a social enquiry report (“SER”) be set aside and fresh directions made as to its preparation.
5. That is not the entirety of the relief sought by the Husband, but it is a fair summary of the main points.
6. The application came on before me on 1st October 2015, and was adjourned to an *inter partes* hearing on 6th October 2015 for argument.
7. I am grateful to Georgia Marshall who appeared for the Husband and Nancy Vieira who appeared for the Wife for their helpful submissions.

Factual background

8. I have had the benefit of affidavit evidence from both the Husband and the Wife.
9. The Husband alleges that, without his knowledge or consent, the Wife obtained his personal notes, diaries and creative writings, some of them from many years ago, and used them in the production of the Questioned

Affidavits and as exhibits thereto. He asserts that these documents were self-evidently confidential.

10. The Husband states that the material was contained in storage bins in a storage facility, the key to which was left in the former matrimonial home; in magazine file folders in his home office; and on his laptop computer. He states that this material was kept apart and not commingled with the Wife's belongings.
11. The Husband alleges that the Wife altered material on his laptop before burning it onto a CD. He states that he did not transfer any of the confidential material onto a disc.
12. The Wife in her affidavit of 13th August 2015 refers to the "*recent discovery*" of allegedly confidential material in the former matrimonial home, "*to be specific, three large storage bins, three magazine folders and a 'Vision Board'*". The Vision Board was a board to which were attached numerous affirmations in the sense of written statements of aspirational thoughts. Later in the affidavit she mentions that the Vision Board was often left on the floor where their child could see it. The Wife states that she found allegedly confidential material on a CD created by the Husband which was left in the former matrimonial home, "*all of which was kept from me during our marriage*".
13. The allegedly confidential information includes a number of affirmations of the sort mentioned above. The Wife states that the Husband was in the habit of repeating similar affirmations several times a day. It also includes a letter from a doctor addressed "*To Whom it May Concern*" with respect to the Husband's prescription, which letter the Wife states that she "*recently found*".
14. The Wife in her affidavit in reply to the Husband's injunction application states that the papers exhibited to the affidavit sworn on 13th August 2015 were found in a magazine holder in the office which she shared with the Husband and in a box under their bed. She states that the papers were not hidden in any way and that the Husband often used to write his creative writings on documents of hers such as bills or emails, and that on

occasion he had used her computer to write them. She states, “*They were never kept from me*”.

15. As to the CD, the Wife states in the affidavit that it was found on a pile of mutual CDs on the bookshelf and was labelled “*Old Shit*”. She states that it was not password protected. She denies burning information from the Husband’s laptop onto a CD.
16. The Wife asserts that none of this material is confidential.
17. Mrs Marshall submits that there are contradictions or, at the very least, tensions, between the accounts given by the Wife in her 13th August 2015 affidavit and her affidavit in reply as to how she obtained the allegedly confidential material. Eg as to whether any material was obtained from three large storage bins, and as to whether allegedly confidential material was kept from her during the marriage. For present purposes, I need not explore these alleged discrepancies further.

The Law

18. There was little dispute as to the applicable principles. They were analysed by Lord Neuberger MR (as he then was) giving the judgment of the Court of Appeal of England and Wales in Imerman v Tchenguiz [2011] Fam 116 *passim* and conveniently summarised by Mostyn J in L v K (Freezing Orders: Principles and Safeguards) [2014] Fam 35 at para 56.
19. Those aspects of these principles most directly relevant to the particular facts of this case may be summarised thus:
 - (1) It will be a breach of confidence for spouse A without the authority of spouse B to examine, or to make, retain, or supply copies to a third party, of a document whose contents are, and were (or ought to have been) appreciated by spouse A to be confidential to spouse B.
 - (2) The law of breach of confidence applies uniformly to all types of cases. Ie there are not special rules with respect to the relationship

between husband and wife, or regarding particular types of proceedings such as ancillary relief proceedings or applications for the custody, care and control of children.

- (3) The court will take a broad view as to what counts as confidential information. It will include information dealing with all aspects of an individual's private life.
- (4) The particular circumstances of a relationship may be relevant as to whether any given piece of information is confidential. But the mere fact that a document belonging to spouse B is readily accessible by spouse A will not in itself undermine spouse B's claim to confidentiality.
- (5) The court will generally grant an injunction to prevent spouse A from passing on or using documents containing confidential information belonging to spouse B and to prevent a third party to whom spouse A has passed on the documents from doing likewise.
- (6) The court will ordinarily order spouse A and any third party who is in possession of the documents to return the documents to spouse B as they are spouse B's property, and to return or destroy any copies which spouse A or the third party has made.
- (7) Injunctive relief, however, is discretionary. The court need not grant it if the injunction can properly be refused on the general principles affecting the grant of a discretionary remedy, eg delay.
- (8) If spouse A supplies confidential documents to her attorney then the attorney must not read them but must immediately seek to recover any further confidential documents in the possession of spouse A and must return the documents and all copies to spouse B's attorney.
- (9) Spouse B's attorney, who owes a high duty of confidentiality to the court, will read the documents and, depending upon the nature of the proceedings, disclose to spouse A's attorney any that are

required by law to be disclosed. As to the nature of the proceedings, the parties to ancillary relief proceedings have a duty to make full and frank disclosure. Both counsel submitted, albeit without having had the opportunity to research the point, that a similar duty exists in proceedings for the custody, care and control of the child or children of the marriage. That may well be correct, although I need not decide the point.

- (10) If, before that exercise has taken place, spouse B's attorney is dis-instructed, the attorney must retain those documents pending further order of the court.
- (11) The position where one or both parties are unrepresented does not arise in this case so I need not address it. However it is dealt with by Lord Neuberger in Imerman v Tchenguiz.
- (12) The use of unlawfully obtained confidential information, as opposed to the documents in which it is obtained, is permissible so long as the information is relevant and admissible. The use of the documents in which it is contained is also in theory permissible, but only in the unlikely event that the court has not ordered their destruction or return.
- (13) Thus spouse A can, if she so chooses, communicate unlawfully obtained information to her attorney, although she is under no obligation to do so. The attorney can then include that information in an affidavit. But spouse A must candidly disclose in the affidavit that her knowledge derives from unlawfully obtained documents and explain how she got them. This may expose her to civil and/or criminal proceedings.
- (14) The admission of unlawfully obtained confidential information is subject to the discretion of the court hearing the substantive application to which it relates to exclude that information if satisfied that to do so is in the interests of justice. This discretion exists both at common law and under the overriding objective.

- (15) The court may enjoin spouse A from continuing to instruct her attorneys where she has passed confidential information to them where this is necessary to ensure that the attorneys do not use their independent recollection of the confidential information against spouse B. This is by analogy with the principle stated by Lord Millett in Bolkiah v KPMG [1999] 2 AC 222 HL(E) at 233G – 238A, which concerns the use of confidential information by a solicitor against a former client.
- (16) As the mischief to which the enjoinder relates is the use of confidential information by an attorney against the person to whom that information belongs, it is in my judgment unnecessary in the context of a breach of confidence application such as the present one that the confidential information is also privileged. This was the one bone of contention between the parties with respect to the applicable principles. If and insofar as Mostyn J suggested that privilege is necessary in L v K at para 56(5) I respectfully part company from this very experienced family judge.

Findings

20. I am not satisfied that the Vision Board contains confidential information as the Wife's uncontradicted evidence suggests that it was on open display in the former matrimonial home.
21. However I am satisfied that all the other documents identified by the Husband belong to him and contain confidential information. The Wife knew or ought to have known this, as ought her attorneys.
22. Dealing specifically with the affirmations, I am not satisfied that the written affirmations were spoken out loud by the Husband in the presence of the Wife. Hence I am not satisfied that confidentiality in those documents has been waived.
23. More generally, and assuming for the purposes of this application that the Wife's evidence as to how she came by the Questioned Documents is true, I am not satisfied that the circumstances in which they were

obtained undermine the confidential nature of the documents which is apparent on their face.

24. The Wife must therefore return the Questioned Documents, along with the laptop and the disc on which some of them are stored, to the Husband's attorneys, and destroy or return any copies.
25. I draw the reasonable inference that the Questioned Affidavits were prepared using the Questioned Documents. Thus I am satisfied that the documents rather than the Wife's memory were the primary source of the confidential information appearing in the Questioned Affidavits.
26. I therefore order that with respect to the Questioned Affidavits the passages and, with the exception of the Vision Board, exhibits, about which the Husband complains be struck out.
27. Mrs Marshall has informed me that she has reviewed the exhibits about which the Husband complains and has formed the view that none of them should be disclosed to the Wife. It is not for me to comment on the correctness of that view.
28. The Wife and her attorneys have formed the view that what I have ruled is confidential information is relevant both to the ancillary relief proceedings and the custody, care and control proceedings. Indeed, on the Wife's case it is directly relevant to the Husband's suitability to have any share of the custody, care and control of the child.
29. Both the Wife and her attorneys have a recollection of the confidential information. There is a risk that the attorneys' recollection will in some respects be better than that of the Wife. There is a further risk that the Wife's attorneys will unwittingly use this information to the Husband's disadvantage in preparing further affidavits or – even if there are no such affidavits or if there are but they are ruled inadmissible – in cross-examining the Husband. I am therefore satisfied that the court should intervene to restrain the Wife from continuing to instruct her present attorneys.

30. I appreciate that this decision is likely to cause the Wife additional expense and inconvenience. But the situation is entirely one of her and her attorneys' own making.
31. As to the SER, enquiries by the Registrar have established that the court appointed social workers did not receive the affidavits which the Wife's attorneys emailed to them as the attachments were too large to access from their server. Bearing in mind the overriding objective of dealing with cases justly, including saving expense, I shall take a robust approach and dismiss the Husband's application that the order for preparation of a SER be set aside. I am satisfied that the court appointed social workers will prepare an impartial and objective report.
32. I shall hear the parties as to costs; the terms of the order pursuant to this ruling; and any consequential directions.

Dated this 6th day of October, 2015

Hellman J