IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 155

Suit No 849 of 2017
(Summons No 5377 of 2017)

Between

Harsha Rajkumar Mirpuri (Mrs) née
Subita Shewakram Samtani

… *Plaintiff*

And

Shanti Shewakram Samtani Mrs
Shanti Haresh Chugani

… *Defendant*

GROUNDS OF DECISION

[Civil Procedure] — [Injunctions]
[Civil Procedure] — [Jurisdiction] — [Inherent jurisdiction to supervise conduct of solicitors]
[Equity] — [Confidence]
[Legal Profession] — [Conflict of interest] — [Former prospective client]

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v
Shanti Shewakram Samtani Mrs Shanti Haresh Chugani

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High Court — Suit No 849 of 2017 (Summons No 5377 of 2017)
Valerie Thean J
12, 13 March 2018

5 July 2018

Valerie Thean J:

Introduction

1 This was an application by the plaintiff for an injunction to restrain the law firm representing the defendant from continuing to act for the defendant in a pending action brought by the plaintiff. The firm have requested, and the plaintiff has consented, that they remain anonymous in these grounds of decision, so I shall refer to them as "the Firm". The plaintiff contended that the Firm were in possession of information pertaining to the action that was confidential to the plaintiff which the plaintiff had conveyed to them when she was considering instructing them to act for her. Because the plaintiff did not eventually retain their services, hers was not the typical allegation that there is for the law firm in question a conflict between their duty of loyalty to a current client and their duty of confidentiality to a former client. The plaintiff was not

a former client, but a former prospective client. The question was whether the Firm ought in such circumstances to be restrained from acting for the defendant.

2 This was a question that raised fundamental issues of principle regarding the court's jurisdiction to restrain a law firm or a lawyer from acting against a former client or a former prospective client for the purpose of protecting confidential information belonging to that client. Those issues included the basis for that jurisdiction, its relationship with the court's inherent jurisdiction to supervise the conduct of its officers, and the relationship between the applicable common law principles and the ethical rules contained in the Legal Profession (Professional Conduct) Rules 2015 (S 706/2015) ("the PCR"). After hearing the parties, I dismissed the application. I now give the full reasons for my decision.

Background

3 In August 2016, the plaintiff contacted the Firm with the intention of appointing them to act for her in the action that she has since brought against the defendant, who is her sister. The plaintiff had come to the view that the defendant had made unauthorised withdrawals from bank accounts which were in their joint names, and wanted to recover her claimed beneficial share in half the moneys withdrawn, which she estimates to be worth approximately $14.7m. She was also considering recourse against the defendant for her mismanagement of their late parents' estates. Through her trusted friend, Mr Attlee Hue, the plaintiff sent a lawyer of the Firm her identification details and those of the defendant and their late father, and also their late parents' respective wills.

4 In due course, the Firm confirmed that they were in a position to act for the plaintiff through two lawyers whom I shall call Mr A and Mr B. On 19

October 2016, Mr Hue corresponded with Mr A and Mr B through email to explain briefly that the plaintiff's claim was that the defendant had wrongfully transferred moneys from their joint account to a discretionary trust that the defendant operated, and also that the plaintiff had sought an opinion from another lawyer, who had suggested obtaining an injunction. Mr A replied to ask whether it was a Mareva injunction that had been suggested, and Mr Hue responded by suggesting that the plaintiff be allowed to set out the facts before a course of action was decided upon.

5 The plaintiff, her daughter and Mr Hue met Mr A and Mr B the next day, on 20 October 2016. What was communicated at this meeting was a matter of dispute in this case. The plaintiff claimed that the meeting lasted "a few hours". By contrast, Mr A claimed that the meeting took one and a half hours. It is sufficient to state here that the plaintiff's case was that confidential information and documents which are material to her pending action were presented to Mr A and Mr B, and that their continued possession of this information presented a risk that it would be disclosed to the lawyers from the Firm who are now acting for the defendant, to the prejudice of the plaintiff's claim.

6 After the meeting, Mr B on 21 October 2016 sent the plaintiff an email inviting her to sign an appointment letter and a warrant to act, and asking for payment of an initial amount of $10,000 so that he and Mr A could begin work on the plaintiff's matter. Mr B also asked the plaintiff to provide him information and documents relevant to her potential claims, including details of the bank accounts that the plaintiff held jointly with the defendant and a chronology of the plaintiff's dealings with the defendant from 2006 to the present day. The plaintiff did not respond to this email, and eventually did not

appoint the Firm to act for her. Instead, in early November 2016 she retained the services of Rajah & Tann Singapore LLP ("R&T").

7 Some nine months later, in August 2017, R&T on behalf of the plaintiff issued the defendant a letter of demand. The defendant did not respond. Thus, on 14 September 2017, the plaintiff commenced the present underlying action against the defendant, and on the same day, applied *ex parte* for a Mareva injunction with worldwide effect against the defendant. I heard the application that day and granted the injunction.

8 On 29 September 2017, the defendant appointed lawyers. On 3 October 2017, she filed an application to discharge the Mareva injunction that I had granted, and in November 2017, the plaintiff filed three affidavits in reply. Those lawyers were later discharged. On 15 November 2017, the Firm informed the plaintiff that they had been appointed the defendant's lawyers. The next day, the defendant through the Firm filed a reply affidavit in her application to discharge the Mareva injunction, and also a new application to amend the application to discharge. It was common ground that between October 2016 and November 2017, the Firm did not inform the plaintiff about or seek her consent for their acceptance of the defendant's appointing them as her lawyers.

9 R&T wrote to the Firm to say that the Firm would be in breach of r 21 of the PCR if they continued to act for the defendant, and that they ought to cease doing so. Rule 21 sets out the circumstances in which a lawyer is not to act against his "former client". The Firm replied to say that they were not in possession of any confidential information belonging to the plaintiff and that in any event, they had established a "Chinese wall", or information barrier, to prevent the flow of any information that may have been communicated by the

plaintiff to Mr A and Mr B in October 2016. The Firm therefore considered themselves not to be in breach of r 21, and decided to continue acting for the defendant. On 22 November 2017, the plaintiff filed the present application for an injunction to restrain the Firm from acting.

Parties' positions

10 The plaintiff's case was based on a direct application of r 21 of the PCR to the question whether the court ought to grant an injunction to restrain the Firm from acting for the defendant. As the plaintiff was not a "former client" of the Firm in the ordinary sense of that expression, but a former prospective client, she relied on the definition of "client" under s 2 of the Legal Profession Act (Cap 161, 2009 Rev Ed), which includes "any person who … is about to retain or employ, a solicitor …", in order to bring herself within the ambit of r 21. The Firm did not disagree with the application of this definition to the PCR.

11 The plaintiff's position was that the Firm should be restrained from acting because they satisfied the three requirements under r 21(2) of the PCR, which are that (a) the law practice must hold confidential information relating to a former client; (b) the law practice's current client must have an adverse interest to the former client; and (c) the information must reasonably be expected to be material to the representation of the current client. The plaintiff also argued that if the Firm had adequately advised the plaintiff to obtain independent legal advice and also obtained the plaintiff's consent in writing for the Firm to act for the defendant within the meaning of r 21(3) of the PCR, then the Firm would nevertheless be entitled so to act, but they did not do those things.

12 Having not done so, the Firm could justify their acting for the defendant only by showing that they took reasonable efforts to comply with r 21(3), as well as erected adequate safeguards to protect the plaintiff's confidential information and notified the plaintiff of those safeguards, within the meaning of r 21(4) of the PCR. These the Firm also failed to do, according to the plaintiff, and therefore an injunction ought to be granted to restrain the Firm from acting for the defendant. In this regard, the plaintiff attempted to show that the information barrier that the Firm had established was insufficient to protect the confidentiality of information that the plaintiff had left with Mr A and Mr B.

13 The Firm were represented in the present application by one of their own lawyers, whom I shall call Ms X. She did not dispute that r 21 of the PCR applied directly to the question whether the court ought to grant an injunction restraining the Firm from acting for the defendant. Thus, she made opposing arguments on each of the sub-provisions under r 21 that the plaintiff had submitted on. In particular, she argued that none of the information that Mr A and Mr B learned from their meeting with the plaintiff on 20 October 2016 was confidential or material to the plaintiff's pending action, and that they were not in fact shown the allegedly confidential documents that the plaintiff claimed to have shown them at the meeting. Ms X also invited me to consider the right of a party to be represented by counsel of his choice, and to decide whether there was a reasonable risk of mischief to be avoided only by granting the injunction sought. She was guided in this submission by the High Court's decision in *Alrich Development Pte Ltd v Rafiq Jumabhoy* [1994] 3 SLR(R) 38 ("*Alrich*").

14 At the hearing, I asked counsel whether the PCR were indeed the applicable law in a case such as this where a civil injunction was being sought to restrain the opposing party's lawyer from acting. Mr Gregory Vijayendran,

for the plaintiff, submitted that they were, relying on *Vorobiev Nikolay v Lush John Frederick Peters and others* [2011] 1 SLR 663 ("*Vorobiev*"), where the High Court applied the PCR to determine whether an application to restrain the plaintiff's lawyers by way of an injunction ought to be granted. He also submitted that conceptually, the court had two sources of jurisdiction to restrain a lawyer from acting, the first being the substantive law on breach of confidence, and the second being the inherent jurisdiction of the court to supervise the conduct of its officers, which I will refer to as the court's "supervisory jurisdiction". Mr Vijayendran submitted that the PCR informed the exercise of the latter. Ms X did not disagree that the PCR were applicable, but she added that they could not be interpreted in a vacuum, and had to be considered together with the common law.

Issues to be determined

15 There were two broad questions to be answered. The first was whether the Firm should be restrained from acting in the pending action against the plaintiff, a former prospective client, on the ground that confidential information belonging to the plaintiff which might be in the Firm's possession ought to be protected. The specific issues that arose for consideration were (a) whether the PCR represent the relevant applicable law in this context; (b) if they do not, then what the applicable common law principles are; and (c) how those principles apply to the facts of the present case.

16 The second broad question was whether the Firm should be restrained from acting against the plaintiff on the basis of the court's supervisory jurisdiction. The specific issues that arose for consideration in this context were (a) whether there exists such a supervisory jurisdiction; (b) the principles that

govern the exercise of this jurisdiction; and (c) whether and, if so, how the PCR relate to those principles.

17 In brief, my view was that the PCR do not govern an application for an injunction to protect confidential information, and that the applicable principles are instead to be drawn from the common law. Applying those principles, I concluded that the Firm should not be restrained from acting for the defendant. This was because the information in question was either not in the Firm's possession or not confidential or relevant in the requisite sense, and in any case had ceased to be confidential or relevant by the time the application was brought. I also accepted the existence of the court's supervisory jurisdiction, but there were no grounds upon which this jurisdiction should be exercised in this case. Having regard to all the circumstances, it was sufficient to go forward with the undertakings which the Firm offered. I turn now to explain my view on each of the issues identified above.

Issue 1: Restraining the Firm under the law on breach of confidence

Application of the PCR

18 As a matter of principle, codes of conduct for legal practitioners are not intended to govern civil proceedings between private parties, including applications for an injunction to restrain a law firm from acting, because they are meant to be enforced by the relevant disciplinary bodies empowered to do so. There is no reason why such an injunction which is sought for the purpose of protecting confidential information should be an exception to this principle. It follows that the PCR, being the code of conduct in question here, do not represent the governing law in the present case. This position is well supported by the authorities, to which I now turn.

19 The High Court has dealt with the role of the PCR in an application to restrain a law firm in *Then Khek Khoon and another v Arjun Permanand Samtani and another* [2012] 2 SLR 451 ("*Then Khek Khoon*"). In that case, the plaintiffs' action against the defendants was brought, rather unusually, to recover losses in the form of costs that the plaintiffs owed the law firm representing them in that action. The second defendant applied to restrain the firm from acting for the plaintiffs. The second defendant's case was that the plaintiffs' lawyers had an interest in the outcome and were therefore in breach of the PCR, and that the court had the inherent jurisdiction to determine whether the PCR had been breached and, on the basis of such a determination, to restrain the lawyers from acting for the plaintiffs.

20 Quentin Loh J rejected this approach for two reasons. First, the court exercises its inherent jurisdiction, which it does to prevent injustice or to prevent an abuse of process of the court, only in exceptional circumstances where there is a clear need for it, and those circumstances were not present. Second, the proper forum for determining the second defendant's allegations of breach of the PCR was the Law Society, not the court. Therefore, the PCR should not govern applications to obtain a civil injunction to restrain a law firm from acting.

21 Loh J's second reason was of particular relevance to the present case. In developing this reason, Loh J first observed that having a court determine breaches of the PCR raises the concern that the court's inquiry and findings might "usurp the Law Society's jurisdiction in hearing the issue [at] first instance", subvert "the proper inquiry and due process laid down in the Legal Profession Act", and deny the lawyers their rights thereunder (at [16]). In this regard, Loh J opined that the view that the Law Society was the proper forum

for determining breaches of the PCR was "not new" (at [17]), observing that a similar view had been taken by Choo Han Teck JC (as he then was) in the High Court's decision in *Ong Jane Rebecca v Lim Lie Hoa and others* [2002] 1 SLR(R) 798. In this context, Loh J (at [18]) distinguished the High Court's decision in *Vorobiev*, where the PCR were directly applied to determine whether to restrain the plaintiff's lawyers from acting (see [14] above), on the basis that the issue of the court's being the proper forum for determining breaches of the PCR was not examined in that case.

22 Loh J then distinguished two procedural contexts. The first is where disciplinary proceedings are brought by a regulatory authority against a member of a profession (for example, by the Law Society against a law firm or a lawyer), and the second is where an application for a civil injunction is sought to restrain a law firm or a lawyer from acting in order, for example, to protect confidential information. I shall refer to these as the "disciplinary context" and the "injunctive context" respectively. He observed that codes of professional ethics like the PCR are intended to govern only the disciplinary context, and that the injunctive context by contrast drew on the common law and involved "something quite independent of … purported breaches of the [PCR]" (at [19]). Loh J observed that this distinction was supported by English authorities (at [20]):

> This was the precise distinction which the English court made in *David Lee & Co (Lincoln) Ltd v Coward Chance (a firm)* [1991] Ch 259 which opined that the Law Society was the right forum to determine breaches of professional rules of conduct. The court recognised that professional rules tended to impose a higher duty on the members of the profession than the law itself. Further, the decision to restrain the solicitors was made on the basis of legal obligations owed to the client and '*not the obligations imposed by professional rules of conduct laid down by the Law Society*' (at 266) [emphasis added]. Similar reasoning was applied in *In re A Firm of Solicitors* [1992] QB 959

> where the court limited itself to the common law and only applied rules from the conduct rules which were within the boundaries of existing obligations owed at law. [emphasis in original]

23 This analysis is supported by other authorities. Thus, in the English Court of Appeal's decision in *Geveran Trading Co Ltd v Skjevesland* [2003] 1 WLR 912 ("*Geveran Trading*"), Arden LJ observed that "[w]here a party objects to an advocate representing his opponent, that party has no right to prevent the advocate from acting based on the Code of Conduct [of the Bar of England and Wales] as the content and enforcement of that Code are not a matter for the court" (at [42]). And in the Canadian Supreme Court's decision in *William Steward Arnold Martin v William Hamilton Gray, administrator with will annexed of the estate of John Edwin MacDonald* [1990] 3 RCS 1235 ("*MacDonald*"), Sopinka J observed that "[a] code of professional conduct is designed to serve as a guide to lawyers and typically it is enforced in disciplinary proceedings", and that "[t]he courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics" (at 1245*h*–*i*).

24 It is clear, therefore, that the court is not the proper forum for the determination of whether a given provision in the PCR has been breached, and that to apply the PCR in the injunctive context is effectively to invite the court to make or attempt to make such a determination, which is inappropriate. In my judgment, the PCR are a code of professional ethics which is enforced by a regulatory body, in this case, the Law Society, through disciplinary proceedings against legal practitioners in Singapore. The PCR are not, and were never intended to be, a set of rules governing when a private party might in civil proceedings obtain an injunction to restrain a law firm from acting for the opposing party.

25 Given my conclusion that the PCR do not apply to the injunctive context, the question then arises as to what principles in the common law do, especially where the injunction is being sought against a law firm by a former client and, even more particularly, by a former prospective client, on the ground that confidential information belonging to that client needs to be protected. I therefore turn to examine this issue.

Restraining a law firm for the purpose of protecting confidential information

26 Before the first version of the PCR was introduced in Singapore in 1998, there was no doubt that the applicable principles on restraining a law firm from acting against a former client for the purpose of protecting confidential information were drawn from the common law. The leading case was the High Court's decision in *Alrich*, which Ms X cited: see [13] above. In *Alrich*, a lawyer who had previously done work for the plaintiff had joined the law firm which were now acting for the defendant in the plaintiff's action. The plaintiff applied for an injunction to restrain that firm from acting on the ground that the lawyer was in possession of confidential information belonging to the plaintiff that was prejudicial to the plaintiff's prosecution of its action.

27 Chao Hick Tin J (as he then was) at [138] considered the applicable principle to be that stated by Buckley LJ in *Rakusen v Ellis, Munday & Clarke* [1912] 1 Ch 831 ("*Rakusen*"), which was that such an injunction would be granted if "there exists … may exist, or may be reasonably anticipated to exist, a danger of a breach of that which is a duty, an enforceable duty, namely, the duty not to communicate confidential information" (at 845). Chao J paraphrased this test using the expressions whether there was a "reasonable anticipation of

mischief" and whether there was a "reasonable likelihood of mischief" (at [139]). Applying the test in this formulation, he decided that there was on the facts no such anticipation or likelihood of mischief for a number of reasons, including the lawyer's minimal prior involvement with the plaintiff's case, the defendant's lawyers' undertaking not to discuss the matter with the lawyer, and the defendant's right to counsel of his choice (at [141]).

28 In 1998, however, the House of Lords in its seminal decision in *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222 ("*Bolkiah*") overruled *Rakusen* because of what was felt to be its lenient approach to the obligation of lawyers to protect confidential information obtained from a former client. *Bolkiah* has been described as "the foundation of the modern law of conflicts" in England, and it represents the existing approach in that jurisdiction on restraining a law firm from acting on grounds of protecting confidentiality: Charles Hollander & Simon Salzedo, *Conflicts of Interest* (Sweet & Maxwell, 5th Ed, 2016) ("*Conflicts of Interest*") at para 1-007. Its effect in Singapore is of particular relevance to the present case, and it therefore merits detailed consideration.

29 The plaintiff was Prince Jefri Bolkiah of Brunei. He was the chairman of a state investment agency, and was involved in major litigation relating to his financial affairs for which he had retained the defendants, KPMG, to provide forensic accounting services and litigation support. The litigation settled and, around the same time, Prince Bolkiah was removed as chairman of the agency. The government of Brunei later established a task force to investigate the activities of the agency during Prince Bolkiah's chairmanship, and appointed KPMG to assist the task force. Prince Bolkiah then commenced an action for breach of confidence against KPMG and sought an interlocutory injunction restraining them from acting for the agency. The judge granted the injunction,

which was discharged by the Court of Appeal and then reinstated by the House of Lords on Prince Bolkiah's appeal.

30 The leading speech was given by Lord Millett. His Lordship observed that the *Rakusen* test had been criticised by many, particularly in relation to lawyers, and that a more stringent test had frequently been advocated (at 236B–C). This was relevant to the facts in *Bolkiah* because it was not disputed that the litigation services KPMG had provided Prince Bolkiah justified their being treated effectively as his former lawyers. Lord Millett considered the criticisms well founded principally because the *Rakusen* test, by placing the onus on the former client to prove a reasonable probability of real mischief, imposed an unfair burden on him by exposing him to a risk to which he had not consented, and failed to give him sufficient assurance that his confidence would be respected (at 236D–E). It also exposed the lawyer to a degree of uncertainty which could inhibit him in his dealings with the second client when he cannot be sure that he has correctly identified the source of his information (at 236E–F). His Lordship therefore rejected the *Rakusen* test.

31 The proper approach, his Lordship considered, should instead be as follows. A plaintiff who seeks to restrain the law firm whose services he had previously retained from acting in a matter for another client must first establish (a) that the law firm are in possession of information which is confidential to him and to the disclosure of which he has not consented; and (b) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own (at 235D–E). Once the plaintiff establishes these facts, the evidential burden shifts to the law firm to show that even so, there is "no risk" that the information will come into the possession of those now acting for the defendant (at 237F–G). Lord Millett decided that

relevant confidential information had passed to KPMG, and that KPMG were unable to show that "effective" measures had been put in place to prevent the risk of such information coming into the hands of those now acting for the agency (at 238A and 239D). As a result, KPMG had to be restrained from acting.

32 The effect of the *Bolkiah* test is to make it easier for a former client to obtain an injunction. That is because if he is a former client, it will not be difficult for him to prove that confidential information has travelled into the hands of the law firm and so shift to the firm the burden of proving the absence of a risk of disclosure of that information, failing which the court will intervene: see *Bolkiah* at 237G–H. In deciding that the burden was on the firm to prove the absence of a risk of disclosure, Lord Millett in fact borrowed from the most onerous of the various tests previously applied, namely, the test formulated by Lightman J in *In re A Firm of Solicitors* [1997] Ch 1 and also applied at first instance in *Bolkiah*: see *Bolkiah* at 237A–B.

33 *Bolkiah* has been well received across the Commonwealth: see *Conflicts of Interest* at paras 1-011 and 1-013. Australia has largely followed it: see *Borgese v Cater & Blumer Pty Ltd t/as Cater & Blumer (No 3)* [2017] NSWSC 92 at [50]–[53] *per* N Adams J. The New Zealand Court of Appeal appears to have recognised, and decided not to resolve, the conflict between *Bolkiah* and an earlier decision of that court, *Russell McVeagh McKenzie Bartleet & Co v Tower Corporation* [1998] 3 NZLR 641 ("*Russell McVeagh*"), which prescribes undertaking a discretionary balancing exercise to determine whether a law firm should be restrained: see *Carter Holt Harvey Forests Ltd v Sunnex Logging Ltd* [2001] 3 NZLR 343 at [10] and [18] *per* Blanchard J. But in a series of recent first instance decisions by different New Zealand High Court judges, *Bolkiah*

has been treated as authoritative without any explicit reference to *Russell McVeagh*: see *Torchlight Fund No 1 LP (in receivership) v NZ Credit Fund (GP) 1 Limited and others* [2014] NZHC 2552 at [16]–[19] *per* Gilbert J; *Amanda Adele White and another v Christopher Maurice Lynch and another* [2014] NZHC 2819 at [26] *per* Heath J; and *Vernon Peter Morris v Margaret Clare Morris and another* [2015] NZHC 2315 at [19]–[22] *per* Edwards J.

34 The approach in Canada is even stricter than *Bolkiah*. The leading case is *MacDonald* ([23] *supra*), where the Canadian Supreme Court established two rebuttable presumptions: first, that confidential information will have been communicated by a former client to the lawyer in the course of the retainer; and second, that lawyers who work together share confidences. As the plaintiff in the present case correctly observed, while the *Bolkiah* test requires the plaintiff to prove the communication of confidential information to the law firm, the *MacDonald* test presumes the fact of such communication and places the burden on the law firm to disprove it. Like Lord Millett, Sopinka J considered the *Rakusen* test to be "wanting" (at 1259*h*). Instead, a higher standard, embodied in the two presumptions, was necessary for "giving precedence to the preservation of the confidentiality of information imparted to a solicitor" so that the public's confidence "in the integrity of the profession and in the administration of justice will be maintained and strengthened" (at 1263*g*–*h*). Words to similar effect were expressed by Lord Millett in *Bolkiah* at 236G.

35 The question whether *Bolkiah* is the applicable authority in Singapore where an injunction to restrain a law firm from acting is sought on the ground of protecting confidential information has not been considered. However, the case has been referred to in a few authorities. In *Rickshaw Investments Ltd and another v Nicolai Baron von Uexkull* [2007] 1 SLR(R) 377, an appeal against

the grant of a stay of proceedings on the ground of *forum non conveniens*, the Court of Appeal cited *Bolkiah* for the general proposition that the duty of confidentiality is a duty to keep the information in question confidential and not to misuse it (at [22] *per* Andrew Phang Boon Leong JA). In *Boey Pang Sim Richard v Law Society of Singapore* [2016] 1 SLR 837, a case in the disciplinary context, George Wei J observed that *Bolkiah* is stricter that the approach applied in earlier High Court decisions such as *Alrich*, which followed *Rakusen*, in that while the later decision in *Bolkiah* places the burden on the law firm to show that their duty to preserve their former client's confidentiality is not prejudiced, *Rakusen* places the burden on the plaintiff to show a reasonable anticipation of mischief if the law firm are allowed to act (at [31]).

36 I am prepared to accept that the *Bolkiah* test should govern a former client's application to restrain a law firm from acting on the grounds of protecting his confidentiality. That is because I agree that the strict approach it embodies is justified by cogent reasons of principle and policy that have been echoed and accepted not only in England but also throughout the Commonwealth as the authorities examined above have shown, and which need not be repeated here. In arriving at this conclusion, it is also important for me to highlight that I endorse *Bolkiah* only as a conceptual step, albeit an essential one, leading to the question whether *Bolkiah* applies where a former *prospective* client is concerned. On this note, I turn to examine that question.

37 It is necessary to examine the broader jurisdictional basis of the *Bolkiah* test in order to discern whether that test or some form of it should govern a former prospective client's application to restrain a law firm from acting on the ground of protecting confidential information. Now an injunction of the type granted in *Bolkiah* is generally accepted to be based on the substantive law on

breach of confidence, in that the injunction is granted in order to prevent an anticipated breach by the law firm of a duty of confidentiality that they are said to owe the plaintiff. Therefore, the specific question here is whether it may be said that such a duty is owed to a former prospective client.

38 This requires a closer look at the juridical nature of the duty of confidentiality, which is an issue that continues to be debated even though breach of that duty, as a cause of action, is well established. The conventional school of thought holds that the duty of confidentiality is capable of arising in either contract or equity. The idea is that a plaintiff may establish an action for breach of confidence either by relying on a contractual agreement between himself and the defendant under which a duty of confidence has been expressly implied or imposed or by invoking the equitable jurisdiction of the court to protect the obligation of confidence that the defendant owes him. This view is supported by a number of authorities: see *eg*, *X Pte Ltd and another v CDE* [1992] 2 SLR(R) 575 at [23] *per* Judith Prakash JC (as she then was) and *Deta Nominees Pty Ltd v Viscount Plastic Products Pty Ltd* [1979] VR 167 at 190–191 *per* Fullagar J. It is also the view taken in a leading treatise on the subject: see R G Toulson & C M Phipps, *Confidentiality* (Sweet & Maxwell, 1996) at para 2-24.

39 The most significant competing view is that the action for breach of confidence is *sui generis* in nature, and that it is difficult to confine the action exclusively within one conventional jurisdictional category. The policy of the law is to enforce confidences where a confidant has been given or has gained access to confidential information, and the idea is that it is this policy itself which is the basis of the court's jurisdiction: see *Duchess of Argyll v Duke of Argyll* [1967] 1 Ch 302 ("*Argyll*") at 332 *per* Ungoed-Thomas J. On this view,

the conventional jurisdictional sources on which the courts rely – *ie*, contract, equity, property and tort – are merely secondary mechanisms which provide the means by which the courts can enforce a confidence. This view is seen in, for example, *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574 at 615*b*–*e per* Sopinka J and *Hunt v A* [2008] 1 NZLR 368 at [64], and also see Tanya Aplin *et al*, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2nd Ed, 2012) ("*Gurry*") at paras 4.02 and 4.09.

40 Where a former client of a law firm is concerned, the jurisdiction to grant an injunction to restrain the firm from acting against him seems suitably analysed under the view that an action for breach of confidence is founded in either contract or equity. That is because while the contract between the former client and the firm will have been discharged following the termination of the retainer, there is no doubt that the firm in accepting the retainer assumed a continuing equitable duty to protect confidential information that they obtained during the course of their work under the retainer, and that an action might be brought or interlocutory relief obtained on the basis of the breach of that duty. This was Lord Millett's analysis in *Bolkiah* (at 235C–D).

41 In the present case, however, the plaintiff and the Firm had no contract. The act of accepting a retainer, by which the law firm may be said to have assumed an equitable duty of confidentiality, is missing. Yet, the defendant does not seek to argue, nor would I have accepted, that if the Firm had come into possession of the plaintiff's confidential information, they would have been at liberty to do as they pleased with that information simply because there was no retainer. Indeed, it is well established that the court may grant an injunction restraining the use of confidential information belonging to one party to an

action that falls into the hands of opposing counsel by malicious design and even by accident. Thus, in *Lord Ashburton v Pape* [1913] 2 Ch 469 ("*Lord Ashburton*"), the English Court of Appeal restrained the defendant from using in the plaintiff's action against him confidential letters that he had procured a clerk to obtain from the plaintiff's solicitor. And in *English & American Insurance Co Ltd v Herbert Smith* [1988] FSR 232 ("*English & American Insurance*"), the English High Court restrained the defendants' lawyers from using confidential and privileged papers concerning the action that the plaintiffs' lawyers had sent them by mistake.

42 The argument must be that in such cases, the equitable duty of confidentiality is imposed, rather than undertaken. But this argument only leads to the question why such a duty is imposed. The only reason, in this context, is that the protection of confidential information must be ensured. In my judgment, the case of a former prospective client is no exception to this line of reasoning. And once this perspective is taken, it appears that if any injunction were to be granted at all in the present case against the Firm, it would be better analysed under the second view outlined above, in that equity is properly to be regarded as a secondary means by which the law enforces confidence between a law firm and a former prospective client. To that extent, then, a former prospective client of a law firm might rely on the substantive law on breach of confidence to restrain that firm from acting against him.

43 This brings me to the question whether the *Bolkiah* test applies in such a case. The distinctive feature of the *Bolkiah* test is that once the plaintiff has shown that relevant confidential information was communicated to the law firm, the burden shifts to the firm to demonstrate that there is no risk that that information will be disclosed to those now acting for the defendant. The reason

for this shift is that a strict approach towards enforcing the firm's duty of confidentiality is required because the firm by accepting the retainer assumed a fiduciary obligation of loyalty to their former client, and confidential information that the client conveyed under that relationship calls for special protection. It is clear from 235C–D, 235H–236A and 236F–G of Lord Millett's speech that this idea was central to his reasoning:

> … The *fiduciary relationship which subsists between solicitor and client* comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information *imparted during its subsistence*.
>
> …
>
> … The *former client* cannot be protected completely from accidental or inadvertent disclosure. But he is entitled to prevent *his former solicitor* from exposing him to any avoidable risk; and this includes the increased risk of the use of the information to his prejudice arising from the acceptance of instructions to act for another client with an adverse interest in a matter to which the information is or may be relevant.
>
> …
>
> It is in any case difficult to discern any justification in principle for a rule which exposes a *former client* without his consent to any avoidable risk, however slight, that information which he has imparted in confidence *in the course of a fiduciary relationship* may come into the possession of a third party and be used to his disadvantage. …
>
> [emphasis added]

44 This idea was also central to Lightman J's reasoning in *In re A Firm of Solicitors*, which, as I have mentioned at [32] above, was Lord Millett's source for the idea of placing the burden on the law firm to demonstrate the absence of a risk of disclosure. Lightman J said at 11D–E:

> … *The contract of retainer creates a close fiduciary relationship between the client and the firm and each partner*, a relationship

> to which the law attributes unique incidents, e.g. legal professional privilege, reflecting its unique importance in the eyes of the law. *Having regard to such fiduciary relationship, the burden must (in the absence of the informed consent of the client) surely be upon any person who was a partner in a firm which was retained* whilst he was a partner in the firm and which in the course of such retainer became possessed of confidential information, to establish that there is no risk of his misusing confidential information before he can thereafter act against that client. … [emphasis added]

45 This idea does not apply, however, in the case of a former prospective client. In such a case, the law is clear that there was no fiduciary relationship between him and the law firm. Confidential information a prospective client conveys to his prospective lawyer, therefore, is not information that is conveyed under a relationship that is worthy of special protection. Nevertheless, that does not mean that the confidentiality of such information should not be protected. It certainly should be, but necessarily, as a matter of equitable principle, to a lesser degree. The same view is shared by the learned authors of *Conflicts of Interest* at para 8-007:

> The real issue is whether the [*Bolkiah*] test applies to the range of cases where the claimant is not a party who was in a prior fiduciary relationship with the professional. … It is submitted that the justification for applying the *Bolkiah* test is the public policy importance of protecting former clients from concerns as to their confidential information being used or disclosed against their interests. There is no justification for applying that exceptional rule in the absence of a prior fiduciary relationship and the courts should not extend the *Bolkiah* test.

46 Of particular importance is the observation in the last sentence to the effect that if the courts hold that the *Bolkiah* test applies to a case where there was no prior fiduciary relationship between the claimant and the professional, such as a case involving a former prospective client, the test would be extended beyond its original context. I agree. Based on the extracts from Lord Millett's speech cited above, it is clear that his Lordship was in *Bolkiah* thinking only

about former client conflict. There is no indication that his Lordship intended the test to apply to a case like the present case.

47 In my judgment, therefore, where the plaintiff is merely a former prospective client, he should not obtain the advantage conferred by that part of the *Bolkiah* test that places the burden on the law firm to prove the absence of a risk of disclosure. There is no reason, however, to distinguish a former prospective client from a former client in relation to all the other aspects of the *Bolkiah* test. The applicable rule, therefore, is that where a former prospective client seeks to restrain a law firm from acting on the ground of protecting confidential information belonging to him, he must establish that (a) the law firm are in possession of information which is confidential to him and to the disclosure of which he has not consented; (b) the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own; and (c) there is a risk that the information will come into the possession of those now acting for the new client.

48 Finally, the fact that a former prospective client is able to satisfy this test does not mean that he would be automatically entitled to an injunction that restrains the law firm from acting. The case of a former prospective client falls under a broader category of cases in which the law firm sought to be restrained have never in fact acted for the plaintiff, and in those cases, the courts have preferred to grant an injunction whose effect is to restrain only the use of the confidential information in question, as opposed to restraining the law firm from acting for the defendant entirely. The reason for this is that in practice, information that may fall or has fallen into the hands of lawyers who have not acted for the plaintiff tends to be limited in scope, such that simply restricting the use of that information is generally an adequate remedy for any prejudice

that the plaintiff might suffer as a result of its misuse. The earlier discussed cases of *Lord Ashburton* and *English & American Insurance* are clear examples of this practice, which continues to be endorsed in recent English decisions: see *eg*, *Stiedl v Enyo Law LLP and others* [2011] EWHC 2649 (Comm) at [39] *per* Beatson J. But there can of course be no inflexible rule because the form of the injunction in any given case must be tailored to avoid the likely prejudice, and the court must consider all the circumstances in deciding the proper relief.

Whether the Firm should be restrained under the law on breach of confidence

49 The plaintiff had to establish that (a) the Firm were in possession of information which is confidential to her and to the disclosure of which she had not consented; (b) the information is or may be relevant to the present matter in which the interest of the defendant is or may be adverse to her own; and (c) there was a risk that the information would come into the possession of the lawyers from the Firm who are now acting for the defendant. For the reasons below, the first two requirements were not satisfied in this case, and that was sufficient to dispose of the matter.

50 The principles relating to the first two requirements are as follows. First, the question whether a particular individual is in possession of confidential information is a question of fact which must be proved or inferred from the circumstances of the case: *Bolkiah* at 235F. The plaintiff has the burden of proof in this regard. From an evidential perspective, it may be observed that where the plaintiff is a former client of the law firm in question, the fact of such possession will not ordinarily be difficult to establish. By contrast, where the plaintiff is a former prospective client, his engagement and communications with the firm will in all likelihood have been limited, and he will as a result find it that much harder to establish the fact that confidential information was conveyed. This

phenomenon was amply demonstrated in the present case, as it will be seen below.

51 Second, the basic attribute which information must possess before it can be considered confidential is inaccessibility, in the sense that it must take time, labour and effort for a member of the public to reproduce that information: *Gurry* at para 5.14, citing *Saltman Engineering Co, Ltd and others v Campbell Engineering Co, Ltd* [1948] 65 RPC 203 at 215 *per* Lord Greene MR. Beyond the general concept of inaccessibility, the courts approach the question of whether information is confidential in a pragmatic way, reluctant to develop rigid definitions of what suffices to confer confidentiality on an item of information, preferring instead to assess it in the context of the facts of the case at hand: *Gurry* at para 5.12, citing *Argyll* ([39] *supra*) at 330 *per* Ungoed-Thomas J. In the context of a solicitor-client relationship, information that the client gives to the lawyer which is considered confidential generally comprises information about the client's affairs: see *Parry-Jones v Law Society and Others* [1969] 1 Ch 1 at 7B *per* Lord Denning MR. Discussions between a lawyer and a client on how the client's case ought to be run would, I consider, be considered confidential to the client as well. The same principles ought also to apply in the case of a former prospective client.

52 In addition, it is noteworthy that information may cease to have the quality of confidentiality. As Lightman J put it in *In re A Firm of Solicitors* at 9G–H:

> … Confidential information passing between solicitor and client and otherwise acquired by a solicitor on behalf of his client may, like any other confidential information communicated to anyone else, subsequently cease to be confidential. Confidential documents and information may become common knowledge or at least known to an opponent in the course of a trial. Some

> information may be memorable and some eminently forgettable. Common sense requires recognition that not all confidential information acquired by a solicitor will remain in the mind of the solicitor or be susceptible of being triggered as a recollection after the lapse of a period of time. …

53 Lightman J's point that information disclosed during the course of proceedings ceases to be confidential as between the parties is illustrated by the decision of the Scottish Court of Session in *Ecclesiastical Insurance Office plc v Whitehouse-Grant-Christ* [2017] CSIH 33 ("*Ecclesiastical*"), which Ms X cited. In that case, the defender, a former client of the lawyer in question, applied to restrain the law firm which that lawyer had later joined from acting for the pursuer. The court rejected her application principally because she had already made available to the pursuer a substantial amount of the material relating to her instruction of the lawyer and, in those circumstances, it was difficult to see what other material there was that she had provided that lawyer which she still expected to remain confidential and which needed to be protected by way of an injunction (at [10] *per* Lord Bracadale).

54 Third, confidential information which is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own might be referred to as "relevant" information for short. As Lord Millett said in *Bolkiah*, whether information is relevant in this sense "will often be obvious" (at 235E). It is important to appreciate, however, that this requirement is part of a broader principle that the court will act to protect information that a law firm would for some reason be obliged to disclose to their new client but are conflicted from doing so by their duty to a former client, former prospective client or someone else to keep that information confidential: see *Conflicts of Interest* at para 7-003. Relevant information, in the *Bolkiah* sense, is simply the most common type of such information, and is also naturally the most pertinent

type in a case like the present case where a former client or former prospective client is suing to restrain a law firm from acting in pending proceedings out of a concern that his position there would otherwise be prejudiced.

55 A separate point to be mentioned is that when information loses confidentiality, very often it loses relevance too. Thus, where the information is already contained in material freely disclosed by the plaintiff, the law firm in question can have no conceivable obligation to disclose it to the defendant, given that as between the parties, it will already be common knowledge. Nor will there be any risk of such information being used in a manner adverse to the plaintiff's interest in the litigation: see *Ecclesiastical* at [10] *per* Lord Bracadale and [74] *per* Lord McGhie.

56 Applying these principles, I analysed, first, whether the plaintiff was able to show that she did in fact communicate to Mr A and Mr B each item of information that she claimed to have communicated to them; second, whether those items of information were properly regarded as confidential; and third, whether they were properly regarded as relevant to the plaintiff's action against the defendant. For reasons which will become apparent, I considered that the answer to at least one of these three questions was in the negative in respect of all the items of allegedly confidential information that the plaintiff claimed to have communicated to Mr A and Mr B.

57 According the plaintiff, she gave three categories of confidential information to Mr A and Mr B at the meeting on 20 October 2016. I shall deal with each category in turn.

58 First, the plaintiff contended that instructions were given and advice was received relating to the merits of an application for a Mareva injunction. Mr A, on the other hand, asserted that he and Mr B did not opine on whether the plaintiff would be able to obtain a Mareva injunction, and instead told her that they needed to take further instructions to provide an assessment on the prospects of such an application. While it was possible, in the light of the emails between Mr Hue to Mr A on 19 October 2016 (see [4] above), that the topic of seeking a Mareva injunction could have been broached at the meeting, I agreed with Ms X's submission that if they had given advice in any detail on this issue, it would have been mentioned again in Mr B's email dated 21 October 2016. That is because a Mareva injunction is usually applied for on an urgent basis. But it was not mentioned. Instead, Mr B asked only for documents, evidence and a chronology of the parties' dealings. The lack of urgency was borne out also by the fact that the plaintiff applied for a Mareva injunction against the defendant nearly a year after she first met Mr A and Mr B. In the circumstances, I was not inclined to believe that an application for a Mareva injunction was discussed in detail at their meeting on 20 October 2016.

59 More fundamentally, I did not consider such information confidential or relevant in the sense defined at [53] above. Between the plaintiff's meeting with Mr A and Mr B, and the filing of her Mareva application, almost a year had lapsed. By the time the Firm were appointed to act for the defendant, the plaintiff had already obtained a Mareva injunction on an *ex parte* basis. She had already filed an affidavit setting out the facts which she believed supported a meritorious application for Mareva relief. Whatever assets revealed to Mr A and Mr B had been augmented by other assets uncovered after a year's investigations and disclosed to the court. Therefore, it was difficult to see how there was any confidential information that Mr A and Mr B had relating to the

merits of such an application which they had the duty to inform the defendant, given that the plaintiff had *already* put such information before the court. The principle in *Ecclesiastical* and *In re A Firm of Solicitors* applies squarely in this regard.

60 Second, the plaintiff contended that instructions were given and advice was received on three witnesses that she might call in the event of a trial and the merits of calling each witness. Mr A denied this. He claimed that the plaintiff mentioned a brother who would support her case against the defendant, but that there was no discussion on the specific evidence that the brother might be able to give. Consistent with his evidence, his email of 21 October 2016 made no mention of any potential witness. I accepted his evidence. The plaintiff produced no objective evidence to show the contrary.

61 Third, the plaintiff alleged that instructions were given and advice was received on possible strategies apart from litigation in Singapore:

(a) The plaintiff claimed that Mr A and Mr B had advised the plaintiff to file a police report against a certain individual. It was common ground that such advice had been given. Mr A explained that he had done so because the plaintiff had told him that that individual had grabbed her by the arm and prevented her from leaving his office on 20 July 2016. In my view, however, neither the facts of this incident nor the advice to make a police report was confidential. The facts of the incident were already in evidence in the plaintiff's second affidavit, filed 1 November 2017, before the Firm were appointed by the defendant. Also, as Ms X submitted, the suggestion to report a possible crime to the police is a suggestion that anyone could have given. I therefore also accepted

Mr A's claim that the advice was not part of any overall strategy for the plaintiff's case against the defendant. For the same reasons, the advice also failed the test of relevance – there was no reason to think that this was information that the Firm would be obliged to disclose to the defendant.

(b) The plaintiff also claimed that she, Mr A and Mr B had discussed the possibility of commencing criminal and civil proceedings against the defendant in another jurisdiction in relation to assets situated there which were part of the estates of the plaintiff's and defendant's late parents. Mr A denied that this was discussed. I accepted his evidence because the plaintiff produced no objective evidence for her contention. It was also notable, as Ms X highlighted, that Mr Hue, who was at the meeting, stated specifically in his affidavit that he did not recall any detailed discussion to that effect.

(c) The plaintiff claimed that she, Mr A and Mr B had discussed the possibility of taking "self-help measures" to address the defendant's alleged threats to harm her, and her fears that her home might be bugged. Mr A denied that this was discussed. I accept Mr A's evidence, again because the plaintiff produced no objective evidence for her contention.

62 Next, the plaintiff stated she disclosed three categories of confidential documents to Mr A and Mr B at the meeting. Mr A responded that he was "certain" that he and Mr B had not been shown or provided any of these documents. Again, I shall deal with each category in turn.

63 First, the plaintiff claimed that she had shown Mr A and Mr B privileged attendance notes of a meeting between the plaintiff, two witnesses she might call at trial and lawyers from another firm which she had consulted prior to consulting the Firm, as well as a summary of those notes, relating to matters in issue in the pending action. Mr A denied this, claiming that he was not aware that the earlier set of lawyers the plaintiff claimed to have seen were from that firm, and that the plaintiff did not convey instructions to him at the level of detail that appeared in those notes. I accepted Mr A's evidence, principally because the plaintiff produced no objective evidence for her contention. I was also not satisfied that the notes were credible. As Ms X observed, the plaintiff did not identify the makers of the attendance notes and the summary. Nor was it clear why there were three sets of attendance notes for a single meeting.

64 Second, the plaintiff claimed that she had shown Mr A and Mr B mobile text correspondence between the plaintiff and one of the witnesses she might call at trial relating to matters in issue in the pending action. Mr A denied having seen this. I did not find the plaintiff's contention credible. She chose to exhibit the correspondence in a way that made it impossible to discern when the messages had been sent and received, and whether they existed before the plaintiff's meeting with Mr A and Mr B on 20 October 2016. In fact, in one of the messages, the plaintiff states, "I'm getting my lawyers already doing a search", whereas according to the plaintiff, she had not yet appointed lawyers as at 20 October 2016. This made it unsound for any inference to be drawn that Mr A and Mr B saw any of those messages at that meeting.

65 Third, the plaintiff claimed that she had showed Mr A and Mr B an earlier version of the plaintiff's will which she was intending to rely on in the pending action in support of a certain line of argument. Mr A denied having

seen the will. I accepted Mr A's evidence because the plaintiff produced no objective evidence for her contention. I also noted that in any event, that particular line of argument had already been stated in the affidavit she filed in support of her application for Mareva relief. Therefore, any relevance that this information might have had would have disappeared by the time of this application, applying *Ecclesiastical* and *In re A Firm of Solicitors*.

66 For the reasons above, I found that the plaintiff failed to establish that the Firm, through Mr A and Mr B, were in possession of information belonging to the plaintiff that was either confidential to the plaintiff or relevant in the requisite sense to her pending action. This was sufficient ground for declining to restrain the Firm from acting under the law on breach of confidence. For completeness, however, I shall discuss briefly the applicable principles for assessing whether a risk of disclosure has been established and the question whether the maintenance of the Firm's information barrier served any useful purpose.

Risk of disclosure of confidential information

67 Where a former prospective client is concerned, the burden, it will be recalled, is not on the law firm to demonstrate the absence of a risk of disclosure, but on the applicant to demonstrate a risk of disclosure: see [47] above. In a case concerning a former client, the rule is that once the firm have been shown to be in possession of relevant confidential information, the burden falls on the firm to show clear and convincing evidence that "effective" measures have been taken to ensure that no disclosure will occur: *Bolkiah* at 237F–238A. It follows that a former prospective client must show the converse. He must show that ineffective measures have been taken to ensure that no disclosure will occur, for

the burden is on him to show a risk that relevant confidential information will be disclosed.

68 Regardless of whether it is a former prospective client attempting to prove a risk of disclosure or it is a law firm attempting to prove the absence of such a risk, the inquiry is ultimately one of fact: see *GUS Consulting GmbH v Leboeuf, Lamb, Greene & Macrae (a firm)* [2006] EWCA Civ 683 at [31] *per* Mummery LJ. Hence, whether the measures taken to protect against disclosure are effective or ineffective must depend, in each case, on a range of factors, including the nature of the work done for the former client, the timing of the creation of the information barrier, the size of the law firm, the physical locations of departments within the firm, the number and seniority of tainted lawyers, and so on: see *Conflicts of Interest* at para 7-016. Thus Lord Millett's dictum that in *Bolkiah* at 237G that "[t]here is *no rule of law* that Chinese walls or other arrangements of a similar kind are insufficient to eliminate the risk" [emphasis added].

69 Mr Vijayendran submitted that the information barrier that the Firm had erected on 19 November 2017 after receiving the plaintiff's complaint was inadequate for the purpose of ensuring the containment of confidential information she had communicated to Mr A and Mr B because such information could have by then been already disseminated to other members of the firm. I accepted the logic of this argument. But my conclusion that the Firm were not in possession of relevant confidential information belonging to the plaintiff meant *ipso facto* that no such information could have been circulated within the firm, whether before or after 19 November 2017. The Firm had also verified that as at that date, no information had passed from Mr A and Mr B to the lawyers now representing the defendant and, in order to maintain the barrier,

had appointed Ms X, who was not a member of either team, to argue this application. This being the case, the question that remained was whether maintaining the Firm's information barrier would serve any useful purpose.

70 The nature of the information barrier that the Firm had established was described in their letter to the plaintiff's lawyers dated 20 November 2017 in the following terms:

> In any event, steps have been taken to put in place safeguards to protect against the flow of any confidential information which may have been communicated to our [Mr A] and [Mr B] a year ago. This 'Chinese Wall' formally requires the following:
>
> (a) The lawyers and staff involved in the meeting with your client in October 2016 are prohibited from discussing the said meeting, or disclosing anything relating to the said meeting, to any other staff or lawyer within our firm, in particular but not limited to the lawyers and staff involved in [the pending action], under any circumstances.
>
> (b) The lawyers and staff involved in [the pending action] are prohibited from discussing the matter with, or disclosing anything relating to the matter, to any other staff or lawyer within our firm, in particular but not limited to the lawyers and staff involved in the meeting with your client in October 2016, under any circumstances.
>
> (c) All files and materials relating to (i) the meeting with your client in October 2016, and (ii) [the pending action], are labelled with the words **'Restricted File'** and **'Only authorised persons are permitted access to this file'**.
>
> (d) Access to relevant electronic documents saved on our firm's servers is restricted to the lawyers and staff involved in the respective matters and the document folders are labelled accordingly.
>
> (e) No files, documents or other relevant materials are left unattended in commonly accessible areas.
>
> (f) The lawyers and staff who were involved in the meeting with your client in October 2016 shall not have access to any confidential documents relating to [the pending action]. The lawyers and staff involved in [the pending

> action] shall not have access to any confidential documents relating to the meeting with your client in October 2016.
>
> [emphasis in original]

71 At the hearing of the present application, the Firm undertook to the court that they would maintain the information barrier as described in the letter. In addition, the Firm offered to extend the prohibitions in paras (a), (b) and (f) to the lawyer from the Firm whom the plaintiff first approached through Mr Hue: see [3] above.

72 In my judgment, these undertakings served a salutary purpose. Even though I found that the Firm were not in possession of relevant confidential information belonging to the plaintiff, I could understand that the plaintiff might still have residual concerns about the Firm's continuing to act for the defendant. More importantly, I noted that behind the ethical injunction in the PCR that lawyers not put themselves in positions of conflict with former clients is a broader public interest in ensuring that the integrity and standing of the profession as a whole are not undermined: see *Law Society of Singapore v Seah Li Ming Edwin and another* [2007] 3 SLR(R) 401 at [25] *per* Andrew Phang Boon Leong JA. In a similar vein, a client's confidence in his lawyer, and the law's role in protecting it, was regarded by Lord Millett as "a matter of perception as well as substance": *Bolkiah* at 236G. In my view, the continued maintenance of the Firm's information barrier, although not strictly necessary, would contribute positively to meeting these concerns, removing any semblance of impropriety from the Firm's representation of the defendant and ensuring more broadly that justice in the pending action not only be done but seen to be done.

Issue 2: Restraining the Firm under the court's supervisory jurisdiction

Existence of the supervisory jurisdiction

73 In my view, the court does have a supervisory jurisdiction to regulate the conduct of its officers which is distinct from its jurisdiction arising from the law on breach of confidence as delineated by the reasoning and the test in *Bolkiah*. I therefore accept Mr Vijayendran's submission to that effect. In the Victoria Court of Appeal's decision in *Spincode Pty Ltd v Look Software Pty Ltd and Others* [2001] VSCA 248, Brooking JA having analysed *Bolkiah* in detail took the view that to the extent that *Bolkiah* suggested that confidential information was the sole basis for restraining lawyers from acting, it had omitted consideration of a stable stream of authorities for the existence of a supervisory jurisdiction of the kind referred to here. One of those authorities which provides a clear statement of that jurisdiction is *Davies v Clough* (1837) 8 Sim 262, where Sir Lancelot Shadwell VC observed (at 267):

> … The cases … appear to afford this general principle, namely, that all Courts may *exercise an authority over their own officers as to the propriety of their behaviour*; for applications have been repeatedly made to restrain solicitors who had acted on one side from acting on the other, and those applications have failed or succeeded upon their own particular grounds, but never because the Court had no jurisdiction. [emphasis added]

74 It is also noteworthy that the English Court of Appeal in *Rakusen* understood its jurisdiction to restrain lawyers from acting against a former client as being based in a jurisdiction to regulate the conduct of its officers. Thus, Cozens-Hardy MR was concerned with invoking the court's "special jurisdiction over solicitors" (at 835). Fletcher Moulton LJ spoke of "the power that we certainly possess of directing what the officers of the Court should and should not do" (at 841). The effect of their Lordships' reasoning is that one

circumstance in which the court might exercise this power is where the lawyer is acting against his former client about whom he has confidential information, but that that is not the only circumstance. Evidently, this jurisdiction overlaps with the court's jurisdiction to protect confidential information through the law on breach of confidence in the sense that they can be applied to the same set of facts, although the two appear to be juridically distinct.

75 Two sets of differences are worth pointing out. The first is this. On the one hand, it would appear that the purpose of the court's supervisory jurisdiction over its officers is to ensure that its officers adhere to a minimum standard of propriety in conduct. On the other, the purpose of the court's jurisdiction in the substantive law on breach of confidence is to ensure that confidential information is not unjustifiably disclosed. If this is accepted, the second difference is that while the court's jurisdiction to protect confidence will often be invoked to prevent entire law firms from acting in consideration of the risk of disclosure of confidential information *within* the firm, the court's supervisory jurisdiction might often be more appropriately exercised against individual lawyers whose individual conduct is regarded as inappropriate. Hence, there seems to be a different overall scope and purpose to each jurisdiction. To the extent that *dicta* in *Rakusen* might be read as suggesting that they can be reduced to the same jurisdiction, that view must now be regarded as having been overtaken by the reasoning in *Bolkiah*, which is rooted firmly in the substantive law on breach of confidence, which is governed by principles distinct from those that inform the court's inherent jurisdiction to supervise the conduct of its officers.

76 Therefore, if the court is purporting to exercise its supervisory jurisdiction, it cannot be the *Bolkiah* test that applies. What then are the applicable principles?

Principles governing the supervisory jurisdiction

77 The applicable principles must naturally be derived from the purpose of the supervisory jurisdiction itself, which have already been alluded to. The central idea behind this jurisdiction is the court's overriding duty to ensure the proper administration of justice, to protect the integrity of the legal process and to maintain public confidence in the rule of law. Within the justice system, lawyers play a critical role as officers of the court and as fiduciaries of their clients. For this reason, the proper discharge of their role is governed by the highest professional and ethical standards, embodied in the PCR, by which they may be held to account through disciplinary proceedings. Exceptionally, however, the conduct of a lawyer in a particular case may pose an immediate actual or perceived risk to the proper administration of justice, whether in the particular case at hand or, even more exceptionally, at large. In such circumstances, it cannot be doubted that the court has the duty, and correspondingly, the power, to purge that risk directly by restraining the lawyer from continuing to act.

78 Indeed, a jurisdiction of this nature was contemplated by Loh J in *Then Khek Khoon*. It will be recalled that in that case, Loh J declined to exercise what the defendants had described as the court's inherent jurisdiction to determine breaches of the PCR, principally because the Law Society and not the court was the proper forum for making such determinations. The exceptional case was not ruled out, where the court could intervene to remove a lawyer from acting in order to prevent confidence in the administration of justice from being

undermined, and that in deciding whether such a power ought to be exercised, the standards set out in the PCR might be analytically relevant. Thus Loh J said at [22]:

> … It therefore seems to me that where one is concerned only with breaches of the [Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2010 Rev Ed)], which do not trigger any concurrent breach of legal obligations owed by the counsel to the court or the client at Common Law, the proper forum for investigation and determination of the breach is the Law Society rather than the court. *I should not be taken to say that this is an immutable rule.* There may be *special or exceptional circumstances* where the nature of the complaint is such that on *an objective view, a reasonable, fair minded observer* would think that a fair trial would not be possible without the court's intervention and restraint of the advocate or solicitor from continuing to act. *Where matters impinge on the proper administration of justice, due process and wider public interest issues, the court should intervene, either on its own initiative or pursuant to a complaint by the other party. The Court must not allow confidence in the administration of justice to be undermined.* [emphasis added]

79 In Australia, a jurisdiction of a similar kind has been regarded by the Federal Court as well established even though "contentious" in application: see *Dealer Support Services Pty Ltd (ACN 008 607 403) v Motor Trades Association of Australia Ltd (ACN 008 643 561)* [2014] FCA 1065 at [37]–[38] *per* Beach J. An example of that jurisdiction in action is *Peter Kallinicos and Anor v Peter Anthony Hunt and ors* [2005] NSWSC 1181, a decision of the New South Wales Supreme Court. The first plaintiff applied to restrain the defendants' lawyer from acting on the basis that the lawyer had been involved in transactions which were the subject of the action, and therefore was likely to be a material witness in the trial and had a perceived interest in the outcome. Brereton J granted the application on the basis that permitting the lawyer to act would affect the proper administration of justice. The test, in his view, was "whether a fair-minded, reasonably informed member of the public would

conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice" (at [76]), and the test was considered to be satisfied on the facts.

80 A similar jurisdiction has also been expressly recognised in England relatively recently. In *Geveran Trading* ([23] *supra*), a debtor applied for a retrial of his petition of bankruptcy on the ground that the petitioner's lawyer had been socially acquainted with the debtor's wife and therefore should not have accepted instructions. It was argued for the lawyer that he could have been restrained from acting only if he had confidential information belonging to the debtor, under the *Bolkiah* principle (at [16]). The English Court of Appeal rejected this argument. Arden LJ held that there are other permissible circumstances, which are "likely to be very exceptional", but which are not without precedent (at [39]). Examples her Ladyship cited included when a husband and wife or other cohabiting partners appeared as advocates against each other in a contested criminal matter (*R v Batt* [1996] Crim LR 910) and when the solicitor for the local authority in care proceedings cohabited with the solicitor for the family (*In re L (Minors) (Care Proceedings: Solicitors)* [2001] 1 WLR 100). Arden LJ then laid down the principle in the following terms (at [42]):

> … The court has an inherent power to prevent abuse of its procedure and accordingly has the power to restrain an advocate from representing a party if it is satisfied that there is a real risk of his continued participation leading to a situation where the order made at trial would have to be set aside on appeal. The judge has to consider the facts of the particular case with care … However, it is not necessary for a party objecting to an advocate to show that unfairness will actually result. … In many cases it will be sufficient that there is a

> reasonable lay apprehension that this is the case because, as Lord Hewart CJ memorably said in *R v Sussex Justices, Ex p McCarthy* [1924] 1 KB 256, it is important that justice should not only be done, but seen to be done. Accordingly, if the judge considers that the basis of objection is such as to lead to any order of the trial being set aside on an appeal … he should accede to an order restraining an advocate from acting. But we stress that the judge must consider all the circumstances carefully. A connection, for instance, between counsel for one party and a witness on the other side may be an important factor where the evidence is of fact but, depending on the nature of the connection, it may be less important where the evidence is of an expert nature and the cross-examination is likely to be on questions of technical expertise. The judge should also take into account the type of case and the length of the hearing, and any special factor affecting the role of the advocate, for instance, if he is prosecuting counsel, counsel for a local authority in care proceedings or as a friend of the court.

Arden LJ did not think that the debtor had brought himself within this principle on the facts, and therefore declined to grant the order sought (at [49]).

81 In my judgment, the essence of the true principle is captured in Loh J's *dictum* at [22] of *Then Khek Khoon* which I have cited above. In short, the test is whether there is an actual or reasonably perceived risk that the proper administration of justice would be prejudiced unless the lawyer in question is removed. Whether the alleged risk is reasonably perceived must be assessed objectively through the eyes of the fair-minded observer. And the types of risk that the proper administration of justice would be prejudiced constitute a narrow and exceptional category.

82 Great care must be taken not to adopt an expansive view of this supervisory jurisdiction. This is for at least two reasons. First, as Arden LJ observed in *Geveran Trading* (at [43]), applications to remove an opposing party's lawyer "can be used for purely tactical reasons and will inevitably cause inconvenience and delay in the proceedings". Second, as Lightman J pointed

out *In re A Firm of Solicitors* (at 9C–D), there is an interest in respecting the freedom of lawyers to obtain instructions from any member of the public and the freedom of all members of the public to instruct lawyers of their choice. Therefore, there must be a compelling reason for depriving both the client and the solicitor of their free election, a reason that demonstrates an actual or reasonably perceived risk to the proper administration of justice, before the court will act to restrain a lawyer from acting under its supervisory jurisdiction.

83 In this context, the question whether a given rule in the PCR has been breached or is at risk of being breached, in my view, may serve as an analytical tool for determining whether the supervisory jurisdiction ought to be invoked. It has been seen that Loh J also contemplated this possibility in *Then Khek Khoon*: see [78] above. The rules in the PCR are ethical standards to which lawyers in this jurisdiction must hold themselves. Therefore, whether the lawyer in question appears to be in breach of a given rule in the PCR must be of some relevance to determining whether, in the eyes of a fair-minded observer, restraining him from acting is necessary to ensure the proper administration of justice. However, in applying the PCR this way, it is imperative for the court not to express any final opinion on whether any particular rule has been breached, as the proper forum for such a determination is the Law Society. A positive example in this regard is Arden LJ's comment in *Geveran Trading* that "[w]hile it is not for this court to enforce the Code of Conduct, there is no suggestion that [the lawyer in question] did not properly apply the rules set out in the Code of Conduct or conscientiously consider the position in accordance with the best standards of the provision" (at [49]). This approach is consistent with the general principle that the PCR are not the governing law in the injunctive context: see [18]–[23] above.

Whether the Firm should be restrained under the supervisory jurisdiction

84 In the present case, there was no reason why the Firm should be restrained from acting under the court's supervisory jurisdiction. In the first place, it was not suggested that the proper administration of justice would be prejudiced unless the defendant's current lawyers from the Firm, or the Firm as a law firm, were restrained from acting. In the second place, the only factual allegation supporting the plaintiff's case was that the Firm were in possession of confidential information belonging to her which may be used to her prejudice in the pending action. Having already rejected this allegation, I found no basis for any actual or reasonably perceived risk that the proper administration of justice would be prejudiced unless the Firm were removed. It followed that the plaintiff had no case under the court's supervisory jurisdiction.

Appropriate procedure

85 A final point remains to be made concerning the procedure adopted by the plaintiff in bringing this application. There is a well-established general rule in civil procedure that in order to obtain an interlocutory injunction, the applicant must have a cause of action in law entitling him to substantive relief: see David Bean, Andrew Burns & Isabel Parry, *Injunctions* (Sweet & Maxwell, 11th Ed, 2012) at para 1-04. That is because an injunction is not a cause of action which is capable of being sought or granted in its own right. As Lord Mustill put it in *Channel Tunnel Group Ltd and Another v Balfour Beatty Construction Ltd and Others* [1993] AC 334 at 362C, "the right to an interlocutory injunction cannot exist in isolation, but is always incidental to and dependant [*sic*] on the enforcement of a substantive right, which usually although not invariably takes the shape of a cause of action", citing *Siskina (Owners of cargo lately laden on*

board) and Others v Distos Compania Naviera SA [1979] AC 210 (see especially 254C–E *per* Lord Diplock).

86 An application for an injunction to restrain a law firm from acting that is made pursuant to the court's substantive jurisdiction in the law on breach of confidence is no exception to the general principle stated above. The result is that it is necessary for a party seeking such an injunction to do so by recourse to an originating process against the law firm in question, which in this jurisdiction is commenced by either bringing an action by writ of summons or issuing an application by originating summons. Both approaches are used for this purpose in England. In *Bolkiah*, for example, Prince Bolkiah applied for the injunction to restrain KPMG from acting pursuant to an action for breach of confidence that he had commenced against KPMG: see [29] above. In *In re A Firm of Solicitors* ([32] *supra*), the application was made by way of originating summons.

87 The plaintiff brought the present application by taking out a summons pursuant to her pending action against the defendant. This approach had precedent and was graciously intended to save the Firm the embarrassment of a lawsuit. The Firm also did not object to the form of the application. In my judgment, it would have been appropriate for the plaintiff to have used an originating process. The plaintiff was not asserting any substantive right under the law on breach of confidence against the defendant in the pending action, and it was not the defendant she was seeking to restrain from committing a breach of confidence. Accordingly, it would not have been correct for an injunction in the terms she sought to be granted pursuant to the pending action. Further, and more importantly, if an originating process had been used, the jurisdictional basis for the injunction sought, whether it be breach of confidence, the

supervisory jurisdiction of the court, or some other source of substantive or procedural law, would have been clearer. So too might have been the analysis of the relevance of the PCR in each context.

Judgment

88 This case illustrates that the various legal principles drawn from different areas of substantive and procedural law that are in play in an application to restrain a law firm from acting for an opposing party. In the typical case of such an application that is made by a former client, the starting point is to afford the strongest protection to confidential information conveyed under the fiduciary relationship which subsisted between him and the law firm during the period of their retainer. But the absence of such a relationship, as in the case of a former prospective client, is not decisive, because under the law on breach of confidence, an equitable duty to protect that client's confidentiality is nevertheless imposed on the firm, and may be enforced by way of an injunction restraining that firm from acting. In this case, the requirements for such relief were not met, principally because no relevant confidential information had in fact been at stake. Yet, the court could nevertheless have issued the injunction sought by exercising its inherent jurisdiction to supervise the conduct of its officers. The grounds for doing so, however, are narrow. This is to ensure that the jurisdiction is not abused and that the right of a party to his choice of counsel is respected. Here, none of those grounds was present, and the undertakings offered were in my judgment more than sufficient to address any residual concern that justice not only be done but seen to be done.

89 For all the reasons above, I dismissed the plaintiff's application. The Firm did not ask for costs although they resisted the application successfully. I therefore made no order on costs.

Valerie Thean
Judge

Gregory Vijayendran Ganesamoorthy, Cheng Jin Edwin and Chua Zhi Huei (Rajah & Tann Singapore LLP) for the plaintiff;
Ms X (The Firm) for the Firm.