TAN HENG CHEW & ORS v. TAN KIM HOR & ORS
FEDERAL COURT, PUTRAJAYA
SITI NORMA YAAKOB, CJ (Malaya); STEVE SHIM, CJ (SABAH & SARAWAK); ABDUL HAMID MOHAMAD, FCJ
CIVIL APPEAL NO. 02-7-2005 (W)
23 JUNE 2006
[2006] 3 CLJ 481

***CIVIL PROCEDURE**: Appeal - Federal Court - Appellants sought to disqualify solicitors for respondents - Proposed test raised before Federal Court was not canvassed before courts below - Whether Federal Court should hear appeal*

The appellants sought to disqualify the solicitors for the respondents ('SD') from acting for the respondents on the ground that SD had acted as common solicitors for the appellants and the respondents. The High Court and confirmed by the Court of Appeal dismissed the application. The appellants were granted leave to appeal to this court. Before this court, the respondents raised a preliminary objection that the appeal was not based on a cause or matter raised in the courts below. They argued that the appellants had taken a completely new stand and based it on a new case altogether. This was because the appellants contended that SD need not be in possession of confidential information contrary to their principal contention that confidential information was passed to SD. Also, that the appellants contended that the House of Lords decision in *Prince Jefri Bolkiah v. KPMG (a firm)* [1999] 1 All ER 517 was no longer good law contrary to their contention before the courts below that the common law principles of the said case were applicable. It was further argued that the appellants sought to follow the test laid down in *Spincode Pty Ltd v. Look Software Pty Ltd & Others* [2001] 4 VR 501. In reply, the appellants argued that they were only citing a new authority that they had failed to cite in the earlier proceedings. They had not abandoned their old ground.

Held (dismissing the appeal)

Per Abdul Hamid Mohamad FCJ delivering the judgment of the court:

> **(1)** The test proposed by the appellants before this court had not been argued nor considered in the courts below. The findings of fact made by the High Court and confirmed by the Court of Appeal would be rendered superfluous and irrelevant. The basis of the appellants' earlier argument was that confidential information had passed. The basis of their new argument was that it did not matter whether confidential information had passed or not. It was not just a matter of citing another case to support the application of the earlier test that had been argued in the courts below. The truth was that the appellants had abandoned the "old test" and were urging this court to accept a completely new test. (paras 12, 13 & 15)

***Bahasa translation** of headnotes*

Perayu memohon untuk melarang peguamcara responden ('SD') dari mewakili responden atas alasan bahawa SD pernah bertindak sebagai peguamcara bagi kedua-dua perayu dan responden. Permohonan ditolak oleh Mahkamah Tinggi dan kemudian oleh Mahkamah Rayuan. Perayu bagaimanapun mendapat kebenaran untuk merayu ke mahkamah semasa. Di pendengaran, responden membangkitkan bantahan awal bahawa rayuan tidak berdasarkan kepada kausa atau halperkara yang berbangkit di mahkamah-mahkamah di bawah. Dihujahkan bahawa perayu telah mengambil satu pendirian yang berlainan dan telah mengasaskan kesnya kepada asas-asas yang sama sekali baru. Sebabnya ialah kerana perayu berhujah bahawa SD tidak perlu memiliki apa-apa maklumat rahsia yang mana ia adalah bertentangan dengan plea utamanya bahawa maklumat rahsia telah disalurkan kepada SD. Menurut responden lagi, perayu juga menyatakan bahawa keputusan House of Lords dalam *Prince Jefri Bolkiah v. KPMG (a firm)* [1999] 1 All ER 517 tidak lagi merupakan undang-undang terpakai, sedangkan, di mahkamah-mahkamah di bawah, perayu berhujah bahawa prinsip common law kes tersebut adalah terpakai. Dihujahkan selanjutnya bahawa perayu berhasrat untuk mengikuti ujian yang dibentang oleh *Spincode Pty Ltd v Look Software Pty Ltd and Others* [2001] 4 VR 501. Perayu menjawab bahawa mereka hanya memaparkan autoriti baru yang gagal dibangkitkan dalam prosiding terdahulu dan sekali-kali tidak meninggalkan landasan-landasan lama mereka.

Diputuskan (menolak rayuan)

Oleh Abdul Hamid Mohamad HMP menyampaikan penghakiman mahkamah:

> **(1)** Ujian yang dicadangkan oleh perayu di mahkamah ini tidak pernah dihujah atau dipertimbang di mahkamah-mahkamah di bawah. Dapatan fakta yang dibuat oleh Mahkamah Tinggi dan yang disahkan oleh Mahkamah Rayuan akan menjadi sia-sia dan tidak relevan. Asas hujah perayu dahulu adalah bahawa maklumat-maklumat rahsia telah disalurkan. Asas hujahan barunya pula adalah bahawa adalah tidak menjadi hal sama ada maklumat rahsia telah disampaikan ataupun tidak. Ini bukanlah semata-mata tindakan menamakan satu kes lain bagi menyokong permohonan ujian dahulu yang telah dihujah di mahkamah-mahkamah di bawah. Hakikatnya adalah, perayu telah meninggalkan "ujian lamanya" dan meminta supaya mahkamah ini menerimapakai ujian yang serba serbi baru.

Case(s) referred to:

*Prince Jefri Bolkiah v. KPMG (a firm) [1999] 1 All ER 517 (**refd**)*

*Raphael Pura v. Insas Bhd & Anor [2003] 1 CLJ 61 FC (**refd**)*

*Spincode Pty Ltd v. Look Software Pty Ltd & Ors [2001] 4 VR 501 (**refd**)*

Legislation referred to:

Courts of Judicature Act 1964, s. 96(a)

Legal Profession (Practice and Etiquette) Rules 1978, rr. 3, 5

Counsel:

For the appellants - Lim Kian Leong (Sia Siew Mun, Wong Yoke Peng, Tan Shin Shin & Rohana Ngah with him); M/s Lim Kian Leong & Co

For the respondents - Cecil Abraham (Shafee Abdullah, Yee Mei Ken & Sunil Abraham with him); M/s Shearn Delamore & Co

Reported by Usha Thiagarajah

Case History:

Court Of Appeal : [2003] 1 CLJ 634
High Court : [2004] 6 CLJ 338
High Court : [2004] 3 CLJ 401
High Court : [2003] 1 CLJ 472
High Court : [2001] 8 CLJ 736

JUDGMENT

Abdul Hamid Mohamad FCJ:

[1] The respondents herein had filed a winding up petition in the High Court to wind up Tan Chong Consolidated Sdn. Bhd. ("TCC"), the ninth appellant on the just and equitable grounds. The appellants herein are the respondents in the petition. The appellants then filed a notice of motion in that petition for an order to restrain the legal firm of Shearn Delamore & Co ("Shearn") from acting for the petitioners/respondents.

[2] The grounds forwarded by the appellants to disqualify the respondents from retaining Shearn are that Shearn had over the years acted as common solicitors for the appellants and the respondents. In the course of so acting, Shearn had advised on at least three corporate exercises involving reductions and restructuring of capital in which Shearn had prepared affidavits and company returns stating the respective shareholdings of the parties in TCC. From 1998 to 2000, Shearn was advising as common solicitors for the parties including TCC in respect of a de-merger exercise for Tan Chong Motor Holdings Bhd. ("TCMH") in which TCC had approximately 44% of the shares. Shearn was also the common solicitor at the time of the Emergency General Meeting on 11 September 1999 when the shareholders of TCC voted to approve TCC's participation in the de-merger exercise.

[3] The High Court dismissed the application. The appeal to the Court of Appeal was also dismissed. On 17 May 2005, this court granted leave to appeal on the following question:

> What is the proper test to be applied in determining whether a firm of

> solicitors should be disqualified from representing parties in subsequent litigation.

[4] Before us, Dato' Cecil Abraham, learned counsel for the respondents raised a preliminary objection. His objection was that the appeal, as it is now, is not based on a cause or matter raised in the Court of Appeal or in the High Court. He argued that the appellants' case in the High Court and in the Court of Appeal was that:

> (a) Shearn was in possession of confidential information
>
> (b) the applicable legal principles are as set out in *Prince Jefri Bolkiah v. KPMG (a firm)* [1999] 1 All ER 517.
>
> (c) Shearn should therefore be restrained from acting for the respondents/petitioners in the winding up petition.

[5] As a result the High Court had made a finding of fact that Shearn was not in possession of any confidential information. The judgment of the High Court reads:

> I am satisfied that the Firm is not in possession of any information, confidential or otherwise, as alleged by the respondents, which the Firm is capable of using against the respondents (the Appellants herein - my addition) in this petition. The respondents' only complaint is that the Firm's corporate department had previously advised TCC in certain corporate matters and in its participation of the de-merger exercise of TCMH, I am of the view that the respondents' assumptions of any conflict of interest and confidentiality are seriously misconceived. These allegations are far-fetched and have been credibly responded to by the petitioners. The partners of the corporate department in the Firm have confirmed that during their retainer by TCC, neither the petitioners nor the respondents had confided information, confidential or otherwise, to the Firm which are relevant or material to this petition. Their scope of advice to TCC was confined to the company only and not to the individual shareholders.
>
> It is specifically noted that the Firm is not privy to information of the respondents or their personal business affairs, which are relevant or material to this petition or which can be used against the respondents in this litigation. More importantly, there is no evidence in support of the respondents' bare allegation that the Firm may be in possession of confidential information which can be used against them in this petition. I am of the view that the Court cannot and will not grant an injunction based on bare allegations or assumptions of the respondents. And it must be highlighted that this family winding up petition does not deal with the merits or demerits of the de-merger exercise of TCMH, which had been concluded and implemented. There is no risk, real or otherwise, that the Firm will disclose any confidential information as alleged by the respondents because there is no such information. On this ground alone, which forms the substratum of the application, this application should be dismissed with cost.

[6] The Court of Appeal confirmed that finding of fact. The judgment of the Court of Appeal

on the issue reads:

> 9. In the appeal, the appellants failed to show that the learned Judge erred in coming to that finding. In paragraph (iv) on page 7 of the appellants' counsel's written submission it was said that the fact of the Firm's having confidential information might be readily inferred not only from the documents passed to the Firm but also from "oral discussions", and there then followed, as if in illustration or support of the argument, a reference to certain exhibited documents which were said to indicate that inconsistent opinions had been rendered by the Firm to "TCMH/Warisan" and the fourth petitioner, but it was not shown how the rendering of opinion by the Firm meant the receipt of confidential information by them. In paragraph 3 on page 11 of the said written submission a reference was made to a paragraph on page 6 of the learned judge's judgment in which he spoke about the separation in the Firm between the corporate department and the litigation department. It was said that the learned judge erred in being satisfied that such a separation of separateness was sufficient to ensure that confidential information received by the corporate department would not be known to the litigation department and misused. But in the passage that I have quoted it is obvious that it was not the finding of the judge that the Firm's corporate department did receive confidential information but there was no danger of its being passed to the litigation department which would be handling the petition. It is obvious that what the judge found was that the Firm, whether its corporate department or litigation department, was not in possession of any confidential information. As I said it was not shown in the appeal that the judge erred in that finding and therefore I had to accept that finding as correct. That finding justified the dismissal of the application and for that reason I decided that the appeal should be dismissed.

[7] Learned counsel for the respondents argued that the appellants have now taken a completely new stand. Their appeal is now based on a "new case" altogether. The appellants are now seeking to argue their appeal on a new ground which was never raised in the Court of Appeal and the High Court. Now the appellants are saying that Shearn need not be in possession of confidential information contrary to their principal contention that confidential information was passed to Shearn. Learned counsel for the respondents argued that the appellants are now saying that the House of Lords' decision in *Prince Jefri Bolkiah (supra)* is no longer good law contrary to the crux of the appellants' submission that the applicable common law principles are that of *Prince Jefri Bolkiah* 's case *(supra).* The appellants now argue that this court should instead follow the test laid down in *Spincode Pty. Ltd. v. Look Software Pty. Ltd. and Others* [2001] 4 VR 501 by the Court of Appeal in the State of Victoria, Australia. This was not the appellants' case in the Court of Appeal.

[8] Learned counsel for the appellants replied that the appellants were only citing a new authority which they had failed to cite in the earlier proceedings. They had not abandoned their old ground. The question is what is the test that should be applied.

[9] On the date of the hearing, we declined to make a ruling as we thought that we would get a better picture after hearing the appeal. What more, this court had heard the arguments during the hearing of the leave application and had granted leave. However, whether or not

we would answer the question, after hearing the full appeal, is another matter.

[10] Reading the appeal records, it is true that both parties had relied on *Prince Jeffri Bolkiah* 's case *(supra)*. However, the learned judge did not even refer to the case. Instead he referred to rr. 3 and 5 of the Legal Profession (Practice and Etiquette) Rules 1978 ("LP (P&E) R 1978") which make reference to "possession of confidential information." It may well be that the learned judge had both the case and the rules in mind.

[11] The Court of Appeal did not refer to any decided case. It dealt with only one issue: whether the appellants had shown that the learned judge had erred in his findings of facts. The Court of Appeal held that the appellants had failed to do so. Before us, the said findings of facts are not challenged. But, the appellants now argue that, whether or not Shearn had the confidential information is not relevant. The test applied by the House of Lords in *Prince Jeffri Bolkiah* 's case *(supra)* should not be followed. Instead a wider test applied by the courts in New Zealand, Canada and Australia should be followed. The appellants even proposed the test as follows:

> The proper test is:
>
> > Where:
> >
> > > (1) A solicitor (or a solicitor's firm) has advised a former client on a matter (or a matter related or connected to such matter) which on the facts is or may reasonably be expected to be relevant to a subsequent case; or
> >
> > > (2) It is in the interests of justice:
>
> The solicitor (and the solicitor's firm) shall not act in such subsequent case nor in any way adverse to the interests of the former client in relation to the matter and as may be further ordered by Court.

[12] I am now able to appreciate the respondents' complaints better. The proposed test had not been argued and considered in the courts below. The findings of facts made by the High Court and confirmed by the Court of Appeal would be rendered superfluous and irrelevant. The respondents now have a new case to meet. Had the proposed test been argued and accepted by the High Court, we do not know what the learned judge's findings of facts relevant to the test and what his decision would have been. For example, quoting from the wording of paragraph (1) of the proposed test, whether Shearn had advised "a former client on a matter (or a matter related or connected to such matter) which on the facts is or may reasonably be expected to be relevant to a subsequent case..." (emphasis added). This require findings of facts. For this court to answer the question as per the proposed test would require this court to assume that the facts required for the application of the proposed test are proved. The truth is that both the High Court and the Court of Appeal had not addressed their minds to the issue. Neither should this court assume that they have been proved. So, the consideration of what the "the proper test" should be, is academic. It is trite law that this court should avoid answering academic questions - *Raphael Pura v. Insas Bhd. & Anor [2003] 1 CLJ 61*. Neither can we say that the learned Judge had committed an error of law by not applying the proposed test because "the proposed test" is not the law of this country and was

not even canvassed before him. The law is the LP (P&E) R 1978 which was applied by the learned judge. Similarly, we do not know the views of the Court of Appeal on the proposed test.

[13] It is also not correct for the learned counsel for the appellants to say that the appellants had not abandoned their old grounds but are only citing a new authority. The basis of the earlier argument was that confidential information had passed. The basis of the new argument is that it does not matter whether confidential information had passed or not. It is not just a matter of citing another case to support the application of the earlier test as had been argued in the courts below. The truth is that the appellants had now abandoned the "old test" and are urging the court to accept a completely new test.

[14] Having now the benefit of full arguments and more time to ponder, I am now of the view that this court (in which I was a member) should not have granted leave to appeal. However, leave having been granted, the issue is whether this court should now answer the question, in the circumstances mentioned above. I am of the view that this court should not do so.

[15] I have given serious thought whether, I should nevertheless consider the question and give an answer to it. I think I should not. Otherwise I would be making assumptions of what the learned High Court and Court of Appeal judges would have decided, on facts and law. Even "the law" that is said to lay down the new test are, in fact, judgments in other jurisdictions with their own statutory provisions and rules. We have our own statutory provisions peculiar to us in the Legal Profession Act 1976 and the LP (P&E) R 1978 as well as the Civil Law Act 1956. I do not think that this is a proper case for the court to examine whether the law applicable in other jurisdictions but not in others should be applied in this country.

[16] Lastly, I would like to clarify that this judgment is not on the ground that the appeal falls outside the provisions of s. 96(a) of the Courts of Judicature Act 1964. On the other hand it is on the ground that the appeal has taken a new turn completely and to answer the question posed (which issue was never canvassed in the courts below) would be a pure academic exercise which requires this court to assume that the facts required to answer the question had been proved, when the courts below had not even addressed their minds to them. Neither should this court assume that they had been proved.

[17] I would therefore dismiss the appeal with costs and order that the deposit be paid to the respondents to account of their taxed costs.

[18] The learned Chief Judge (Malaya) and the learned Chief Judge (Sabah and Sarawak) had read this judgment in draft and had expressed their agreement with it.