RBC v Appleby

Jurisdiction:	Jersey
Judge:	The Deputy Bailiff
Judgment Date:	14 November 2007
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Text

[2007] JRC 211

ROYAL COURT

(Samedi Division)

Before:

M. C. St. J. Birt, **Esq.**, Deputy Bailiff, **and** Jurats Allo **and** Le Cornu.

Between
1. RBC Trustees (CI) Limited (formerly Abacus (CI) Limited
2. Michael David de Figueiredo
Representors
and
John Bisson
Graham Boxall
Michael O'Connell
Mark Lewis
Andrew Pim

Fraser Robertson
Timothy Hart
Gillian Robinson
David Benest
Farah Ballands
Wendy Benjamin
Andrew Weaver (exercising the profession of Advocates and Solicitors under the name and style of Appleby).
Respondents

Advocate T. J. Le Cocq **for the Representors**.

Advocate M. St J. O'Connell **for the Respondents**.

Authorities

Abacus (CI) and Others v Bisson and Others [2007] JRC 150.

Les Pas Holdings Limited v Receiver General [1995] JLR 163.

Jersey Evening Post Limited v Al Thani [2002] JLR 542.

Companies (Jersey) Law 1991.

The Deputy Bailiff

1 On 6 th July 2007 this Court ordered that the respondents ("Appleby") should cease representing Gamlestaden Fastigheter AB ("Gamlestaden") in certain proceedings ("the Baltic proceedings") currently before the Royal Court. The Court subsequently gave reasons for its decision in a judgment on 27 th July [2007] JRC 150 ("the July judgment").

2 Appleby now asks the Court to re-visit the matter in the light of an alleged change in circumstances since the Court's original decision and to order that Appleby be permitted to continue to represent Gamlestaden in the Baltic proceedings. The application raises a preliminary question of whether the Court is *functus officio*. The hearing was in private and submissions were made concerning various legal firms who were not present. In the circumstances we propose only to identify those firms which have already acted for the parties in the Baltic proceedings.

3 Abacus (CI) Limited has now changed its name to RBC Trustees (CI) Limited but we propose for convenience to continue to refer to it as 'Abacus'. We shall also for the most part not distinguish between Abacus and the second representor, Mr de Figueiredo, and accordingly references to the submissions of Abacus are taken to include those of Mr de Figueiredo.

Background

4 The background to this matter is set out fully in the July judgment to which reference should be made for a detailed understanding of the matter. Suffice it to say that Gamlestaden has brought proceedings against Mr de Figueiredo and other employees of Abacus in respect of their actions as directors of a Jersey company, Baltic Partners Limited, of which Gamlestaden was a shareholder. It is alleged that, as a result of the directors' breach of duty Gamlestaden has lost not less than DM98m. The proceedings have a protracted history and this is described in paragraphs 2-4 of the July judgment.

5 Until September 2004 Gamlestaden was represented by Crill Canavan. However it then sought to instruct Appleby instead. Abacus immediately objected. By agreement Appleby acted for Gamlestaden in respect of various purely legal points argued before the Court of Appeal and then the Privy Council but, following the decision of the Privy Council that the Baltic proceedings should be permitted to continue, Abacus renewed its objection to Appleby acting for Gamlestaden.

6 The ground of objection was that Appleby had previously acted for Abacus in a complex matter related to the Y Trusts. Mr de Figueiredo had been the principal person at Abacus with responsibility for the Y matters and he had dealt with Appleby. It was said that, as a result of acting for Abacus on the Y matters, Appleby was in possession of confidential information acquired from Abacus which might be relevant to the Baltic proceedings, where the interests of Appleby's new client Gamlestaden were adverse to those of Abacus.

7 In the July judgment the Court referred to the relevant authorities, described the evidence in the case and the parties respective submissions and then stated its conclusion in paragraphs 43 and 44, which we think convenient to set out in full:-

> ***"43 We turn therefore to the central issue in this case.*** Appleby accepts that it is in possession of confidential information received from Abacus while acting in respect of the Y matters. Is there a real risk that such information (or some of it) is relevant to the Baltic litigation?
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> ***44 We have not found this to be an easy decision.*** The arguments are reasonably closely matched. However, on balance, we have concluded that there is a real risk of some of the confidential information imparted to Appleby during the Y matter being relevant to the Baltic litigation. Our reasons can be summarised as follows:-
>
> ***(i) We have no reason to doubt Mr de Figueiredo's evidence on affidavit.*** We accept therefore that he discussed the matters which he summarises in his affidavits with one or more members of Appleby. The fact that the partners of Appleby do not recall it is not surprising. They cannot be expected to recall details of conversations which were not intended to be and almost certainly

were not in fact significant in the context of the matter upon which they had to advise .

(ii) It is true that the evidence of Mr de Figueiredo is very general. He does not give detailed specific examples of confidential information which he disclosed and which may be relevant to the Baltic litigation. However we do not consider that to be surprising. The relationship with Appleby in relation to the Y matter was a two-year relationship with over forty meetings and many ***other communications.*** It was an intense and prolonged relationship. We have no difficulty in inferring that, in the context of such a relationship, there would have been wide-ranging and informal conversations amongst fellow professionals concerning matters such as how Mr de Figueiredo viewed his role as a director, how he performed it etc .

(iii) Mr de Figueiredo gives certain categories of information which he knows that he discussed. These are summarised at paragraph 10 above. We will refer to each of them in turn. We do not consider that, in the context of this case, discussions of the ownership structure of Abacus or the approach to business and personal characteristics of some of the key senior management at Abacus (unless they were Mr Bailey or Mr Boleat, which is not asserted) have any possible relevance to the Baltic litigation. We do however think that Abacus' insurance cover could be relevant. For example, if Mr de Figueiredo had disclosed the level of the professional indemnity cover or the level of any excess, this might well be highly relevant for Gamlestaden when considering its tactics when claiming a sum as high as DM98m. We accept that Mr de Figueiredo does not assert that he discussed either the level of any cover or the excess but we agree that there is a real risk that discussion about Abacus' insurance position may have disclosed information which would be helpful to Gamlestaden .

(iv) As to the question of Abacus' approach to litigation generally and to settlement thereof, we think that there is a real risk of this too being relevant. We have already discussed the extreme example outlined at para 42 above but we can envisage many less extreme examples about Abacus' general approach to litigation and to settlement of claims which would be of assistance to an adverse party such as Gamlestaden and we consider therefore that there is a real risk of such information being relevant .

(v) As to the way in which Abacus manages its client companies, its communication with those companies, its approach to risk in respect of those companies and how the directors run those companies (including most importantly Mr de Figueiredo's approach to his responsibilities as a director of a client company) we think there is a real risk of such information being relevant. We accept that the factual situations are quite different. In the Baltic litigation certain specific actions taken by Mr de Figueiredo as a director of Baltic are criticised. He did not of course take exactly similar actions as a director of any of the Y Companies. However general background information about how Mr de Figueiredo performs as a director and

his approach to such responsibilities (particularly where his actions as a director of one of the Y Companies had been the subject of implied or possible criticism) could be very ***relevant.*** Such information would be helpful, for example, to Mr O'Connell when deciding how to cross-examine Mr de Figueiredo, who is the key witness in the Baltic litigation .

(vi) At paragraph 21 of his second affidavit, Mr de Figueiredo states that he believes he would have discussed the Baltic litigation itself with members of Appleby. We do not think that that is sufficient. Unlike his assertion on the other matters referred to above ("I know I have talked to Bailhache Labesse about the following .....") he merely conjectures that he might have spoken about such matters. In our judgment this has not crossed the necessary threshold so as to satisfy us that there is a real risk of such information being in the hands of Appleby or being used against Abacus .

(vii) We accept that a client alleging the possession of relevant confidential information by a former solicitor should normally have to give some particularity (see the judgment of Lightman, J quoted at para 28 above). But the courts may sometimes infer the existence of such information. This appears not only from the same passage in the judgment of Lightman, J but also the decision of Timothy Walker, J in *Re a firm of solicitors* ***referred to at para 30 above.*** If Appleby's instructions in relation to the Y matter had been of the more conventional variety and had therefore lasted a comparatively short time with a moderate level of fees being incurred, we would not have found for Abacus in the absence of something more specific and concrete from Mr de Figueiredo. But this is a matter where some £800,000 of time was incurred over a two-year period. The contact was almost entirely with Mr de Figueiredo. It was an intense and prolonged matter where some of the issues raised related to Mr de Figueiredo's performance as a director. Although the Baltic litigation relates to his performance as a director of a different company, there is nevertheless, in the unusual circumstance of this case, a real risk that the many discussions referred to by Mr de Figueiredo contained material which may be helpful to Gamlestaden in its claim and which may inform the manner in which Appleby conducts that litigation or the manner in which Advocate O'Connell would cross-examine Mr de Figueiredo .

(viii) We accept the good faith of the partners of Appleby and that none of the partners believes that he or she is in possession of any relevant confidential information. However, as a number of the cases have made clear, the risk is that such information is stored away subconsciously and can then be triggered subsequently. As Sir David Croom-Johnson put it in the case of *Re a firm of solicitors* ***referred to at para 41 above (although this was in the context of an information barrier, the point remains the same) at 369:-***

"..... the staff and personnel who are handling the present litigation are not those who were concerned in the earlier cases but in view of the complexity of the issues in all the cases, the reasonable man knowing of the overlap could not be confident that in the course of the present case

some inadvertent revelation might not take place, caused perhaps by the awakening of memory by someone consciously or unconsciously availing himself of information which had in the past been obtained from A&A and communicated to him in the course of his work or even in social meetings with other members of the firm. He might well not appreciate the origin of the information, but the risk is there."

A similar point was made by Lightman, J in *Re a firm of Solicitors* ***(supra) when explaining what he meant by relevant confidential information at 9:-***

"For the purpose of the law imposing constraints upon solicitors acting against the interest of former clients, the law is concerned with the protection of information which (a) was originally communicated in confidence, (b) at the date of the later proposed retainer is still confidential and may reasonably be considered remembered or capable, on the memory being triggered, of being recalled and (c) relevant to the subject matter of the subsequent proposed retainer. I shall refer to information which satisfies these three qualifications as 'relevant confidential information'."

(ix) We return to the test. It is not whether we are satisfied on the balance of probabilities that there is relevant confidential information in Appleby's hands. The test is whether there is a real risk that there is such evidence in their possession. In the unusual circumstances of this case and on the basis of the evidence put before us, we have concluded that there is a real risk of the confidential information which is undoubtedly in Appleby's hands turning out to be relevant to the Baltic litigation in the way we have described."

8 In the course of the July judgment the Court referred to the fact that two potentially competing principles were in play in a case such as this. Thus at paragraph 31 the Court said this:-

"31 There is one final aspect of the law which we should consider before turning to the facts. Underlying the development of the law in this area there are two important but in some respects competing principles. The first is that eloquently outlined by Lord Millett in Prince Jefri, namely that it is in the ***public interest that a client should feel free to disclose information freely to his lawyer in the knowledge that it will remain confidential and that he should not be put at risk of finding it being used subsequently for the benefit of someone with an adverse interest to him.*** The second is the countervailing public interest that the choice of lawyers open to the public should not be unduly or unnecessarily restricted. A client should be free to go to the lawyer of his choice unless there is good reason to the contrary."

9 In connection with the second principle the Court considered that the small size of the Jersey bar could in some circumstances be a relevant consideration. In this respect it differed from the decision of Crill, Commissioner in *Les Pas Holdings Limited v Receiver*

General [1995] JLR 163. Having quoted the remarks of the Commissioner to the effect that the small size of the Jersey Bar did not justify any greater degree of flexibility than was adopted by English courts, the Court, in its July judgment, went on to say as follows:-

> ***"34 Whilst we understand the context in which these remarks were made, we think that they could potentially lead to considerable injustice if they were to be applied literally.*** By reason of its position as a successful international finance centre, Jersey has a number of substantial institutions. Abacus is an example. Inevitably - and this is no criticism - they will occasionally be sued .
>
> ***35 It will often be the case that such an institution will from time to time have instructed a number of the larger firms of lawyers in the Island on different matters.*** It is of fundamental importance that there should not be a perception that it is difficult or impossible to find lawyers of the appropriate calibre and stature to act against substantial financial institutions in the island. Litigation nowadays can be a complex and time consuming business. Whilst there are undoubtedly lawyers of outstanding ability in small practices who are perfectly capable of conducting the heaviest litigation, and some clients would wish to instruct such lawyers, there will inevitably be a perception amongst many overseas clients that, in a complex and heavyweight piece of litigation where the financial institution instructs one of the larger firms, the client should instruct a firm with equal resources and reputation. It would be a matter of injustice and damaging to the Island's reputation if an over zealous application of the law in this area led to a situation where there was a perception that clients wishing to sue local financial institutions could not obtain representation by firms of lawyers which they considered to be the match of the firm instructed by the financial institution .
>
> ***36 Accordingly, we respectfully disagree with the comments of the Court in*** *Les Pas*. ***In our judgment the Court may, in appropriate circumstances, take account of the small size of the Jersey Bar and of the nature of the different firms within that profession.*** Clearly in some cases the small size of the Bar cannot make any difference. For example, if there were a case where a firm was undoubtedly in possession of a substantial amount of highly relevant confidential information and if it was clear that an information barrier could not possibly provide the necessary protection, the Court would be left with no alternative but to restrain the firm from acting. However, where the relevance of the confidential information may be borderline or where the information barrier may be effective, it seems to us that the Court must take into account the consequences of any order it makes. If the consequence of an order prohibiting a firm from acting for a plaintiff were that the plaintiff would find it difficult or impossible to find an appropriate replacement firm, that must be a relevant factor in deciding how the Court should exercise its discretion. As was said in *Koch Shipping Inc v. Richards Butler* [2002] 2 All ER (Comm) 957 ***each case turns on its own facts.*** In some cases the small size of the Jersey Bar will be irrelevant and in others it may be a material consideration. Ultimately the Court

has to do its best to ensure protection of both the competing principles referred to above but, given the small size of the Jersey Bar, the significance of the second principle may be somewhat more material in Jersey than in the United Kingdom if clients are not to be seriously disadvantaged in bringing claims against substantial financial institutions in the Island."

10 Finally, having given its reasons at para 44 for concluding that there was a risk of the confidential information which was undoubtedly in Appleby's hands turning out to be relevant to the Baltic proceedings, the Court went on to say that in coming to its conclusion, it had taken into account two additional factors, the first of minor importance but the second of material significance. It described that second factor in paragraph 47 of the judgment as follows:-

> ***"47 The second factor concerns the question of Gamlestaden being able to obtain alternative Jersey legal representation in the Baltic proceedings.*** There was no evidence before the Court on this aspect but, on enquiry at the hearing, Advocate Le Cocq informed the Court that there were a number of firms who were not conflicted. Mr O'Connell did not dispute that Gamlestaden would be able to find appropriate alternative representation if the Court decided against it and the Court very much took this into account in reaching its conclusion. Given the fairly general and unspecific nature of the relevant confidential information alleged to be held by Appleby in this case, this is one of those cases where, had the evidence been that Gamlestaden was unable to ***obtain appropriate alternative representation, we would have regarded the importance of a claimant against a financial institution in Jersey being able to obtain adequate legal representation as outweighing the risk, in this particular case, of relevant confidential information being used against Abacus*** **."** (emphasis added)

Developments since the Court's decision

11 On behalf of Gamlestaden, the Court has received two affidavits from Mr Fredrik Vinge, a partner in the firm of Swedish lawyers acting for Gamlestaden in the Baltic proceedings. Abacus has also filed two affidavits, one from Mr de Figueiredo and one from Ms Carla Swansberg, senior counsel for the Royal Bank of Canada law group.

12 Prior to the hearing which gave rise to the July judgment, Advocate O'Connell had, as a precaution, obtained the agreement of Advocate X of Firm A to act for Gamlestaden in the Baltic proceedings should the decision go against Appleby in the then forthcoming application. Firm A had carried out their conflict checks and had agreed in writing that they would act. It was because he knew that Firm A could act that Mr O'Connell did not dispute at the hearing that Gamlestaden would be able to find adequate alternative representation should the Court decide that Appleby could not continue to act.

13 It appears that, following the announcement of the decision on 6 th July that Appleby could not continue to act (but before the reasons for the judgment were issued on 27 th July) Advocate X spoke to Ms Swansburg. He indicated that while there was no conflict which prevented Firm A from acting against Abacus, he was aware that they had acted and were acting on a number of matters for the Royal Bank of Canada ("RBC"), the parent company of Abacus. He had some concerns about damaging the overall commercial relationship with RBC. Ms Swansburg discussed the matter internally with others at RBC and concluded that it would be RBC's preference from a relationship perspective that Firm A did not act against RBC. Accordingly she spoke to Advocate X on 12 th July and informed him that, whilst RBC could not stop Firm A acting for Gamlestaden, RBC would prefer them not to. The same day Advocate X sent an e-mail to Mr Vinge stating that RBC did not wish his firm to act in the case and, given the fact that they had a long-standing client relationship with RBC, they felt that they had no choice but to respect RBC's wishes in the matter. They therefore refused to act.

14 After discussing the matter with Advocate O'Connell, an approach was then made on Gamlestaden's behalf to a leading advocate in one of the medium size firms in Jersey but he was unable to act because of a conflict of interest. It was at this stage that the Court's reasons as set out in the July judgment were made available and, following consideration of paragraph 47 of the judgment, Gamlestaden decided to apply to the Court for a variation of its decision.

15 Abacus submits as a preliminary point that the Court is *functus officio* and has no jurisdiction to vary the decision it made on 6 th July as expressed in the July judgment. We must first consider that preliminary objection.

Functus officio

16 The general position in relation to *functus officio* was not in dispute between the parties. The principle was conveniently summarised by Bailhache, Bailiff in *Jersey Evening Post Limited v Al Thani* [2002] JLR 542 at 550:-

> ***"A court is functus when it has performed all its duties in a particular case.*** The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even where a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its rulings on adjudication must be taken to a higher court if that right is available."

17 It is agreed that, in this case, the order reflecting the outcome of the July judgment has been perfected and issued. However, the principle only applies to decisions which can be

regarded as final. To be final a decision does not have to dispose fully and completely of the case. So, for example, in a personal injury claim, judgment on liability, even where consideration of quantum is deferred, cannot be revisited by the first instance court. The only remedy of a dissatisfied party is to appeal the court's decision on liability.

18 The principle does not apply to a decision which, by its nature, is interim or requires continuing monitoring. Thus the Court regularly makes case management decisions in connection with the progress of a case to trial and then varies such decisions in the light of changed circumstances. Similarly, the Court may vary from time to time the terms of an interim injunction and may indeed go so far as to discharge it and then re-impose it. A further example would be where the Court is providing ongoing guidance and direction in connection with a trust. This is a continuing obligation and the Court may re-visit its position from time to time in the light of new developments. The *Al-Thani* case itself is another example of a continuing obligation. The case concerned an order prohibiting the reporting of in camera proceedings and the Court held that the prohibition imposed a continuing obligation so that, if circumstances had changed, it was open to the Court to review or discharge its order.

19 Thus, when determining whether it is *functus*, a court must consider the nature of the decision which it is being asked to vary. Mr Le Cocq argues that the decision that Appleby should not represent Gamlestaden in the Baltic proceedings is a final decision. There was nothing more to be decided as between Abacus and Appleby. The representation of Abacus had asked simply for an order that Appleby be prohibited from acting and this had been granted by the Court. The suit between Abacus and Appleby was exhausted. There was nothing provisional about the order. The Court had granted the full extent of the relief sought by Abacus by granting the order prohibiting Appleby from acting.

20 The Court has carefully considered Mr Le Cocq's submissions but has concluded that it is not *functus* in this case. Our reasons are as follows:-

(i) The decision on legal representation must be put in context. The real matter before the Court is the Baltic proceedings. As part of its supervisory jurisdiction over the legal profession and in order to prevent abuse of its process, the Court will intervene as necessary where it concludes that it would be improper for a particular lawyer to continue to represent a particular party.

(ii) This must be a continuing responsibility for so long as the Baltic proceedings are before the Court. Suppose, for example, that the Court had decided the other way in July and had ruled that Appleby could continue to act for Gamlestaden on the grounds that there was insufficient evidence to show a real risk that Appleby was in possession of relevant confidential information. Suppose further that six months later, incontrovertible evidence were to be forthcoming that in fact Appleby was undoubtedly in possession of highly relevant confidential information obtained from Abacus. It seems to us clear that, in those circumstances, the Court, as part of its continuing responsibility in connection with the conduct of the Baltic proceedings,

would have jurisdiction to make an order prohibiting Appleby from continuing to act. It would be nonsensical to insist on Abacus applying for leave to appeal well out of time against the earlier decision when the whole factual basis of that decision would have changed.

(iii) Mr Le Cocq did not concede that the Court would have jurisdiction in such circumstances. He said that Abacus' remedy would be to seek leave to appeal out of time. However, for the reasons given in the previous sub-paragraph, we do not accept this submission. As a fall-back position, he submitted that, even if the Court was not *functus* in circumstances where it had refused to order Appleby to cease acting, it was *functus* where it had done so. This was because Appleby was now out of the picture and had no continuing involvement in the Baltic proceedings. The position had been finally resolved.

(iv) We do not accept this further submission of Mr Le Cocq. It seems to us that the matter is correctly to be regarded as a form of interim order in connection with the ongoing responsibility of the Court for the conduct of proceedings before it and that this is so whether the initial decision is to allow the lawyer to continue to act or not. Suppose that, following the July decision, a new firm had taken over the conduct of the Baltic proceedings. Suppose further that, in two years time, that firm had to cease acting for good reason and suppose that all the other Jersey firms were by then also conflicted. It seems to us that it would undoubtedly be open to this Court, in fulfilment of its continuing obligation to supervise litigation conducted before it, to re-visit the question of whether Appleby should be permitted to be re-introduced as Gamlestaden's lawyers in the light of the changed circumstances. Mr Le Cocq, whilst accepting that it might be difficult in practice, suggested that, even in two years' time, the only avenue would be an application for leave to appeal out of time against the July decision. It seems to us that that would be highly inappropriate. The correct approach would be for this Court to consider the matter in light of the changed circumstances with either party having a right of appeal to the Court of Appeal against such decision at that time. As Bailhache, Bailiff said in a different context in the *Al Thani* case, if circumstances have changed, it cannot be right to require a litigant to go to the Court of Appeal where the appellate court would have no inkling of the views of this Court on the merits or de-merits of discharging the original order.

(v) It seems to us that the order made in this case is analogous to an interim injunction concerning the preservation of assets, where the Court may undoubtedly vary or revoke its orders from time to time in the light of changing circumstances. Such orders are ancillary to the main proceedings. In this case the main proceedings are the Baltic proceedings. The ancillary issue is the question of which firm of lawyers may represent Gamlestaden in those proceedings. It seems to us that, until the Baltic proceedings have ended, the Court has a continuing jurisdiction to make such orders as it thinks fit concerning the question of legal representation in those proceedings and to vary such orders from time to time in the light of changing circumstances if the interests of justice so require.

21 For these reasons we hold that the Court is not *functus officio* and there is accordingly

jurisdiction to consider the application of Appleby to revoke the order of 6 th July with a view to allowing Appleby to continue to act for Gamlestaden.

Should Appleby be allowed to represent Gamlestaden?

(i) Discussion

22 Mr Vinge's affidavits and that of Mr de Figueiredo in response touch upon the position of various legal firms within the island. We do not think that it would be seemly or appropriate to refer to such matters in this judgment. What follows therefore is a brief summary of each side's position but, in reaching our decision, we have carefully considered all the material put before us as well as counsel's submissions.

23 Mr Vinge explains that the parties behind Gamlestaden consist of a consortium of banks including three of the leading Swedish banks. The amount involved in the Baltic proceedings is large and the proceedings have a high profile within the financial community in Sweden. He points out that they are legally and factually complex; indeed the litigation has already been continuing for some ten years on preliminary legal issues. These have culminated in an appeal to the Judicial Committee of the Privy Council which gave an important judgment clarifying the law in relation to Article 141 of the Companies (Jersey) Law 1991. Mr O'Connell said that, although concerned with Jersey law, the judgment of the Privy Council will be of equal importance to all jurisdictions whose company law in this area is based upon that of the United Kingdom. The legal and factual issues in the main action would be similarly complex.

24 Mr Vinge stated that the leading international legal directories listed five firms in Jersey as being in the first tier of commercial firms in terms of size and reputation. Of these, one was acting for Abacus, two were conflicted, one was Appleby and the fifth was Firm A. He went on to explain in paragraph 19 of his affidavit some of the considerations which would weigh with the banks:-

> *"19 I am also conscious that a case of this size and complexity requires to be presented by an experienced commercial litigation advocate.* It is important to be aware that the banks forming part of the consortium require litigation of this sort to be undertaken by a recognised commercial law firm. Whilst an individual or small organisation might be content to instruct a small law firm or sole practitioner to undertake work on their behalf, this is not in my experience the case with large commercial organisations (such as the banks in this case) where a number of people may be held to account in relation to the choice made of the law firm or adviser selected. Were this case being brought in England, it is a case where Gamlestaden would instruct a major City law firm together with senior commercial Queen's Counsel (as, indeed, it did in the Privy Council) to represent it at trial."

25 He accepted that a number of the medium and smaller firms in Jersey contain advocates of considerable ability who would be capable of undertaking complex heavyweight litigation. However he explained that, in the perception of the banks, size is important. Thus he said this at para 18 of his first affidavit:-

> *"18 As I said, I have no doubt that there are able lawyers in some of the smaller firms in Jersey and if Gamlestaden is forced to instruct a smaller firm in order to progress this litigation in Jersey then it will have to do so.* It would not, however, be Gamlestaden's choice to do so. The importance of having a firm with appropriate resources to deal with a substantial piece of commercial litigation cannot, in my view, be over-estimated. Commercial litigation can be document intensive and can involve a firm having to explore a great many factual and legal avenues as part of the litigation. Having strength and depth is, accordingly, important since it is possible (and, indeed, frequently is the case) that a small firm can be swamped with the work required on a large commercial case. A large firm may be able to dedicate a number of fee earners to deal exclusively with the case. A smaller firm may not have that luxury. Indeed, a large firm may use the lack of resources available to a smaller firm to its tactical advantage. In a case of this sort, which raises complex corporate law issues, it is also important to ensure that the law firm acting has access to lawyers who have corporate law expertise to assist in the preparation of the case."

26 He said that he and his clients agreed with the sentiments expressed by the Court in paragraph 35 of the July judgment, namely that perception was important. It was accepted that this must be reasonable perception, but he emphasised the steps which Gamlestaden had taken to try and obtain representation. He said that it was important for the perception of justice that Gamlestaden should if possible be able to instruct a firm of similar size, resources and standing to that instructed by Abacus. Gamlestaden was entitled, unless it was impossible, to feel confident that there was an equality of arms in such a complex and substantial piece of commercial litigation.

27 Mr O'Connell argued that the basis upon which the Court had reached its decision in the July judgment was now known to be incorrect. Whereas it had been thought that Gamlestaden could be represented by Firm A (with which it would have been entirely happy) that was no longer the case. As the Court envisaged at paragraph 47 of its judgment, the balance now swung in favour of the need to ensure a perception of fairness and equality of arms.

28 Mr Le Cocq submitted that, as mentioned in para 8 above, there were two competing principles which the Court had to consider. He also accepted that, in a case such as this, there might come a time when the need to ensure adequate legal representation outweighed the risk of the misuse of confidential information. However he submitted strongly that that position had not yet been reached. He reminded the Court that it had found that there was a real risk that some of the confidential information in the hands of Appleby relating to Abacus might turn out to be relevant to the Baltic proceedings. Abacus

was entitled to protection from the risk of misuse of such information unless there was a very strong countervailing public interest which outweighed it. This would only arise if the Court was satisfied that Gamlestaden could not obtain adequate alternative representation. It was not a question of Gamlestaden's perception; it was a question of whether adequate representation was in fact available. The Court must view the matter objectively.

29 He referred to Mr de Figueiredo's affidavit which pointed out three firms which, he submitted, were capable of conducting the Baltic proceedings but had not yet been approached by Gamlestaden. He submitted that Gamlestaden's perception that it needed to have a firm of the same size as Ogier in order for there to be equality of arms was not objectively justified and was insufficient to lead the Court to reverse its decision, so as to allow the possibility of Appleby being able to use confidential information acquired from Abacus in a manner contrary to Abacus' interests.

Decision

30 The Court has carefully considered these submissions but has concluded that, in the light of the developments since the original judgment, the balance has now swung in favour of allowing Appleby to act for Gamlestaden. We would summarise our reasons as follows:-

(i) We remain of the view expressed in para 35 of the July judgment (quoted at para 9 above). It is of the first importance to the reputation of Jersey as a jurisdiction where all parties can expect to obtain a satisfactory hearing before an independent and impartial tribunal (which process includes a need for adequate legal representation) that there should not be a perception that it is difficult or impossible to find lawyers of the appropriate calibre and stature to act against substantial financial institutions in the island. It would be a matter of injustice and damaging to the island's reputation if an over-zealous application of the law in this area led to a situation where there was a perception that clients wishing to sue local financial institutions could not obtain representation by firms of lawyers which they considered to be the match of the firm instructed by the financial institution.

(ii) We would of course emphasise that any such perception must be reasonable, but in our judgment Gamlestaden has acted and is acting reasonably in this matter. We accept without hesitation that there are advocates in medium and smaller firms who are perfectly capable of conducting heavyweight litigation with great skill. Many clients would indeed prefer to instruct such a firm in the hope, perhaps, of a more personal service. However, we cannot categorise as unreasonable a view amongst international financial institutions, such as the banks in this case, that they would wish, if possible, to instruct one of the five largest firms in a matter of this value, weight and complexity. We accept that, to such institutions, size is important because of the importance which they attach to depth of resources etc.

(iii) In many cases it will of course not be possible for such an institution to obtain representation from one of the five largest firms. For example, in a piece of litigation

involving many different parties, all the larger firms might already be acting or might be conflicted. In those circumstances, such an institution would obviously have to retain a medium or smaller firm. However, given our assessment that it is not unreasonable for such an institution to wish to instruct one of the larger firms if possible, it is incumbent upon the Court to take that into consideration when deciding where the balance of justice falls in a particular case.

(iv) In this case, Gamlestaden originally instructed Crill Canavan. Following the decision of the Royal Court, *inter alia*, to dismiss the case for want of prosecution (although this decision was subsequently overturned by the Court of Appeal), they chose to move to Appleby, a larger firm. They were prevented from using Appleby by the decision of this Court contained in the July judgment. They then approached Firm A, which they considered to be of suitable size and reputation. However, that firm subsequently refused to act because RBC had expressed a preference that it should not do so. Subsequently Gamlestaden approached a leading advocate in a medium sized firm but he had a conflict of interest. We are satisfied that Gamlestaden has not stuck obstinately to Appleby but has made reasonable endeavours to find alternative representation. In the light of this history, it is not surprising that Gamlestaden should feel thwarted in obtaining representation by a legal firm which it considers to be the match of that retained by Abacus. It cannot presently be represented by any of the five commercial firms said to be in the first tier.

(v) We do not think it right to ignore the circumstances in which Firm A came to refuse to act for Gamlestaden. Firm A was originally willing to act and Gamlestaden was content with the size and stature of the firm. Yet, RBC then stated that it would prefer Firm A not to act for Gamlestaden and Firm A withdrew its agreement to act. There was no conflict of interest which required this; it was merely a question of preference by RBC. It might be thought somewhat rich, RBC having entirely for its own reasons effectively prevented Firm A from acting for Gamlestaden, for Abacus to insist that Gamlestaden should now make do with one of the three remaining firms which are smaller and which Gamlestaden considers to be of lesser stature.

(vi) Firm A is now willing to act for Gamlestaden, having received confirmation from RBC that it no longer has any objection to the firm so acting. However, Gamlestaden has now lost trust and confidence in Firm A and does not wish to be represented by a firm which put its commercial relationship with RBC ahead of its agreement to act for Gamlestaden. In the circumstances, we cannot possibly categorise Gamlestaden's attitude as being unreasonable and we accept therefore that Firm A is no longer a realistic option.

(vii) In the July judgment the Court found the matter to be finely balanced. It was not a case where relevant confidential information clearly existed in the hands of Appleby; nor was it even a case where there was a substantial risk that such information was present. In those circumstances as the Court said at paragraph 36 of the July judgment, the small size of the Jersey Bar would be unlikely to affect the outcome. In this case the assertions by Abacus were of a general unspecific kind and were based essentially upon the fact that the relationship with Appleby concerning the Y matters had been an intense and prolonged one. The Court concluded that there was a risk

that the confidential information which was undoubtedly in Appleby's hands in connection with the Y matters might turn out to be relevant to the Baltic proceedings. As against that the Court was informed that there would be no difficulty in Gamlestaden obtaining alternative representation. In the circumstances the safe and prudent course was clearly to restrain Appleby from acting on the basis that no prejudice would be caused to Gamlestaden by such an order whereas there was a risk - albeit small - of prejudice to Abacus if Appleby were not restrained.

(viii) However, as the Court made clear in para 47 of the July judgment, had the evidence been that Gamlestaden was unable to obtain appropriate alternative representation, the Court would have regarded the importance of a claimant against a financial institution in Jersey being able to obtain adequate legal representation as outweighing the risk in this particular case of relevant confidential information being used against Abacus. We are satisfied that, given that RBC has effectively prevented Firm A from acting for Gamlestaden for its own commercial reasons, there will, if the Court maintains the prohibition on Appleby acting, be a reasonable perception on the part of Gamlestaden that it is not being allowed to obtain representation which it considers to be the match of that at the disposal of Abacus. For the reasons already given, we think that that would be a highly unsatisfactory situation which should be avoided if reasonably practicable. It is a question of balancing the two competing principles referred to earlier. Given the very general and unspecific nature of the confidential information said to be in the possession of Appleby in relation to the Y matters and given our finding that the risk of such information turning out to be relevant to the Baltic litigation only just crossed the threshold so as to justify restraining Appleby from acting, we have concluded that the need to allow Gamlestaden to have legal representation which it reasonably considers to be the match of the opposition now outweighs the small risk of relevant confidential information being in the possession of Appleby and being used against Abacus.

31 In all the circumstances we therefore remove the prohibition on Appleby acting for Gamlestaden in connection with the Baltic proceedings.