

**THE HIGH COURT**

**FAMILY LAW**

**[2010 No. 11 M.]**

**IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT 1989 AND IN THE MATTER OF THE FAMILY LAW ACT 1995**

**BETWEEN**

**M.M.**

**APPLICANT**

**AND**

**G.I.M.**

**RESPONDENT**

**JUDGMENT delivered by Mr. Justice Michael White on the 18th December, 2014.**

1. The respondent issued a motion on 30th September, 2014, seeking an injunction restraining M.W., solicitor of W. & T., Solicitors on record for the applicant in the proceedings from continuing to represent the applicant in the proceedings including the appeal of the Order of the High Court to the Supreme Court or the Court of Appeal.
2. The motion was grounded on the affidavit of the respondent sworn on 26th September, 2014.
3. The respondent received substantial documentation from solicitors who had previously acted for him on 30th May, 2014. On checking the contents of the boxes of documents it was discovered on 13th June, 2014, that M.W., the applicant's solicitor, when she was a partner in the firm of M.F. Solicitors gave the respondent certain advice in respect of matters arising between him and the applicant.
4. The respondent engaged her services to provide him with legal advice in relation to matters arising from his relationship with M.M., the termination of their engagement and matters consequent thereto. M.W. provided a memorandum on the law relating to non-marital couples and partners which was received by the respondent's English solicitors in October 1997. The respondent had two meetings with M.W. in October 1997 and June 1998 during which specific advices were given to the respondent. Letters of advice were provided by M.W. on 24th November, 1997, and 19th June, 1998.
5. The subject matter of the advices sought and obtained from M.W. by the respondent related to his relationship with the applicant, loans of money given by him to her in connection with a property, a Loan Agreement and a Consultancy Agreement between the respondent's company and M.M. and the termination of their engagement.
6. The respondent did not recollect having engaged M.W. nor having met her until the papers were brought to his attention in June 2014.
7. The solicitor for the applicant, M.W., in her affidavit sworn on 14th October, 2014, stated that she had no recollection whatsoever that she had ever provided any advices to the respondent nor had ever acted for him as a client, and the first time that it came to her attention was when she received a letter from the respondent's current solicitors in a letter dated 12th August, 2014.

**History of the Substantive Proceedings**

8. The substantive proceedings before this Court in which M.W. acted as the applicant's solicitor was an application for Judicial Separation and ancillary relief.
9. The respondent had initially issued Nullity proceedings or in the alternative Judicial Separation proceedings on the 28th January, 2010, which were served on the applicant on 23rd February, 2010.
10. The applicant then issued proceedings on 10th March, 2010, by way of Special Summons which were served on the respondent on 18th March, 2010. Ultimately, the respondent did not proceed with the Nullity application and the Court heard the matter on the proceedings issued by the applicant.
11. The proceedings were lengthy. A separate issue pursuant to s. 35 of the Family Law Act 1995 ("the 1995 Act") was heard in respect of a transfer of assets by the respondent to a Trust and another individual. That matter was heard on 14th, 15th and 16th May, 2012 and judgment was delivered on 7th June, 2012.
12. The substantive proceedings were heard on 12th June, 24th, 25th, 26th, 30th and 31st July, 1st, 2nd and 3rd August, 10th, 11th, 12th, 13th, 17th and 18th December all in 2012 and 7th, 13th and 19th February, 2013. Judgment was delivered by way of a written judgment on 25th April, 2013. The Order was perfected on 14th October, 2013.
13. The respondent appealed the Order to the Supreme Court on 1st November, 2013, and that appeal is presently pending either before the Supreme Court or the Court of Appeal.
14. The Court permitted M.W. to have legal representation, and to have submissions made to the Court on her behalf and the Court also had the benefit of the legal submissions of the respondent and the applicant.

15. There is no dispute that the appropriate test to be applied by the Court is that set out in the United Kingdom House of Lords decision *Prince Jefri Bolkiah v. KPMG (A Firm)* [1999] 2 A.C. 222, [1999] 1 All E.R. 517, [1999] 2 W.L.R. 215.

16. Lord Millett stated:-

"Where the court's intervention is sought by a former client, however, the position is entirely different. The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.

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 its 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. In this respect also we ought not in my opinion to follow the jurisprudence of the United States.

#### *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."

17. In *Re Z a Judgment of the High Court of Justice Family Division* [2009] EWHC 3621 (Fam.), Mr. Justice Bodey approved the test in *Bolkiah* but went on to state at paras. 27 and 28:-

"27. The principles laid down in *Bolkiah* have since been discussed and applied in the several authorities to which I have been referred, namely, in chronological order: *Young v. Robson Rhodes* [1999] 3 All ER 524 (Laddie J); *Davies v. Davies* [2001] FLR 39 (CA); *Newman v. Phillips* [1999] WASC 171, [1999] Western Australian Reports 309 (Steytler J); *Halewood International Limited v. Addleshaw Booth & Co.* [2000] Lloyds Law Reports 298 CH (Neuberger J); *Nick's Sports v. AJ Morrison* (unreported) 3rd February 2000 (Longmore J in the Construction and Technology Court); *Re L (minors: care proceedings: solicitors)* [2001] 1 WLR 100 (Wilson J); *Koch Shipping Inc. v. Richards Butler* [2002] EWCA Civ. 1280 (CA); and *Skjevesland v. Geveran Trading Co. Limited* [2002] EWCA Civ. 1567 (CA).

28. "Only two of the above are family cases (*Davies* and *Re L*) and their facts are quite different and distinct from those of this case. Consideration of these various authorities well demonstrates that which has been recognised in them, namely that every case in this sphere is fact-specific. The picture may change, for example, according to how long ago and for how long the former solicitor acted for the former client; the precise nature of the work done by the former solicitor for the former client and the precise nature of the work being done or proposed to be done by the former solicitor (or the firm which he or she has joined) for the new client; how many individuals who acted for the former client have moved to the firm about to represent or representing the new client; how many people will be working on the case at the new solicitors; where the former solicitor's files of the former client are kept and who can access them; whether the firm against which objection is taken has already been working on the relevant matter for a period of time before the former solicitor joins it having represented the former client; and whether effective 'information barriers' can be made. Permutations and nuances of detail as to factors like these are considerable and vary from case to case, a point which had to be borne in mind when considering dicta from the various authorities to which I have been referred, each having a factual matrix quite different from this case. "

#### **Decision and Conclusion**

18. I am satisfied the respondent has established the low threshold required by way of onus of proof and also applying the two tests in *Bolkiah*. M.W. was in possession of information which was (i) confidential to the respondent, and to any disclosure of which he had not consented and (ii) relevant to the new matter in which the interest of the other client is or may be adverse to his own.

19. I accept that the inability of M.W. to remember she had acted for G.I.M. is insufficient to discharge the burden which has now shifted to the solicitor to justify her actions.

20. The dicta in *Re Z* at para. 28 is important, as in this case the specific facts are very relevant to the decision of the Court.

21. In all the authorities opened to the Court, the litigation had not concluded.

22. In this case the issues, to which the information originally in the possession of M.W. would be relevant, are concluded in this Court and are the subject of an appeal to the Supreme Court or Court of Appeal.

23. If this issue had arisen prior to the Court embarking on the hearing of the proceedings, M.W. would have found herself in a very difficult position if she continued to act.

24. The unchallenged factual position is as follows:-

(i) Apart from the finalisation of the Fee Account, the advices given by M.W. to the respondent occurred between October 1997 and June 1998;

(ii) Neither the respondent nor M.W. remember the interaction;

(iii) The substantive family law proceedings were commenced in January 2010, eleven and a half years subsequent to the final advices;

(iv) The issues in respect of the advices have been determined by the High Court.

25. In the determination of those issues the Court relied on substantial evidence adduced to the Court in respect of the relationship between the respondent and the applicant subsequent to the issue of the proceedings by G.I.M. (Record Number 1999/126 M.) and the striking out of these proceedings in or around May 2000. That evidence was the relationship between the parties as a result of which children were born, The parties marriage, and the transfer of a substantial property to the applicant.

26. Apart from the issue of perception I cannot see how the respondent could be prejudiced by M.W. continuing to act for the applicant in the appeal before the Supreme Court or Court of Appeal. That appeal has to be heard on the transcript of the hearing in the High Court and on the Grounds of Appeal advanced by the respondent It is open to the respondent to seek to have his Grounds of Appeal expanded.

27. The only difficulty I can foresee, is if the Supreme Court or Court of Appeal decides that any part of the proceedings should be remitted to the High Court for further hearing, and the information imparted by the respondent to M.W. is relevant in that remitted hearing. If that were to be the case, a major issue would arise if M.W. continued to act.

28. The Court has to take into account the prejudice which would undoubtedly arise to the applicant from a direction of this Court that M.W. discontinue to act for the applicant. She is an innocent party and due to the length, complexity and difficulty of the proceedings to date would be severely prejudiced in her appeal to the Supreme Court or Court of Appeal, if the Court directed M.W. to discontinue acting as her solicitor.

29. The Court also has to bear in mind the undisputed evidence before this Court that M.W. did not remember that she had given advices to G.I.M., and did not have any access to the material which G.I.M. discovered in June 2014.

30. For those reasons the Court refuses the relief sought by the respondent.