IN THE COURT OF APPEAL OF BELIZE A.D. 2020

CIVIL APPEAL NO 18 of 2016

CURTIS DALE SWASEY Appellant

V

BELIZE TELEMEDIA LIMITED 1st Respondent

MMR BELIZE LIMITED 2nd Respondent

IN THE COURT OF APPEAL OF BELIZE A.D. 2020

CIVIL APPEAL NO 19 of 2016

BELIZE TELEMEDIA LIMITED Appellant

V

CURTIS DALE SWASEY Respondent

IN THE COURT OF APPEAL OF BELIZE A.D. 2020

CIVIL APPEAL NO 33 of 2016

BELIZE TELEMEDIA LIMITED Appellant

V

CURTIS DALE SWASEY Respondent

BEFORE:

The Hon Sir Manuel Sosa — President
The Hon Justice Samuel Awich — Justice of Appeal
The Hon Justice Lennox Campbell — Justice of Appeal

M Perdomo for the appellant/respondent.
E Courtenay SC along with K Musa and W Piper for the appellant/respondent.

11 June 2018 and 26 October 2020

SIR MANUEL SOSA P

[1] I have read, in draft, the judgment of Awich JA and concur in the reasons for judgment given, and the orders proposed, therein. I would add that, either party may apply to the Registrar for a different order as to costs in seven days from the date of promulgation of this judgment, and that in the event of such an application, both parties shall file and exchange written submissions on the matter in ten days from the date of the filing of the application (which may be made by letter to the Registrar copied to the other side) and the application shall be determined on the basis of such written submissions only.

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SIR MANUEL SOSA P

AWICH JA

[2] These three appeals, No. 18 of 2016, No. 19 of 2016, and No. 33 of 2016, were filed on 12 May 2016, 13 May 2016, and 30 September 2016, against two orders made on February 2016, and 20 July 2016, at the end of the trial of Claim No. 690 of 2014, by the learned judge, Abel Courtenay, in the Supreme Court. The parties in the appeals were parties in the trial in the Supreme Court. One of the parties, MMR Belize Limited, to which I shall refer simply as MMR, did not appeal.

[3] After the first appeal was filed by the appellant, Belize Telemedia Limited, BTL, on 12 May 2016, the respondent, Mr. Curtis Swasey, instead of cross-appealing by giving respondent's notice under Order II rule 5, of the Court of Appeal Rules, S.I 90, filed on 13 May 2016, notice of his own appeal, the second appeal (under s.16 of the Court of Appeal Act, Cap. 90 Laws of Belize). The third appeal, No 33 of 2016, was filed later on 30 September 2016, by BTL; the court order appealed against was made on 20 July 2016, subsequent to the filing of the first two appeals. This Court decided to hear all three appeals together, and prepare one judgment in which all three appeals are decided. This is the judgment I have prepared for my part in the entirety.

The orders made, the notices of appeal and the grounds.

[4] On 23 February 2016, at the end of the trial of Supreme Court Claim No. 690 of 2014, the learned judge, Abel Courtenay, made this order:

"**ORDER**

Tuesday, the 23rd day of February, 2016

BEFORE The Honorable Mr. Justice Courtenay A. Abel

UPON THE TRIAL of this matter,

AND UPON HEARING Mr. Kareem Musa and Mr. Wayne Piper of Messrs. Musa & Balderamos LLP of Counsel for the Claimant, Ms. Magalie Perdomo of Counsel for the First Defendant and Ms. Naima Barrow of Messrs Barrow & Co. LLP of Counsel for the Second Defendant:

It is ordered that;

1. Belize Telemedia Limited pay to Curtis Dale Swasey damages assessed in the sum of $25,000.00 for breach of contract and breach of confidence.
2. Belize Telemedia Limited and MMR Limited pay to Curtis Dale Swasey costs to be agreed or assessed by this Judge.

DATED the 22nd day of April 2016.

BY ORDER

REGISTRAR"

The order was signed on 22 April 2016.

[5] The full judgment in the case was subsequently delivered on 4 March 2016. Belize Telemedia Ltd, was dissatisfied. On 12 May 2016, it filed a notice of appeal against the order. The notice was given appeal No. 19 of 2016. It includes the grounds of the appeal; it is the following:

"IN THE COURT OF APPEAL OF BELIZE, 2016 A.D.

CIVIL APPEAL No. 19 of 2016

Between:

BELIZE TELEMEDIA LIMITED Appellant

AND

CURTIS DALE SWASEY Respondent

_____

NOTICE OF APPEAL

1. TAKE NOTICE that the above-named Appellant being dissatisfied with that part of the decision more particularly stated in paragraph 2 hereof of the Supreme Court contained in the judgment of the Honourable Mr. Justice Abel dated the 4th Day of March 2016, and drawn up and perfected in the Order of the Court dated the 22nd Day of April, 2016, DOTH HEREBY appeals to the Court of Appeal upon the g rounds set forth in paragraph 3 and will at the hearing of the appeal seek the relief set out in paragraph 4.

And the Appellant further states that the names and addresses, including their own, of the persons directly affected by the appeal are set out in paragraph 5.

2. **The grounds of appeal are:**

   a. The learned judge misdirected himself and erred in law and fact in finding that the Respondent had a right of a proprietary nature, identifiable as belonging to him, in the SMS Lottery Concept arising from its originality and in so doing the learned judge,

   i. Erred in failing to take account of the overwhelming evidence that the SMS Lottery Concept and SMS Lottery Information was in the public domain and that the Appellant and MMR were already aware of the concept.

ii. Erred in finding that BTL owed a duty of confidence to the Respondent as regards to the concept of SMS Lottery texting.

b. The learned judge erred in law and fact in finding that the Respondent's Lottery Concept and SMS Lottery information was disclosed by the Appellant to MMR Belize Limited and in doing so,

i. Erred in failing to take account of the total lack of evidence establishing a significant fingerprint or similarities between the SMS Lottery game provided by MMR and that of the Respondent.

ii. Erred in finding that MMR did not shift the evidential burden on it to disprove that that the Respondent's SMS Lottery Concept and SMS Lottery Information was used by MMR.

iii. By failing to take account of the overwhelming evidence provided by MMR of its own lottery game, erred in finding that MMR utilized the Respondent's lottery concept to operate MMR's business concept.

iv. Erred in finding that there was circumstantial evidence to prove a breach of confidence and a breach of agreement by the Appellant in relation to the Respondent's SMS Lottery Concept and or his information.

c. The decision is against the weight of the evidence.

3. The Appellant will seek from the Court of Appeal an Order that:

a. The court of Appeal set aside the Orders of the Honourable Mr. Justice Abel.

b. The Respondent shall pay the costs of this Appeal and in the court below to the Appellant.

c. Such further or other relief as may be just.

4. Persons directly affected by the appeal:

…

Dated the 12 day of May 2016"

[6] On the 13 May 2016, Mr. Curtis Swasey filed a notice of his own appeal. It was curiously given appeal No. 18 of 2016, a number ahead of the number given to BTL's appeal, filed the previous day. The notice of appeal which includes the grounds of appeal is the following:

IN THE COURT OF APPEAL OF BELIZE, A.D. 2015

CIVIL APPEAL NO. 18 of 2016

Between:

CURTIS DALE SWASEY APPELLANT

AND

BELIZE TELEMEDIA LIMITED 1st RESPONDENT

MMR BELIZE LIMITED 2nd RESPONDENT

NOTICE OF APPEAL

To: The Registrar, Court of Appeal

TAKE NOTICE THAT the Appellant being dissatisfied with the decision more particularly stated in Paragraph 2 hereof of the Supreme Court contained in the Judgment of the Honourable Justice Courtenay A. Abel, dated the 4th day of March, 2016 and the Order dated the 22nd day of April, 2016 does hereby appeal to the Court of Appeal upon the grounds set out in paragraph 4.

AND the Appellant further states that the names and addresses, including their own, of the persons directly affected by the appeal are those set out in the paragraph 5.

2**. The Decisions Appealed Against**

The decision to assess damages only in the sum of $25,000.00.

3. **Grounds of Appeal**

(i) That the Learned Trial Judge erred in law in failing to make an award for Restitutionary Damages.

(ii) That the Learned Trial Judge erred in law in failing to take into account the Appellants evidence as to his occupation and time spent on the project in assessing the damages to be awarded.

(iii) That the learned trial Judge erred in law in assessing the damages awarded to the Claimant only on the basis of compensatory damages.

Relief Sought

(i) That the award of compensatory damages be varied and that, the Court substitute such award as it deems fit and just or remit the case to the Supreme Court for reassessment of damages; and

(ii) Costs

Dated the 11th day of May, 2016

KAREEM D. MUSA

MUSA AND BALDERAMOS LLP…"

[7] Costs of the proceedings were awarded to Mr. Swasey, but assessed later on 9 September 2016, by Abel J, himself in the sum of $58,789.10. The certificate of taxation is this:

"**CERTIFICATE OF TAXATION**

Wednesday the 20th day of July, 2016

BEFORE the Honourable Justice Courtney Abel

UPON HEARING Mr. Kareem Musa and Mr. Wayne Piper, Attorneys-at-Law for the Claimant, Ms. Magalie Perdomo, Attorney-at-Law for the First Defendant and Mrs. Naima Barrow, Attorney-at-Law for the Second Defendant

IT IS HERRBY ORDERED:

1. Subject to the matter of principle on which this court has ruled and in pursuance of the Order of the Court herein dated the 22nd of April, 2016, the

court hereby certifies that, without prejudice to their rights of appeal, the parties have agreed to costs in the sum of $58,789.10 in favour of the Claimant to be paid by the Defendants.

DATED this 9th day of September, 2016

BY ORDER

REGISTRAR"

[8] BTL was again dissatisfied; it appealed against the order assessing costs in the sum of $58,789.10. The notice of appeal which includes the grounds of appeal, filed on 30 September 2016, was given appeal No. 33 of 2016. It is the following:

"IN THE COURT OF APPEAL OF BELIZE 2016 A.D.

CIVIL APPEAL NO. 33 of 2016

Between:

BELIZE TELEMEDIA LIMITED Appellant

AND

CURTIS DALE SWASEY Respondent

_____

NOTICE OF APPEAL

1. TAKE NOTICE that the above-named Appellant being dissatisfied with that part of the ruling more particularly stated in paragraph 2 hereof of the Supreme Court contained in the ruling of the Honourable Mr. Justice Abel dated the 24th Day of June 2016, and drawn up and perfected in the Certificate of Taxation of the

Court dated the 9th Day of, September 2016, DOTH HEREBY appeal to the Court of Appeal upon the grounds set forth in paragraph 3 and will at the hearing of the appeal seek the relief set out in paragraph 4.

And the Appellants further state that the names and addresses, including their own, of the persons directly affected by the appeal are set out in paragraph 5.

2. The Appellant appeals against the Whole of the Ruling contained in the Transcript of Proceedings being:

"So the Court rules that it specifically in the Order for costs made did not make an order for costs on the prescribed basis but rather that the costs should be assessed. This Ruling was, for the purpose of argument on the basis that it is possible for prescribed costs to be assessed. This is on the basis of argument but without necessarily accepting that position, but for the purpose of argument I am to accept it. The Court hopes that by resolving this question of principle the parties may be able to have discussions which will result in substantial or total agreement in relation to the bill of costs submitted by the Claimants with reasonable give and take on either side and without prejudice to the defendant's position if they do not accept the court's ruling as already stated."

3. The grounds of appeal are:

a. The learned judge misdirected himself and erred in failing to apply Rule 64.5(1) of the Supreme Court (Civil Procedure) Rules 2005 and ordering prescribed costs and in so doing the learned judge:

i. Erred in failing to determine costs in accordance with Appendices B and C of Rule 64.

ii. Erred in failing to take account of Rule 64.5(2)(a) that the value of the claim was to be decided based the amount ordered to be paid to the Respondents by Order dated April 22nd, 2015 in the amount of $25,000.00.

iii. Erred in failing to assess costs on a prescribed basis, having accepted that prescribed costs can be assessed.

4. The Appellant will seek from the Court of Appeal an Order that:

a. The Court of Appeal set aside the Cost Orders of the Honourable Mr. Justice Abel.

b. The Respondent shall pay the costs of this Appeal and costs in the court below to the Appellant.

5. Such further or other relief as may be just.

6. Persons directly affected by the appeal:

…

MAGALIE PERDOMO

Counsel for the Appellants"

The facts.

[9] The Supreme Court claim No. 690 of 2014 in which the three orders of Abel J. appealed against were made, was brought by Mr. Curtis Dale Swasey against BTL and MMR Belize Limited. Mr. Curtis Dale Swasey is, "a project designer", BTL is a provider of telecommunications services in Belize. MMR is a company carrying on the business of a game of chance, "MEK ME RICH", in Belize. The claim arose from the following facts.

[10] Mr. Swasey testified that, in January 2010, he developed, "a unique and original concept" of a game of chance as a business venture. He named it "SUPER SLAM SUNDAY". The game would be played by sending message by SMS on mobile telephone. I suppose that payment would be made for a winning number.

[11] In December 2011, Mr. Swasey made a business proposal to Ms. Karen Bevans, the CEO of BTL. The proposal was to carry on Mr. Swasey's game of chance by sending message by SMS on the mobile telephone network of BTL. Thereafter Ms. Caryn Wilson, the Business Development Executive Officer of BTL, contacted Mr. Swasey for discussion of his business proposal. First of all, Ms. Wilson proposed that, they "execute a non-disclosure agreement", to protect both parties from unauthorized disclosure of the other's information. On 13 January 2012, they signed the agreement entitled, "Information Exchange Agreement". It was received in court as exhibits CW1.

[12] Discussions of the business proposed by Mr. Swasey commenced with a meeting on 24 January 2012, and lasted until 7 August 2014, some two years and seven months. Several "senior staff" of BTL, including Mr. Feliz Reyes, a Technology Development Officer of BTL, attended the meeting on 24 January 2012. Mr. Swasey presented his proposal which included: "executive summary business documents, Microsoft VISO flow charts and PowerPoint presentation", which were received in court as exhibit CS6. The Microsoft VISO flowcharts alone were exhibit CS7. BTL staff expressed surprise, ignorance and admiration about his proposal, Mr. Swasey stated.

[13] At the request of BTL made on 21 February 2012, a meeting was held to explain how the business proposal by Mr. Swasey would fit in and work in the services provided by BTL. On 10 May 2012, Mr. Swasey and Mr. Paul Elliot, a computer software developer who Mr. Swasey engaged, again met with Mr. Feliz Reyes for BTL, to discuss how the software of Mr. Swasey would work in BTL's network. Mr. Elliot for Mr. Swasey, provided written answers.

[14] On 3 December 2012, Ms. Wilson, for BTL, wrote to Mr. Swasey informing him that: "BTL was looking into a new gateway to accommodate [Mr. Swasey's] game; and the amount of SMS that would be sent to and from [Mr. Swasey's] customers". Mr. Swasey responded to the letter.

[15] On 28 December 2012, Mr. Swasey informed BTL that, he had commenced the process of obtaining licence for the business, and asked whether he could proceed to obtain equipment needed for the business. BTL was non-committal; Ms. Wilson replied that, the decision would, "be based on what Mr. Swasey deemed best".

[16] On 7 January 2013, Ms. Wilson informed Mr. Swasey that: "[BTL] had a network freeze and [Mr. Swasey's] project was on hold until mid-January 2013, at which time efforts would be resumed".

[17] On 20 June 2013, Ms. Wilson requested further information from Mr. Swasey. She posed ten specific questions. Mr. Swasey did not state the questions in court. He said that he answered all the questions and also made some amendments to his proposal.

[18] On 23 October 2013, Ms. Wilson asked about, "the format for the body of the message," and whether there would be comas between the numbers. Mr. Swasey answered the questions. Mr. Reyes, for BTL also asked five other questions. Mr. Swasey answered. On 9 December 2013, Ms. Wilson again asked for information; it was about "the winning format". Mr. Swasey answered.

[19] In early 2014, Ms. Wilson informed Mr. Swasey that, BTL had received several gaming business proposals from other persons, and that, BTL would not give Mr. Swasey exclusive right to use BTL network for his business proposal, and further that, it would give the right to use BTL's network to other proposers as well. Mr. Swasey stated: "I was livid".

[20] On 13 March 2014, Ms. Wilson informed Mr. Swasey that, BTL was, "reviewing internal areas to accommodate Mr. Swasey game".

[21] On or about 7 August 2014, Ms. Wilson informed Mr. Swasey by telephone that, his proposed game was not approved by BTL. She confirmed this in a letter. She thanked Mr. Swasey for his, "attractive proposal to use BTL's network to offer SMS stimulated games…"

[22] Mr. Swasey alleged that, soon after, in less than a month, a game of chance called "MEK MI RICH", was advertised on television. When it was aired on television he

noticed that, “it followed the exact same format”, as the one he had proposed to BTL. He found out that, the operators of MEK MI RICH was a company called MMR Belize Limited. Mr. Swasey carried out a search at the Companies Registry and ascertained that, MMR Belize Limited was registered as a company in Belize on 30 April 2013.

[23] Ms. Caryn Wilson testified for BTL. She stated that, in January 2012, Mr. Swasey made a business proposal on behalf of a company, Corovision Gaming Company Limited, to BTL. She confirmed that, BTL and Mr. Swasey “executed” the Information Exchange Agreement, exhibit CW1, under which parties were obligated not to disclose confidential information of the other without authorization. She denied that, BTL disclosed any information provided by Mr. Swasey to MMR or to any other person. She stated that, BTL held independent discussions with MMR about a game of chance business; the BTL officials in those discussions were Mr. Orlando Michael, “another Project Executive of BTL”, and Ms. Linda Eck. They did not disclose any information to Ms. Wilson nor did she disclose any information obtained from Mr. Swasey to Mr. Orlando and Ms. Eck.

[24] About meetings with Mr. Swasey, Ms. Wilson testified that, at the first meeting Mr. Swasey gave only general information about the game, she had to ask for more information. As their discussions progressed, Ms. Wilson still had to ask for detailed technical information most times.

[25] Ms. Wilson also testified that, the concept used in MMR’s game was provided by MMR itself; and that, it differed from Mr. Swasey’s in “formula, operation strategy, and in the flow of options and available selections”. She explained that, “the method of operation provided by Mr. Swasey, “differed” from that of [MMR] for example, Mr. Swasey’s required 6 pairs of numbers, while MMR’s game gave a choice of 5 balls.”

[26] Ms. Wilson ended by stating that: the concept of lottery texting was not introduced to BTL by Mr. Swasey, BTL had already known it, and it was in the public domain. She gave as an example, that as early as 3 March 2011, before Mr. Swasey made his proposal and discussions were held with him, BTL signed a letter of intent with a local company, Creative Content Ltd, for providing, “EZ Boledo”, a lottery jackpot

game, played by SMS. The letter of intent, a technical report, PowerPoint and minutes were received as exhibits CW14, CW15, CW16 and CW17 in court.

[27] Mr. Sunjay Hotchandani and Mr. Andre Vega testified for MMR Belize Limited. They were directors of MMR Belize Limited. The sum of their testimonies is the following. They denied that, MMR received confidential information or any business proposal from BTL. They stated that, their concept of the MEK MI RICH game of chance, played by SMS message sent on BTL's telecommunications network was MMR's own concept. It originated in 2011, when all cellphone users were required to register their sim cards. In that year, one, Mr. Hernandez, and one, Mr. Daryanani, showed interest to Mr. Hotchandani, in establishing a lottery game business in Belize. They requested help from Mr. Hotchandani. He contacted Mr. Nima Nejat who worked for Victory Poker Company in the USA. Mr. Nejat in turn contacted Mr. James Morel, who worked for LottoGopher, in the USA, to develop a lottery game for Mr. Hotchandani on behalf of Messrs Hernadez and Daryanani.

[28] On 25 March 2013, Mr. Morel for Messrs Hotchandani, Hernandez and Daryanani, provided "sales scenarios for lottery" game. It was received exhibit AV1. On 29 March 2013, Mr. Morel provided a summary for lottery sales in Belize. Following that, Mr. Hernandez and Mr. Daryanani incorporated the company, MMR Belize Limited. The company applied for "a lottery licence" in 2013.

[29] In April 2013, Messrs Daryanani, Hotchandani, Morel and Vega, met with "both" telecommunications providers in Belize separately. After meeting with BTL, Mr. Morel hired one, Mr. Karim Khanna of FamCom in the USA, so that, they would develop a software together for a lottery game played on BTL's communications network. They worked together with personnel of BTL so that, they would develop the right software that could work in Belize. MMR paid $25,000 to BTL for this engagement. MMR tendered this software as exhibit in court for comparison.

Submissions

(1) Submissions for the appellant BTL; appeals No. 19 of 2016 and No. 33 of 2016.

[30] Learned counsel Ms. Perdomo for BTL, commenced her well researched submissions by confirming that, Mr. Swasey brought his claim in contract, and in equity, "for breach of the duty of confidence". She confirmed further that, the contract, entitled, "Information Exchange Agreement", was signed by BTL and Mr. Swasey on 13 January 2012.

[31] Counsel submitted, however that, "neither the law nor the evidence … before the trial judge [supported] the respondent's claim", for breach of the information exchange agreement, or breach of the duty of confidence. She argued that, Mr. Swasey failed to prove breach of the agreement (the contract), and breach of the duty of confidence because he failed to present evidence, "to show a proprietary right in the concept of lottery texting… and failed to identify, as required by [the] law, or with any precision, the detailed information, flow chart, structure or formulae which were allegedly disclosed [by BTL] to MMR."

[32] Ms. Perdomo particularly contested certain findings of fact and application of the laws by the judge. She submitted that, the judge particularly erred in these findings of facts and the conclusions from application of the laws. She listed them as follows:

"i. [that] the Respondent's SMS Lottery Concept and SMS Lottery Information were given to the Appellant in circumstances giving rise to an obligation of confidentiality.

ii. [that] the concept of SMS Lottery and SMS Lottery Information was not public knowledge or public property but was a result of work done by Mr. Swasey and Mr. Paul Elliot and the result of their time, attention, expertise and brain to produce a result which can only be produced by somebody who goes through the same or similar process.

iii. [that] … Mr. Swasey had a right of a proprietary nature, identifiable and belonging to him in the SMS Lottery Concept arising from its originality,

iv. [that] Mr. Swasey provided BTL with the SMS Lottery Concept arising from its originality,

v. [that] based on circumstantial evidence, the Appellant disclosed Mr. Swasey's SMS Lottery Concept to MMR, [and] MMR knowingly used Mr. Swasey's concept, Mr. Swasey discharged the burden on him of proving his case that the Appellant breached the Agreement, …"

[33] Ms. Perdomo went on to submit that, from the above erroneous findings of fact and application of the laws, Abel. J. erroneously concluded finally that, "there was breach of the information exchange agreement, and breach of the duty of confidence by the appellant [BTL] and by MMR in relation to Mr. Swasey's SMS lottery concept and his information, and Mr. Swasey [was] entitled to $25,000 in damages." The details of counsel's submissions were the following.

[34] Regarding the confidential nature of Mr. Swasey's SMS lottery concept and the rest of his information, the detail of counsel's submission was that, the judge, "erred in law and fact in finding that, Mr. Swasey had a proprietary right in SMS lottery concept arising from its originality," he failed, "to take account of the overwhelming evidence that, SMS lottery concept and [the rest] of the lottery information were [already] in the public domain."

[35] The evidence that counsel referred to was that, in 2004, one Sridhar Jawaharlal, registered in the USA, a patent right to SMS texting lottery concept. Further evidence was that, SMS texting lottery concept had already been introduced to, BTL, and BTL knew the concept of SMS texting lottery; it had on 3 March 2011, signed "a letter of intent" with a local company, Creative Content Limited, for the company to provide a lottery jackpot game played by SMS texting on BTL's telecommunications network. The game was known as "**EZ Boledo**". It was already being carried on as a business. SMS lottery concept was already in the public domain; Mr. Swasey could no longer have a proprietary's right to the concept.

[36] Regarding the question whether, BTL made unauthorized disclosure to MMR, of the concept of SMS texting lottery and the rest of the information in breach of the information exchange agreement, and in breach of the obligation of confidence, counsel submitted several arguments. 1. She submitted that, Mr. Swasey did not identify to BTL, the SMS lottery concept and the particular information by marking them out as the information protected from unauthorized disclosure, as required by the information exchange agreement. 2. She submitted that, the evidence in court did not prove that, BTL disclosed Mr. Swasey's SMS texting lottery concept, or any of his information at all; the evidence proved that, SMS texting lottery concept was already in the public domain; and that BTL had already known it since 3 March 2011, when it signed a letter of intent with Creative Content Limited. So, SMS texting lottery concept and the rest of the information could no longer be the subject of protection or disclosure; BTL could no longer be said to have disclosed the SMS concept and the rest of the information. 3. Counsel submitted that, the evidence presented on behalf of MMR proved the manner in which MMR developed its own SMS texting lottery concept; it engaged Mr. Nejat and Mr. Morel who were knowledgeable in the technology of SMS lottery texting concept. The two hired Mr. Karim Khanna, another knowledgeable person, and together with BTL technical staff, they developed the necessary software that could work in Belize. 4. She submitted that, Mr. Swasey did not in any way by evidence, identify the items of information that he claimed were disclosed by BTL to MMR; the law required him to identify the information very clearly in the proof that a duty of confidence arose and was breached. 5. Counsel submitted that, Mr. Swasey did not present any evidence comparing similarities in the SMS lottery concept and the rest of the information said to have been disclosed by BTL to MMR, with his (Mr. Swasey's) concept presented to the trial court. On the other hand, counsel submitted, evidence for the defendants showed the differences, in that MMR's "game does not follow the same flow structure, formula and operational strategy. [It] differed in both the flow of options and available selections."

[37] In support of her submissions regarding obligation of confidence in equity, Ms. Perdomo cited several case precedents. For the statement that, the information to be

protected must be detailed and distinguishable from the range of information which is generally available, she cited, *Manderson MRE Consulting v Incitec Pivot (No.2) [2011] VSC2*. In support of the statement of law that, the information to be protected: (1) must have the necessary quality of confidence about it, (2) must have been imparted in circumstances importing an obligation of confidence, and (3) must have been disclosed without authorization, to the detriment of the claimant, counsel cited: *Saltman Engineering Co. Ltd v Campbell Engineering Co. Ltd. (1948) 65 RPC 2013; and Coco v A.N. Clark (Engineering) Ltd [1969] RPC 41*. For the requirement for breach, counsel cited: *CMI-Centres for Medical Innovation GmbH and Another v Phytopharm plc. and Another, All England Official Transcript (1997-2000); and Seager Copydex Ltd. [1967] 2 All ER 415*. Counsel then cited the Jamaica Court of Appeal case, *Paymaster v Grace Kennedy Remittance Service Limited and Paul Lowe [2015], JMCA Civil 20*, for the statements of the principles of law, and to distinguish the case on the facts from this appeal case.

(2) Submissions for the respondent Mr. Swasey: appeal No. 19 of 2016, and appeal No.33 of 2016.

[38] Learned counsel Mr. E. Courtenay SC, for Mr. Swasey, made several very clear submissions, whatever view one may come to about the merit of some of the submissions. They are the following.

[39] In response to the submission for BTL that, the judge erred in finding that, Mr. Swasey had a right of a proprietary nature in SMS lottery concept arising from its originality, Mr. Courtenay submitted that, the submission was misconceived; Mr. Swasey provided the SMS lottery concept and other information to BTL as a matter of contract, which in itself "**established**" that, the information provided would be confidential; and further that, the circumstances were such that, as a matter of equity, a duty of confidence was imposed on BTL. The claim was not founded on "copyright where ownership would have to be proved".

[40] From the above base, counsel proceeded to submit that, Mr. Swasey was not required to prove a proprietary right in the SMS lottery concept or in the rest of the information in order for his claim to succeed. He was not required to prove that, he owned the SMS lottery concept and the rest of the lottery information, counsel emphasized. He submitted further that, to prove breach of confidence Mr. Swasey was required, as a matter of law, to prove that: (1) the material (the concept and the rest of information) that he communicated to BTL had the necessary quality of confidence; (2) it was communicated or became known to BTL in circumstances that entailed an obligation of confidence; and (3) BTL made unauthorized use of the confidential information. For these statements of law counsel cited: *Halsbury Laws of England Vol. 97 (2015)/7, at paragraph 700; Coco v AN Clark (Engineers) Ltd [1969] RPC 41; Seager v Copydex Ltd. [1967] 2 All ER 415; and Paymaster Jamaica Limited v. Grace Kennedy Remittance Service Limited and Paul Lowe [2015] JMCA Civ. 20.*

[41] About whether the nature of the SMS lottery concept and the rest of the information was that of confidence, and whether Mr. Swasey disclosed them in circumstances of confidence, Mr. Courtenay's first response was that, he objected to the questions being raised in the appeal. The reason for the objection was that, in the pleading BTL admitted the Information Exchange Agreement "by which the parties agreed to protect information… and to use the information solely in connection with the project contemplated…" So, by the pleadings, Mr. Courtenay argued, parties agreed that, the information provided were of the nature and quality of confidence that required protection from unauthorized disclosure. He argued further that, BTL should have been barred in the Supreme Court, from contesting the nature and circumstances of confidence of the SMS lottery concept and the rest of the information, and the obligation of confidence.

[42] Notwithstanding the objection, Mr. Courtenay submitted on the merit. Some of the matters of fact that he relied on were: that Mr. Swasey himself proposed the information exchange agreement (mistaken); that BTL created "a Chinese wall" between the discussion with Mr. Swasey and the discussion with MMR, it was an

acknowledgement of the confidential nature of the information in the discussion; that the information would be exchanged for the business contemplated between BTL and Swasey only; that SMS lottery business would be exclusively a business between BTL and Mr. Swasey (contrary to the evidence). That Mr. Swasey gave information in response to all the questions sent by BTL; and "that there was no game of a similar type in Belize (contrary to evidence).

[43] Regarding the question whether the trial judge erred in holding that, BTL disclosed to MMR the SMS lottery concept and the rest of the information for unauthorized use, Mr. Courtenay admitted that, there was no direct evidence to prove unauthorized disclosure, however, he submitted that, there was sufficient indirect evidence. He stated that was the view of the trial judge, and that he (Mr. Courtenay) supported it. He added that the judge was justified in reaching the decision that the circumstantial evidence in the case was sufficient proof that BTL wrongfully disclosed the SMS lottery concept and the rest of the information to MMR.

[44] Counsel also invited this Court to read paragraphs 40-44 of his own submissions where he set out what he submitted were items of circumstantial evidence that were sufficient to prove unauthorised disclosure of Mr. Swasey's concept and information by BTL to MMR. They were the following:

> "1. When BTL rejected Mr. Swasey's proposal it lied stating, "at present we are unable to accept your proposal as it does not align with our company's strategy for this current fiscal year. Less than one month later BTL and MMR launches MMR's game, "Mek Mi Rich"- (fact and opinion)
>
> 2. At the trial BTL's witness lied that, the company did not terminate Mr. Swasey project, it made a decision to postpone the project - (opinion)
>
> 3. If BTL were frank, it would have told Mr. Swasey that it had decided to proceed with MMR's proposal instead of Mr. Swasey's… (opinion)

4. BTL did not disclose to the trial court that MMR paid BTL $20,000 development fee, BTL kept this highly secret from the court and Mr. Swasey - (not according to the evidence).

   BTL kept it a secret that, it was in a conflict of interests situation; it was in a financially beneficial relationship with MMR, and a relationship of confidence with Mr. Swasey- (not according to the evidence).

[45] Counsel then submitted that he relied in addition on the circumstantial evidence enumerated by Abel. J in his judgment.

[46] Mr. Courtenay also submitted that, in the circumstances, of the case, the burden of proof during the trial shifted to the defendants BTL and MMR to prove that, the game they developed was not similar to Mr. Swasey's game in concept and other information; BTL and MMR did not discharge that burden.

[47] Finally, Mr. Courtenay submitted that "it was a disturbing fact" that the appellant BTL asked this Court to interfere with the findings of fact made by the trial judge. He stated it was difficult for an appellate court to interfere in a case where a trial judge had evaluated circumstantial evidence and drawn inference; and where the trial judge had assessed credibility. This case was not a proper one for an appellate court to interfere in, Mr. Courtenay contended.

(3) Appeal No.18 of 2016 by Mr. Swasey.

[48] For Mr. Swasey's appeal against assessment of damages at $25,000, Mr. Courtenay submitted that, the judge erred in not considering the submission for Mr. Swasey about the correct basis of assessing damages in this case. The award of $25,000 was an arbitrary sum based on the sum that MMR paid to BTL for developing MMR's project. He asked that the award of damages be set aside, and the case be

remitted to the trial court for assessment of damages. He also submitted that, if Mr. Swasey succeeded in the appeal, costs should follow the event. The submission by Ms. Perdomo was simply that, the judge did not err, no evidence was lead to prove damages.

Determination.

(1) The order.

[49] I have reached the conclusion that, the appeal of BTL, **No. 19 of 2016**, contesting the judgment and order made by Abel J., holding that BTL and MMR Belize Limited were liable to Mr. Curtis Dale Swasey for breach of the Information Exchange Agreement dated 13 January 2012, enjoining BTL and Mr. Swasey not to disclose confidential information without authorisation, and holding that BTL and MMR Belize Limited were liable to Mr. Swasey for breach of the equitable obligation of confidence, be allowed. The order awarding damages and costs against BTL is to be set aside. It follows that the appeal of BTL, **No. 33 of 2016**, against the order assessing (taxing) costs at $58,789.10 is also to be allowed. Costs follow event. The order assessing costs is to be set aside. The flip side is that, appeal **No. 18 of 2016**, of Mr. Dale Swasey against the order of assessment of quantum of damages in the sum of $25,000, is to be dismissed. Costs of all the three appeals and costs in the Supreme Court are to be awarded to BTL against Mr. Curtis Dale Swasey, to be agreed or taxed. The order for costs is provisional, it shall become final in seven days, unless either party applies for a different order for costs within the seven days. I propose that, these be the orders of the Court in these three appeals.

(2) The reasons.

(2) (i) General.

[50] It is common ground that, Mr. Swasey brought his claim in contract and in equity. He did not claim under a patent, or under copyright. Both the patent right and copyright right are matters of statutory law in Belize. The legislations that adopted the rights from the Laws of England are the *Copyright Act Cap. 252, Laws of Belize, and the Patents Act, Cap. 252, Laws of Belize*.

[51] Copyright is the exclusive right to, reproduce, perform in public, broadcast or make adaptation of original artistic, literary, musical and typographical arrangement works, and the right to authorize others to exercise those rights for 50 years - *see ss. 7, 9 and 10 of the Copyright Act.* A patent means the title granted to an inventor, to protect the invention - *see ss. 2 and 8 of the Patents Act.* The registration of a patent under **ss.5** and **8 of the Act** confers on the person an exclusive right to commercially exploit the invention. To qualify for registration and a grant of a patent, the invention: (a) must be new (b) must involve an inventive step, and (c) must be capable of industrial application- *see ss. 5 and 8 of the Patents Act*, and also the *Paymaster Jamaica v Grace Kennedy case*.

[52] Given the patent right conferred on an inventor and the protection afforded to the right by registration of an invention, Mr. Swasey might have considered applying for the registration of his SMS lottery concept. He did not. It was not an issue in the case. I exclude it from my consideration of the appeal.

[53] In his judgment, Abel J. stated the principles of law applicable in contract, and the principles of law applicable in equity accurately. In my respectful view, the learned judge, however, erred in some findings of fact, and in some inferences of fact that he drew. He also erred in that he omitted from consideration the evidence about how MMR

claimed it developed its own SMS texting lottery concept. Further, he erred in interpreting some terms of the information exchange agreement.

[54] Furthermore, the judge erred in that, he failed to consider that Mr. Swasey did not present any evidence comparing his concept and information with the concept and information that he claimed were disclosed without authorization by him. From those errors, the learned judge was led to err in the overall decision that, BTL and MMR were liable to Mr. Swasey for breach of the information exchange agreement, and for breach of the obligation of confidence in equity, and then erred in that he awarded damages and costs against BTL, to be paid to Mr. Swasey.

[55] I am certainly mindful of the general principle that, the function of an appellate court is to review the decision of the trial judge in order to correct any error that may have been made by the judge, and to maintain confidence in the administration of justice. It is not for an appellate court to embark on making original findings of fact **–** see *Designer Guild Limited v Russell Williams (textile) Ltd [2000] 1 WLR 2416.* There are of course, exceptions.

[56] A finding of fact can be overturned on appeal, if there was no evidence to support that finding, or if the finding was against the weight of the evidence as a whole. **–** see *Bank of Credit and Commerce International (Overseas) Ltd v Akindele [2000] Ch 437.* In my view, failure by a trial judge to consider an important piece of evidence may also be considered a factor in the weight of the evidence as a whole.

[57] A finding of fact may also be overturned, if the trial judge drew a wrong inference from facts that have been proved. The case cited by Mr. Courtenay, *Benmax v Austin Motors Co. Ltd. [1995] AC 370*, makes this point in the judgment of Viscount Simons in the House of Lords, at page 372 as follows:

"*Counsel for the appellant urged in the forefront of his argument that, the existence of an inventive step was a question of fact which had been decided by the trial judge, in favor of the appellant, and therefore that the Court of Appeal should not have reversed his decision, except for certain reasons which clearly were not present in this case. I think it convenient therefore to state my view on this question… Fifty years ago, in Montegomerie & Co. Ltd. V. Wallace-James, Lord Halsbury L. C. said: 'But where no question arises as to truthfulness, and where the question is as to the proper interferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an Appellate Court.' And in Mersey Docks and Habour Board v. Procter, Lord Cave L. C. said: 'The procedure on an appeal from a judge sitting without a jury is not governed by the rules applicable to a motion for a new trial after a verdict of a jury. In such a case it is the duty of the Court of Appeal to make up its own mind, not disregarding the judgment appealed from and giving special weight to that judgment in cases where the credibility of witnesses comes into question,* ***but with full liberty to draw its own inference from the facts proved or admitted****, and to decide accordingly'. It appears to me that these statements are consonant with the Rules of the Supreme Court, which prescribe that* ***'the court of Appeal shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been made'****. This does not mean that an appellate court should lightly differ from the finding of a trial judge on a question of fact, and I would say that it would be difficult for it to do so where the finding turned solely on the credibility of a witness. But I cannot help thinking that some confusion may have arisen from failure to distinguish between the finding of a specific fact and a finding of fact which is really an inference from facts specifically found, or* ***'as it has sometimes been said, between the perception and evaluation of facts'****.*"

[58] The above outline of the power of an appellate court to decide questions of fact to a limited extent, is authorised by statute in s**.***19 of the Court of Appeal Act, cap 90.* It states:

> **19.-(1) On the hearing of an appeal under this Part, the Court shall have power to-**
>
> **(a) confirm, vary amend or set aside the order or make any such order as the Supreme court or the judge thereof from whose order the appeal is brought might have made, and to make such further or other order as the case may require;**
>
> **(b) <u>draw inference of facts</u>;**
>
> **…**
>
> **(2) The powers of the Court under this section may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the Supreme Court or the judge thereof from whose order the appeal is brought or by any particular party to the proceedings in that court, or that any ground for allowing the appeal or for affirming or varying the decision of that court is not specified in such notice;…**

(2) (ii) The question of breach of the information exchange agreement.

[59] By entering into the information exchange agreement of 13 January 2012, Mr. Swasey and BTL agreed that, the duty to keep their discussion confidential would be regulated by the agreement, and that, in the event of differences arising or in the event of a question of breach of the duty of confidence arising, the differences or the question

of breach would be resolved by applying the terms of the agreement. They removed the duty of confidence from consideration under other principles of law, including principles of equity. They made it a matter for the terms of their agreement, so unless the terms of the agreement are found to exclude the resolution of the particular difference or the particular question of breach, they must be decided under the agreement.

[60] In making the above statement of law, I was persuaded by the statement made by Megarry J. in the *Coco v A.N. Clark (Engineers)* case. At page 46 Megarry J. stated:

> *"I think it is quite plain from the Saltman case that the obligation of confidence may exist where, as in this case, there is no contractual relationship between parties. In cases of contract, the primary question is no doubt that of construing the contract and any terms implied in it. Where there is no contract however, the question must be one of what it is that suffices to bring the obligation into being; and there is the further question of what amounts to a breach of that obligation. In my judgement, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First the information itself, in the words of Lord Greene M.R. in the Saltman case, must have the necessary quality of confidence about it. Secondly, the information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be unauthorized use of the information to the detriment of the party communicating it."*

[61] The first question to be decided in this case, whether under the agreement or in equity, is the identity of the information protected. Under the agreement, there is no need to demonstrate that the information identified in the terms of the agreement has the necessary quality of confidence about it. The information is protected as a matter of the agreement. In equity the claimant must demonstrate that the information to be protected has the quality of confidence about it - see page 46 of the *Coco v A.N. Clark*

(Engineers) case, and *Saltman Engineering Co. Ltd v Campbell Engineering Co. Ltd [1948] 65 RPC 203.*

[62] The items of information to be protected under the information exchange agreement are enumerated right in the two "recital" paragraphs, A and B, of the agreement. The paragraphs state as follows:

> *" A. The parties acknowledge that it may be necessary for each of them, as Discloser, to provide to the other, as Recipient, certain information, including trade secret information, considered to be confidential, valuable and proprietary by Discloser, for the purpose of evaluating a potential business relationship in connection with a possible business relationship between the parties.*
>
> *B. Such information may include, but is not limited to, technical, financial, marketing, staffing and business plans and information, strategic information, proposals, requests for proposals, specifications, drawings, prices costs, customer information procedures, proposed products, processes, business systems, software programs, techniques, services and like information of, or provided by, Discloser, the fact that the parties are discussing the Project and any terms, conditions or other facts with respect to the Project (collectively Discloser's "information"). Information provided by one party to the other before execution of this Agreement and in connection with the Project is also subject to the terms of this Agreement."*

[63] The identity ***simpliciter*** has not been contested. But BTL contended that: (1) the particular items of information said to have been disclosed out of the enumerated items

of information were not identified by Mr. Swasey; (2) the particular items of information have not been identified by marking them out as required by paragraph 3 of the agreement; (3) Mr. Swasey has not proved by evidence, that the items of information said to have been disclosed were not excluded under paragraph 4(c), (d) and (e), of the agreement, from the information to be protected; and (4) Mr. Swasey has not proved that BTL ever disclosed to MMR any information communicated to BTL in the discussions between BTL and Mr. Swasey, instead, BTL and MMR have proved that MMR obtained its information independently.

[64] I accept the contentions of BTL. The items of information claimed to have been disclosed without authorisation were simply described by Mr. Swasey as, "SMS lottery concept", or "a unique and original concept whereby Belize Telecommunications consumers would be able to play and purchase tickets for my gambling game via cellular phones using Telecommunications service SMS texting". They were stated in the statement of claim as, "flowcharts, structures and formulae."

[65] These descriptions were general and could fit any similar SMS lottery game. Mr. Swasey needed to specify which particular information in these descriptions were wrongfully disclosed to BTL, whether they were the particulars of the flowcharts, the structure or the formulae or even the particulars of the concept. A comparison may be made with the *Coco v A.N. Clark (Engineers)* case where the specific information said to have been wrongfully disclosed was narrowed down to the claimant's design of the pistons in the engine of the claimant's proposed motor assisted cycle to be known as coco moped. This was compared with the pistons in the moped engine manufactured by the defendant.

[66] The second contention that, the items of information were not marked out as required by the agreement, has no answer in the evidence led for Mr. Swasey. Paragraph 3 of the agreement provides as follows:

"3. All information will be provided to Recipient in written or other tangible or electronic form and must be marked with a confidential and proprietary notice. Information orally or visually provided to Recipient must be designated by Discloser as confidential and proprietary at the time of such disclosure and must be reduced to writing marked with a confidential and proprietary notice and provided to Recipient within thirty (30) calendar days after such disclosure."

[67] This paragraph means that, whatever is considered by either party to be an information to be protected from disclosure to someone not a party, must be written and marked out. If made orally, the information must be subsequently identified by marking out within thirty days. Marking out the information would put it in the category of protected information, and would impose the obligation of confidence, the obligation not to disclose. Mr. Swasey never marked out any information in order to identify it for non-disclosure. If BTL disclosed the SMS texting concept or any information that was not marked out, it could not be held liable to Mr. Swasey under the agreement. Identifying the concept or information by marking out was a condition precedent for the duty not to disclose, and for incurring liability under the agreement. In my view, BTL defended the claim successfully under paragraph 3 of the information exchange agreement. The claim should have been dismissed on that defence alone.

[68] The third contention also succeeds. The items of information that would be excluded from protection from disclosure under the agreement are set out at paragraph 4 of the agreement as follows:

"4. Discloser's information does not include:

(a) any information publicly disclosed by Discloser;

(b) any information Discloser in writing authorizes Recipient to disclose without restriction;

(c) any information Recipient already lawfully knows at the time it is disclosed by Discloser, without an obligation to keep it confidential;

(d) any information Recipient lawfully obtains from any source other than Discloser, provided that such source lawfully discloses such information; or

(e) any information Recipient independently develops without use of, or reference to Discloser's information."

[69] BTL in its defence, and submissions in this Court, contended that, the information that could be said to have been disclosed by BTL would be excluded from protection from disclosure under paragraphs 4(c), (d) and (e). I accept that contention.

[70] For BTL and MMR, evidence was led from Messrs. Vega and Hotchandani to prove how the idea of SMS texting lottery was conceived, inquiry made from knowledgeable persons and from the two telecommunications companies in the country. Further, the evidence proved that, MMR's technicians were engaged to work with technicians of BTL to develop a way in which MMR's proposed SMS texting lottery concept would work in Belize. MMR paid $20,000 for engaging BTL's technicians in this development work. No evidence was led by Mr. Swasey to counter this evidence.

[71] Ms. Wilson testified for BTL that, a patent regarding SMS texting lottery had been registered by one, Jawaharlal, and further that, BTL had before commencing negotiation with Mr. Swasey, signed a letter of intent with Creative Content Ltd., allowing the company to carry on SMS texting lottery business on BTL's telecommunication's network, so BTL had already known the SMS texting lottery concept. Mr. Swasey did not lead evidence to the contrary. In this Court, the submissions for Mr. Swasey was not

based on evidence. Mr. Courtenay for Mr. Swasey submitted that, the defendants' witnesses lied, and suggested that, the payment of $20,000 was a bribe or the purchase price for Mr. Swasey's concept and information from BTL. Those were opinions of counsel. They cannot be substitutes for evidence.

[72] In my view, BTL and MMR led evidence to prove that, had BTL disclosed information, the items of information would have been information excluded under paragraph 4(c), (d) and (e) of the agreement, from those that BTL and Mr. Swasey were enjoined not to disclose. The items of information were already known by BTL, or had been independently developed or obtained from another source.

[73] The fourth contention by BTL was that, Mr. Swasey did not prove that, BTL disclosed to MMR any information communicated to it by Mr. Swasey. From the evidence available, I accept that ground of appeal. The trial judge stated that, there was no direct evidence that BTL disclosed information to MMR, and that there was no evidence of finger-print similarity in the information. The judge stated that he decided the question of breach on circumstantial evidence.

[74] It is my respectful view that, the circumstantial evidence that the judge enumerated could not objectively prove that, BTL disclosed any protected information to MMR. The circumstantial evidence that the judge enumerated were these:

> " (a) Mr. Swasey introduced his SMS Lottery Concept and SMS Lottery Information to BTL.
>
> (b) That it took 2 ½ years of communications: meetings, correspondence and emails.

(c) Mr. Swasey demonstrated that BTL were largely unaware of Mr. Swasey's SMS Lottery Concept and SMS Lottery Information until such information was notified.

(d) Mr. Swasey's SMS Lottery Concept and SMS Lottery Information is very similar or even identical with MMR's Business Concept. Any difference was not significant.

(e) MMR paid MTL a fee for BTL to develop the lottery concept information for MMR- at a time when BTL already had Mr. Swasey's SMS Lottery Concept and SMS Lottery Information.

(f) Conflicting testimony as between the witness for BTL, and MMR in relation to the question as to how the lottery concept information for MMR was acquired.

(g) Absence of any communication between BTL and MMR personnel of the development of the concept and information for "Mek Mi Rich". If the court finds that MMR was in possession of Mr. Swasey's Concept and Information then the evidential burden shifts onto MMR to disprove that it used Mr. Swasey's Lottery Concept and Information.

(h) The timing of the events. MMR was formed in 30th April 2013, BTL informed Mr. Swasey on 7th August 2014 that it was unable to accept his proposal and just over a year later (shortly after October 2014) "Mek Mi Rich" was launched using Mr. Swasey's lottery Concept and Information.

(i) Based on all the above, the similarity between the lottery concept and information, they are asking the court to draw an inference that

it was Mr. Swasey's SMS Lottery Concept and SMS Lottery Information that was utilized by MMR."

[75] Some of the items of the "circumstantial evidence" were inaccurate, some others were opinion, not fact, and others were accurate. That aside, at least three other material evidence (facts) should have been added to the list. The first is the evidence of the content of the letter of intent between BTL and Creative Content Ltd. It tended to prove prior knowledge by BTL of the concept of SMS texting lottery, and that there was an independent source of the concept and information said to have been disclosed. The second is evidence outlining the source of MMR's SMS texting lottery. The third is the fact that Mr. Swasey did not call an expert witness to give evidence of any similarity, such as finger-print similarity in Mr. Swasey's SMS texting lottery concept and other information, said to have been wrongfully disclosed by BTL to MMR. These tended to subtract from the cumulative probative value of what the judge regarded as circumstantial evidence. He had a duty to take them into consideration in order to arrive at an objective conclusion.

[76] In the end, I accept the submission for BTL that, Mr. Swasey did not prove that, BTL (and MMR) breached the information exchange agreement of 13 January 2012. The appeal would also be allowed on that ground.

[77] Were I to decide the appeal on the principles of equity, I would also have allowed the appeal. The reasons would be these. 1. The information communicated by Mr. Swasey to BTL was already known by BTL to a large extent, so Mr. Swasey needed to specify which particular items of information and the specifics thereof were disclosed without authorization, and whether the specific item of information had the necessary quality of confidence about it. He did not. 2. Mr. Swasey did not prove breach of the duty of confidence. The items of evidence said to be circumstantial evidence did not include other important items of evidence. In any case, on an objective assessment of

the evidence enumerated by the judge, one would not draw an inference of breach of the duty of confidence. Some statements in the judgment suggest that Abel J. decided that, there was breach on mere suspicion, gut feeling. For instance, he stated at paragraph [127] of his judgment this: “Also I was left with a view of the evidence of the witnesses for MMR, in the context of the present claim, that there was something less than above board, even somewhat shady, going on in relation to this whole ‘Mek Mi Rich’ project.” This is an extraordinary statement for a judge to make.

[78] It seems that Mr. Swasey was vexed and highly suspicious. He said, he was “livid”. He had taken it for granted that, since BTL had accepted to discuss his SMS texting lottery proposal, BTL was bounded to accept it as a business to be carried on exclusively between Mr. Swasey and BTL. He overlooked paragraph 10 of the information exchange agreement which states: “this agreement is not a commitment by either party to enter into any transaction or business relationship…” He also overlooked the fact that, BTL informed him that, it was discussing other proposals with other persons and asked whether Mr. Swasey would accept a non-exclusive business with BTL.

[79] Overall, I would allow appeals No. 19 of 2016 and No. 33 of 2016, of BTL. I would dismiss appeal No. 18 of 2016, of Mr. Swasey, with costs in favour of BTL.

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AWICH JA

CAMPBELL JA

[80] I concur; I am in agreement with the orders made by my learned brother Awich JA

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CAMPBELL JA