IN THE COURT OF APPEAL OF BELIZE A.D. 2009

CIVIL APPEAL NO. 19 OF 2008

BETWEEN:

BELIZE TELEMEDIA LTD.	**APPELLANT**
AND	
LOIS M. YOUNG doing business as LOIS YOUNG BARROW & CO.	**RESPONDENT**

Before:

The Hon. Mr. Justice Sosa	-	Justice of Appeal
The Hon. Mr. Justice Carey	-	Justice of Appeal
The Hon. Mr. Justice Morrison	-	Justice of Appeal

Mr. E. Andrew Marshalleck and Mrs. Naima Badillo for the appellant.
Mr. Fred Lumor, S.C. for the respondent.

13, 16 March & 19 June 2009

SOSA JA

1. On 16 March 2009, the Court intimated that, for reasons to be given in writing at a later date, the appeal of Belize Telemedia Limited would be allowed. The Court proceeded to set aside the order of Muria J, made on 15 July 2008, by which he had refused the application of Belize Telemedia Limited for an order that Lois M Young (doing business as Lois M Young & Co) be restrained from in any way acting for, representing or advising or in any other way assisting Christine Perriott in Claim No 142 of 2007 in the Supreme Court. The Court granted the application that had been so

refused by Muria J, with costs to Belize Telemedia Limited (to be taxed if not agreed) here and in the court below. I concur in the reasons for judgment given by my learned brother, Carey JA, in his judgment, which I have since had the privilege of reading, in draft.

SOSA JA

CAREY JA

2. Ms. Lois Young, the respondent and the defendant in the action from which this appeal arises, is an attorney-at-law since 1976. She holds the rank and status of Senior Counsel. There is no rank of Queen's Counsel in Belize. Between 1987 and 2001 she was legal advisor to Belize Telecommunications Ltd, the predecessor of the appellant and, as I understand it, she was the Secretary to the company until 2004. On 23 March 2007 she filed an action, Claim No. 142 of 2007, on behalf of a dismissed worker of the company, Christine Perriott, seeking compensation for the unlawful termination of her employment with the company. This provoked an action by the company against her claiming an injunction restraining her from "in any way, acting for, representing or advising or in any other way assisting Mrs. Christine Perriott in Claim No. 142 of 2007 in the Supreme Court of Belize". Muria J refused an application for an interim injunction. This then is the genesis of the appeal to this court.

3. We were not concerned in this appeal with any such issue as conflict of interest, or possible breaches of the canons or indeed any suggestion reflecting on the conduct of Ms. Young. The appeal raises an issue regarding the confidentiality of information and the risk of disclosure. The leading authority on this subject is *Prince Jefri Bolkiah v. KPMG [1999] 2 A.C. 222* – where it was held that: *"…where it was established that solicitors or accountants providing litigation services were in possession of information confidential to a former client which might be relevant to a matter in which they were instructed by a subsequent client the court should intervene to prevent the information from coming into the hands of anyone with an adverse interest unless it was satisfied that there was no real risk of disclosure".*

4. We heard submissions on 13 March and on 16 March, we allowed the appeal, set aside the order of the court below and granted the order sought pending the hearing, with the usual undertaking as to damages. The appellant was to have its costs both here and below. We promised reasons at a later date. These then are my reasons for the order made.

5. It is convenient to begin by referring to the Claim No. 142 of 2007, which Ms. Young filed on behalf of Mrs. Perriott, the former employee of the appellant in order to ascertain the nature of the claim and the relief sought. This will assist in determining whether any confidential information obtained during Ms. Young's prior relationship with the appellant, could be used on behalf of Mr. Perriott, the current client, in furtherance of her Claim No. 142 of 2007. In this claim which was ultimately amended, she claimed (inter alia) the following reliefs:

> "(4) An order for payment of compensation to the claimant by the [appellant] to compensate the claimant for:

(1) Loss of base salary at a rate of $41,160.00 per year for 2008, and thereafter increasing according to salary increases
(2) Loss of BTL increments
(3) Loss of appraisal increments
(4) Loss of negotiated salary increases
(5) Loss of call out and overtime
(6) Loss of year end bonus
(7) Loss of passage grant
(8) Loss of other benefits

(5) Severance Pay amounting to $14,062.94
(6) Notice Pay amounting to $4,963.38
(7) Exemplary damages and or aggravated damages
(8) …
(9) …"

6. In the course of preparing for trial Ms. Young wrote to Barrow & Co., the attorneys for the appellant, requesting disclosure of certain documents. She wrote thus:-

> "Re Claim No. 142 of 2007 Christine Perriott vs. Belize Telecommunications Ltd. and Belize Telemedia Ltd.
>
> In keeping with your client's obligation to make full and frank disclosure to the court (Rule 28.4 and the Court's order that exhibits to affidavit witness statements will stand as disclosure), please forthwith disclose two letters from Lois Young to Belize Telecommunications Limited dated 12th and 18th October 2004, in which Lois Young informed BTL that because of the decision of Judge Barrow in Supreme Court Action No. 403 of 2003 which

clearly indicates that BTL may be liable for severance pay, she would not be in a position to represent BTL in resisting the claim for severance pay brought by *Martha Ayuso et al. vs. Belize Telecommunications Limited in Supreme Court Action No. 580 of 2003*.

Barrow & Co. were not at all minded to comply with this request. They sent off a carefully crafted epistle which delivered legal advice and made a recommendation. I set out the material parts from the reply:

> "1. We refer to your recent letter dated 29 April 2009 in which you request disclosure of correspondence between Belize Telecommunications Limited and yourself. As you know our client, Telemedia has stepped into the shoes of Belize Telecommunications Limited (BTL) in respect of this litigation and has acquired all its rights and obligations in that regard.
>
> 2. You seek "disclosure" of letters from:
> 'Lois Young to Belize Telecommunications Limited dated 12th and 18th October 2004, in which ……
> 3. You no doubt have these letters and are clearly seeking to use this correspondence to advance your current client's case for severance pay. (Emphasis supplied)
> 4. This has highlighted a very serious issue which our client has asked to bring to your attention. That is that you are clearly in possession of confidential information relating to our client and which is relevant to the issues in dispute between our clients in the above proceedings and as such should recuse yourself from acting on behalf of the claimant in these proceedings.
> 5. The leading case in this regard is the well established and unanimous decision of the House of Lords in *Prince Jefri Bolkiah v.*

KPMG [1992] 2 A.C. 222. This set down a very clear test of where a lawyer should recuse themselves from acting for a client. The test is set out at p. 223 E – F as follows: [The test is then quoted]

6. As set out below, it is clear that:

6.1 You are in possession of information with (sic) its confidential to BTL/Telemedia,

6.2 This is directly relevant to your client's current claim for severance (or at the very least might be relevant);

6.3 Since you yourself hold this confidential information and are advising the claimant, effective measures cannot be taken to ensure that no disclosure would occur – this harm has already taken place…"

The letter concluded by saying (inter alia)-

"16. From the foregoing it is clear that you are in possession of confidential information belonging to our client in relation to the issue of severance pay [Emphasis supplied] such confidential information is directly relevant, indeed squarely on point with the claim which Mrs. Perriott seeks to bring against BTL/Telemedia…"

The thrust of the letter as all parties recognized was that the information which Ms. Young had in her possession related to severance pay, one of the reliefs claimed in Mrs. Perriott's suit.

7. By the time of the hearing of the application for an interim injunction to restrain Ms. Young from acting for Mrs. Perriott, circumstances had however, changed. Ms. Young wrote on behalf of Mrs. Perriott advising Barrow & Co. that she would not be pursuing the claims for severance pay ($4,062.94) nor for constructive dismissal and notice pay ($4,545.07). Curiously however, because of apparently unforeseen circumstances,

lead counsel for the appellant (applicant in those proceedings) was not present to make submissions. Accordingly, this was done by his junior. It was not until Mr. Lumor, S.C. came to reply however, that Muria J was apprised of the fact that the two claims earlier mentioned were not being pursued. Not surprisingly, he confined his reply to the non-existent issue of severance pay. In the event, Mr. Marshalleck who had by then entered an appearance was able to deal with the situation, which he did in his reply. He submitted that although the risk no longer existed in relation to the issue of severance, it never-the-less provided evidence of confidential information "derived during the course of acting over 17 and odd years" and it was a demonstration of the risk of disclosure of confidential information. There was an exchange between the judge and counsel. The judge observed that Mr. Marshalleck was extending his application. In demurring, counsel submitted that the application had changed because the facts had changed post application.

8. Additional affidavits filed by a Mr. Tesecum and Mr. Keith Arnold, members of The Board of Directors of the appellant company who spoke to confidential information in the possession of Ms. Young, in respect of which the risk of disclosure existed were before the Judge. He returned to the issue of severance in respect of which, he said, that it yet remained as a claim on the pleadings, despite the letter indicating that it would not be pursued.

9. The judge, in refusing the application, held as follows:

> "With Mrs. Perriott now no longer pursuing her claim for severance pay, there is no longer any reason for restraining the respondent to act for Mrs. Perriott in Claim No. 142 of 2007 based on that claim. There is therefore no "serious issue to be tried" anymore. The serious issue cannot be general. It must be specific to the claim

against the respondent. In this case the claim against the respondent is a permanent injunction to restrain her from acting for Mrs. Perriott in Claim No. 142 of 2007 on the ground that the respondent as former Attorney of BTL gave legal opinions on the question of severance pay to employees of BTL, which opinion is confidential information prepared for the benefit of the BTL. The basis for that claim has disappeared and so there is no live issue left to justify imposing a restraining order against the respondent in this case."

10. At the end of the hearing before the judge, it seems to me that the matter stood thus. The appellant in making the application for interim relief had undoubtedly made the claim for severance pay its especial focus by reason of letters written by Ms. Young when she was counsel for the appellant. The letters evidenced confidential information in her possession. But the claim for severance pay was withdrawn. Such confidential information as she possessed that was relevant to that issue was plainly useless in the action, claim 142 of 2007. But that claim was but one of a number of heads of loss. It was not the entirety of the action by any means. There can be little doubt the judge thought from that stand point his disposition of the case was logical and inevitable. With respect, in my opinion, he was mistaken.

11. The judge was aware during the hearing before him that the application had changed because as Mr. Marshalleck told him when asked, "the facts changed post application. The application, was and remained throughout that Ms Young "be restrained from in any way acting for , representing or advising or in any way assisting Mrs. Christine Perriott in claim no. 142 of 2007 in the Supreme Court of Belize". The application before the judge was not that the respondent be restrained from in any way acting for, representing or advising or in any way assisting Mrs. Christine Perriott in

the claim for severance pay in Claim No. 142 of 2007. Nowhere in the judgment, regrettably, is there a recognition of or an appreciation of the new situation. The judge's attention was indeed drawn to the additional affidavits which provided evidence showing the very strong likelihood of the respondent being in possession of confidential information. Mr. Marshalleck referred him to the second affidavit of Mr. Ediberto Tesucum in which he deposed (paragraph 6) as follows:

> "6. Given that Ms. Young was BTL's legal counsel and as general retainer, she was asked to advise BTL on a wide range of issues. The issues regularly included labour issues given the larger staff which BTL employed. I also verily believe that Ms. Young advised the company on disputes arising in relation to the Belize Communication Worker's Union (the BCWU).
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> 7. Further, in her capacity as Company Secretary, Ms. Young attended numerous Board Meetings of BTL, where labour and union issues were discussed. I have reviewed the relevant board minutes, which are the company's confidential information, and these reveal that in the years 1998, 1999 and 2000 in particular the company's negotiations in relation to the Collective Bargaining Agreement between the BCWU and BTL were discussed. The Collective Bargaining Agreement was eventually entered into in April 2000 with effect from 1 October 1999. Indeed the minutes of those meetings were produced by Ms. Young in her capacity as Company Secretary.
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> 8. Therefore, in her role as Company Secretary Ms. Young was part to confidential discussions about BTL's approach and understanding of the Collective Bargaining Agreement".

The significance of this material laid before the judge was that Ms. Young was in possession of confidential information in relation to labour law issues which she had obtained in the course of her relationship as a legal advisor to the appellant on labour law issues based on her general retainer. There is no room for doubt that the judge entirely misconceived the basis of the appellant's case although he was advised of the fact of changed facts. It may be that he thought that the appellant should have amended the grounds of his application but he did not appear to have made such a suggestion – which he could have done. Howsoever that may be, the duty of the judge under the new Civil Procedure Rules is to ensure that justice is done by determining the real matter of dispute between the parties.

12. Having reached the firm conclusion that the judge decided the application on the basis of a non-issue, it becomes necessary to determine whether the evidence in fact adduced satisfied the test as set out in the *Bolkiah case* (supra). The appellant was obliged to establish (i) that the Respondent attorney was in possession of information which is confidential to the appellant 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 (Mrs. Christine Perriott) is or may be adverse to its own. The burden on the appellant as Lord Millett pointed out, is not a heavy one and as further guidance, he noted that as to (i) above, that fact was readily to be inferred and as to the latter, it was often obvious. (at p. 235).

13. From the fact that Ms. Young was counsel to BTL and was also company secretary when she attended Board Meetings at which confidential issues relating to labour law disputes were discussed, it may be readily inferred that she had possession of a larger amount of confidential information about affairs of the appellant which might at the least be material to Claim

No. 142 of 2007. It must be borne in mind that the claim related to an action for unlawful dismissal in circumstances when Mrs. Perriott was carrying out Union duties. I would suggest that its relevance is obvious.

14. Once the two limbs of the test have been satisfied, the evidential burden shifts to the respondent to show that there is no risk of disclosure or misuse of confidential information belonging to the former client (per Lord Millett in Bolkiah (supra) at p. 237 G). In the instant case, Mr. Marshalleck argued that it is the same person at the Respondent's law firm who advised the appellant and who now advises Mrs. Perriott in respect of Claim No. 142 of 2007, viz. Ms. Lois Young. Accordingly, he submits, no effective steps can be taken by her to ensure that no disclosure would occur and it follows, that the Respondent is unable to prove the absence of a real risk of disclosure. Indeed, the request for disclosure of letters from Ms. Young with respect to the severance pay issue, was, I incline to agree with Mr. Marshalleck, proof positive of the risk of disclosure of confidential material.

15. There was some suggestion below by Mr. Lumor, S.C. that the appellant had waived the attorney-client confidentiality by putting the information in the public domain but the judge dismissed this side wind and nothing more need be said about it. Mr. Lumor, S.C. it must be said did not, nor could he, challenge that finding of the judge.

16. In the result, there was a serious issue yet to be tried and in that respect, the judge fell into error. It is, I think clear, that the judge failed to take into consideration facts which he should, if the matter in dispute were to be adjudicated on. This allows this court to interfere with the exercise of his discretion. *Hadmor Production Ltd v. Hamilton [1983] A.C. 191 per Lord Diplock at p. 220.*

17. For all these reasons, I came to the conclusion that there was much merit in the arguments ably deployed by counsel and that the appeal should be allowed, the order of the court below set aside and an order made in terms of the relief sought. I also agreed with the consequential order for costs.

CAREY JA

MORRISON JA

18. I too have read in draft the judgment of Carey JA. I entirely agree with it and have nothing to add.

MORRISON JA