Conflict of Interest Matters relating to the Bolt Case

The question of whether Mr Neil J Young QC had a conflict of interest in acting for The Herald Weekly Times and Andrew Bolt against me and my brother Graham Atkinson in the Federal Court Action is presented in this short paper.

Neil Young QC represented us as the key legal counsel for the Yorta Yorta v State of Victoria & Ors in our appeal to the High Court, December, 2002. I was one of the key plaintiffs in that case representing my extended family group in the Native Title matters which included substantive evidence on the requirements of Native Title. This included genealogical information on our cultural identity as a claimant group and substantive evidence on our connections with the claimed lands – see ‘Requirements of Native Title’ under the NTA, 1993 s. 225, and case materials in the Federal Court.

There are two grounds of a conflict of interest in the Bolt case that need to be examined.

- The duty of confidentiality,
- The duty of loyalty.

The duty of loyalty

In Spincode Pty Ltd v. Look Software Pty Ltd [2001] 4 VR 501, Brooking JA held that there is an independent equitable obligation of loyalty, which forbids a solicitor acting against a former client in the same matter or in a closely related matter. Although the other members of the Court of Appeal did not decide the matter on the issue of duty of loyalty, Chernov JA considered that Brooking JA had made a compelling case for the view he expressed [at 526].

Spincode concerns a solicitor acting against a former client however arguably the same obligation would extend to barristers.

Neil Young QC represented members of the Yorta Yorta Aboriginal Community in the High Court appeal in their Native Title case in December, 2002. As a result, he developed a close relationship with Yorta Yorta Traditional Owners. This relationship was reflected in the Speech by Kate McMillan SC upon presentation of his commission and swearing in as a Judge of the Federal Court of Australia. Ms McMillan SC said,

“In the Yorta Yorta case, you represented members of the Yorta Yorta Aboriginal community in the High Court appeal in their Native Title case. Your Honour received something a leading silk rarely receives – An elder of the Yorta Yorta community, “Auntie” Liz Hoffman, overwhelmed Your Honour with a long, full-on, physical hug of thanks” (note: Liz Hoffman is directly related to me and Graham on the Atkinson and Morgan family line).

This reference reflects the close affinity and trust that Yorta Yorta Traditional Owners developed for Mr Young QC including myself as a key claimant. It follows from this
important relationship that was forged between the Yorta Yorta and Mr Young that two of the plaintiffs in the Bolt case are Yorta Yorta Traditional Owners (Dr Wayne and Mr Graham Atkinson) for whom Mr Young QC chose to act against.

Brooking JA’s dicta in Spincode limits the duty of loyalty to the same or closely related matters. Accordingly, it is open to argue that the Native Title case and the current case concerning Racial Vilification issues are not the same or closely related matters. The more persuasive argument is that both matters involve substantive evidence of cultural connections and identification – the core issue at the heart of both actions. An additional concern is that the Yorta Yorta Traditional Owners developed a relationship of trust with Mr Young QC. This is a significant thing for Aboriginal People to develop in the face of a history of adversity that has fostered distrust toward non-Aboriginal People and institutions. This “cultural identity consideration” adds strength towards the conclusion that Mr Young QC should honour his equitable obligation to Yorta Yorta Traditional Owners and not act against them in the Bolt case.

The duty of confidentiality

A barrister has a duty to keep confidential the information that he/she receives during the course of a professional relationship with a client. This obligation continues after the cessation of the retainer (Rule 63 – Rules of Conduct as made by the Bar Council pursuant to clause 16.2(b) and 16.3 of the Constitution of the Victoria Bar – “the Rules”).

As a result of Mr Young QC’s role in Yorta Yorta High Court Appeal, he was privy to confidential information involving substantive “cultural identity and connection matters” relevant to that case. He was also privy to the “confidential information” referred to in Yunghanns v. Elfic (1988) 3 July 1998, SCV at p10 and learnt “a great deal about his client, [their] strengths...weaknesses...honesty,...reaction to crisis, pressure or tension, [their] attitude to litigation and settling cases and [their] tactics. These are factors which I would call the “getting to know you factors...”.

The confidential information obtained in the course of the Yorta Yorta High Court Appeal particularly the very sensitive “cultural and genealogical information”, put Mr Young QC in an unfair advantage in the Bolt case. We as plaintiffs in this case are therefore extremely concerned about this forensic advantage and are very disappointed about Mr Young QC’s decision to act against our interests particularly in light of the trust relationship that we established.

Conclusion

Mr Young QC has a clear conflict to act in the circumstances of this case for the reasons outlined. As plaintiffs seeking a fair trial and justice before this court and as previous clients as Yorta Yorta Traditional Owners we do not consent to him acting against us in the upcoming Federal Court action. This should result in Mr Young QC doing the honourable thing by returning the brief.

Dr Wayne Atkinson- Yorta Yorta Elder