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Abacus (CI) and Anor v Bisson and Ors

Jurisdiction:	Jersey
Judge:	Deputy Bailiff
Judgment Date:	27 July 2007
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Text

[2007] JRC 150

ROYAL COURT

(Samedi Division)

Before:

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

1. Abacus (CI) Ltd
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

Foss v Harbottle (1843) 2 Hare 461.

Hirschfield v Sinel [1999] JLR 55.

Prince Jefri Bolkiah v KPMG [1999] 2 AC 222.

Re a firm of Solicitors [1997] Ch 1.

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

Credit Suisse (Guernsey) Limited v Perrot and Others (4 th August 2003)

Marks & Spencer Plc v Freshfields [2004] I WLR 2331.

Dinning v Ozannes (2 nd September 2004).

Cockram v Loyalty Brokers Limited, (25 th June 1992).

Ozannes v Beetle Holdings Limited (10th April 2003).

Koch Shipping Inc v. Richards Butler [2002] 2 All ER (Comm) 957.

Re a firm of Solicitors [1992] 1 All ER 353.

Hollander - Conflict of Interest and Chinese Walls at 2-55 - 2-60

Marks & Spencer Group Plc v Freshfields [2005] PNLR 4.

Deputy Bailiff

1 This is an application by the representors ("Abacus" and "Mr de Figueiredo" respectively) for an order that the respondents ("Appleby") should cease to represent a Swedish entity

called Gamlestaden Fastigheter AB ("Gamlestaden") in certain proceedings currently before the Royal Court. We announced our decision on 6 th July and now give our reasons.

The Baltic Proceedings

2 It is necessary briefly to describe those proceedings. In August 1997 Gamlestaden, in its capacity as a shareholder of a Jersey company called Baltic Partners Limited ("Baltic") instituted proceedings by order of justice ("the Original Proceedings") against Mr de Figueiredo, Mr Bailey and Mr Boleat (who were all directors of Abacus) and Abacus itself. The claim arose out of certain actions taken by Mr de Figueiredo, Mr Boleat and Mr Bailey in their capacity as directors of Baltic. It is not necessary to go into any detail concerning these proceedings. In essence, Gamlestaden contends that certain actions taken by the directors of Baltic have caused it considerable loss. The actions were, *inter alia*, to agree to a Mr Karlsten and a Mr Hansen (partners with Baltic in a German limited partnership investing in commercial property in Germany) withdrawing substantial sums from the German partnership and then agreeing to the conversion of the limited partnership into a limited liability company. It is alleged that the effect of these two actions, together with certain associated decisions of the directors, had a catastrophic consequence on Baltic's financial position. Indeed, Baltic was in due course declared *en désastre* in May 1995. Gamlestaden says that it has suffered a loss in the region of DM98m by reference to the loss in value of its shares in Baltic. It has therefore sued for that amount. Abacus was joined in the proceedings because it had provided Messrs de Figueiredo, Bailey and Boleat as directors of Baltic.

3 This order of justice was struck out in February 1998 by the Greffier on the grounds that the action by Gamlestaden (as a shareholder of Baltic) was in breach of the rule in *Foss v Harbottle* (1843) 2 Hare 461. There was an appeal to the Royal Court, which was stayed in July 1998 pending an application by Gamlestaden under Article 141 and 143 of the Companies (Jersey) Law 1991. These latter proceedings ("the Second Proceedings") sought damages for breach of duty against the directors of Baltic and also sought permission for Gamlestaden to be at liberty to conduct the Original Proceedings in the name of and on behalf of Baltic. The Second Proceedings were struck out by the Royal Court in July 2004, which decision was upheld by the Court of Appeal but was reversed by the Privy Council in April 2007. It is not entirely clear in what form Gamlestaden will now take forward its proceedings but the essential nature of its claim is that it alleges that Mr de Figueiredo, Mr Boleat and Mr Bailey were in breach of their duties as directors of Baltic and that such breaches have caused considerable loss to Gamlestaden, which is put at not less than DM98m.

4 Abacus is a party to the Original Proceedings but is not a party to the Second Proceedings. We were informed by Mr O'Connell that, if Appleby remain the legal advisers to Gamlestaden, the Original Proceedings will be discontinued against Abacus (but not against the directors). However, we were also informed by Mr de Figueiredo in his affidavit that all directors of Abacus are indemnified by Abacus against liabilities incurred as a result

of their acting as directors of companies administered by Abacus. It follows that, if Mr de Figueiredo and the other directors are found liable in any of the Baltic proceedings, the financial burden is likely to fall upon Abacus.

The background to the application

5 Until September 2004 Gamlestaden was represented by Crill Canavan. However in that month Gamlestaden withdrew instructions from Crill Canavan and instructed Appleby. By a letter dated 15th September 2004 Ogiers, on behalf of the representors, objected to Appleby acting but the validity of this objection was not accepted by Appleby. Since then, by agreement, Appleby have continued to act for Gamlestaden in relation to the appeal to the Court of Appeal and Privy Council because these raised pure issues of law. However, now that, following the decision of the Privy Council, the proceedings have been resuscitated, it is necessary to resolve the objection to Appleby continuing to act for Gamlestaden. We should add as a matter of technicality that at present Appleby is only instructed in relation to the Second Proceedings. It is not currently instructed in relation to the Original Proceedings. However, nothing turns on the point and clearly our decision would be as applicable to the Original Proceedings as it is to the Second Proceedings.

6 Appleby are not Abacus' lead lawyers. However, Abacus has on occasions instructed Appleby in relation to particular trusts of which it is trustee or particular companies which it administers. According to the affidavit sworn by Mr Michael Cushing, a lawyer employed by Appleby, the firm's records show 22 active files opened by Appleby in the name of Abacus since 1994. The total amount of time recorded on those files is £924,110. Of this, the sum of £833,004 is recorded on two files, both of which relate to the affairs of a Mr Y. The remaining £91,106 is recorded on the other 20 files.

7 Abacus is the trustee of one or more trusts created by Mr Y. Mr de Figueiredo was the lead director for Abacus in relation to the Y Trusts and he was also director of some 17 companies within those trust structures. On 30 th August 2002 Mr de Figueiredo approached Appleby for advice in relation to the Y Trusts arising out of Mr Y's problematic financial position. Indeed Mr Y was declared *en désastre* on 9 th October 2002. Very complex issues arose as a result. These included a possible settlement with creditors, an application under the Trusts Law, an attack by a third party on a particular asset within the trust structure and possible attack by the Viscount on the assets of the trusts, amongst other matters. Mr de Figueiredo dealt not only with the commercial department at Appleby but also with the dispute resolution group, including Advocate O'Connell, Advocate Robinson and Advocate Robertson.

8 The Y matter was a very significant and time consuming matter. According to Mr de Figueiredo, it was the most significant matter with which Abacus had to deal during this two-year period in terms of legal fees incurred. His records show that he attended some forty meetings with members of Appleby lasting a total of 79 hours. In addition he had innumerable telephone conversations, exchanges of correspondence etc. He attended

upon members of the dispute resolution team in order to swear affidavits. The relationship between him, on behalf of Abacus and Appleby was one of complete trust and confidence. By way of example, he states that a legal assistant to Advocate Boxall (one of the commercial partners of Appleby) spent some ten days in Abacus' open plan office having unsupervised access to all the files in connection with any of the Y entities. No record was kept of what he had looked at or what he had copied for retention by Appleby.

9 Mr de Figueiredo accepts that he is unable to give concrete examples of specific conversations containing confidential information which would be relevant to the Baltic litigation. However, he asserts that, during the course of such a concentrated relationship, he inevitably discussed and disclosed to Appleby confidential Y matters which might well assist Appleby in the conduct of its litigation against him in relation to the Baltic litigation. He says repeatedly in his affidavits that, had he had any thought during this relationship of trust and confidence with Appleby that they might subsequently accept instructions on behalf of Gamlestaden in connection with the Baltic litigation (which was of great concern to him and had been continuing since 1997), he would have behaved very differently in his dealings towards Appleby staff.

10 Mr de Figueiredo has sworn four affidavits since September 2004 setting out his concerns. We have of course considered all that he has said but we would give a brief summary of his main concerns as expressed in those affidavits as follows:-

(i) He talked to members of Appleby about the way in which Abacus manages its client companies, its communications with those companies, its approach to risk in respect of those companies and how the directors run those companies. In particular Appleby would have acquired from him a detailed knowledge of how he in particular worked as a director of client companies because he was the key director in relation to all the Y companies. This was significant because it was also of course his conduct as a director of Baltic which will be under the microscope in the Baltic litigation. He pointed to one particular matter where a question arose as to the validity of security taken over a Mitsubishi aircraft owned by one of the Y companies of which he was a director. A claim was subsequently brought by another entity claiming ownership of the aircraft. The dispute resolution team at Appleby advised settlement on the basis that Mr de Figueiredo may have had constructive notice of the interest of the claimant. This was an occasion therefore where Mr de Figueiredo's conduct as a director was an essential issue for Appleby to consider and advise upon.

(ii) He spoke to Appleby about the ownership structure of Abacus.

(iii) He spoke to Appleby of the approach to business and personal characteristics of at least of some of the key senior management at Abacus.

(iv) Although he cannot recall to whom he spoke or the context of the discussion or the level of information which he passed on, he recalls having spoken of Abacus' insurance cover to Appleby. He believes that any information about such cover would be of assistance to Gamlestaden in the Baltic litigation.

(v) He spoke to Appleby of Abacus' approach to litigation generally and the settlement thereof.

11 He summarised the overall position in para 22 of his second affidavit which we quote in full:-

> *"The above list is not in any way exhaustive.* I have spent hundreds of hours communicating with Bailhache Labesse and I have discussed a great many issues with Bailhache Labesse, some directly relevant to the matters which Bailhache Labesse were advising Abacus on, some not. We had the sorts of discussions one might expect a client would have with its trusted confidante during a period during which that confidante was doing a great deal of work for the client. Again, if I had been aware that Abacus might be put in the position it now finds itself in, I would not have taken the same approach. I would have been much more cautious in what I discussed and in what material I allowed Bailhache Labesse access to. It is fair to say that Bailhache Labesse has had the opportunity to gain, from an outside point of view, an almost unparalleled insight into Abacus as an organisation and its working practices and into my attitude, character and working practices as a director of Abacus, which was only given to them as part of the total confidence I placed in them as Abacus' lawyers."

At the date of the affidavit, Appleby was known as Bailhache Labesse; hence the references to that name in the affidavit.

12 On behalf of Appleby, Mr Michael Cushing has sworn an affidavit in response. He is a member of the dispute resolution group at Appleby. He begins by pointing out that Appleby is not and never has been the principal legal adviser to Abacus. It has never given corporate, commercial or litigation advice to Abacus in relation to Abacus' own corporate affairs. It has only given advice in relation to discrete issues in relation to trusts where Abacus is trustee or in relation to companies which Abacus administers. That was the position in relation to the Y matters. He also points out that the evidence of Mr de Figueiredo is given in extremely general terms which makes it difficult to respond. He has however spoken to each partner of Appleby who has undertaken a substantive amount of work on files opened in the name of Abacus, namely Advocates Boxall, Lewis, Robinson, Robertson and O'Connell. Each of those partners has confirmed to him that, to the best of their recollection:-

(i) Any information received by them from Abacus has related directly to the individual companies in relation to which they were instructed and does not relate to Abacus' general practices, its communication with companies or Abacus' approach to risk in relation to companies.

(ii) They have no knowledge of the ownership structure of Abacus other than information in the public domain or gained otherwise than through acting for Abacus.

(iii) They have no knowledge of the general approach to business of Abacus or the key senior management at Abacus.

(iv) They cannot recall having been given any information as to Abacus' insurance coverage.

(v) They have no knowledge of Abacus' approach to litigation generally or to the settlement of litigation. In each case where advice has been given by Appleby in relation to contentious issues, that advice has related to the facts and merits of the particular matter. If Abacus has an approach to litigation generally and to the settlement of litigation, they assert that Appleby has no knowledge of it.

The nature of the application

13 Abacus seeks an order that Appleby should be prevented from acting for Gamlestaden in the Baltic litigation on two grounds. These are:-

During the hearing, Mr Le Cocq concentrated almost entirely on the first of these grounds and indeed accepted that, on the particular facts of this case, the second ground added nothing to the first ground, so that if he did not succeed on the first ground, he would not succeed on the second ground. In those circumstances, like counsel, we shall concentrate on the first ground although we shall mention the second ground briefly at the end of this judgment.

(i) Appleby is in possession of confidential information acquired from Abacus which may be relevant to the Baltic litigation, where the interests of Appleby's new client Gamlestaden are adverse to those of Abacus;

(ii) Appleby cannot act at the same time for Abacus and Gamlestaden where those two clients have conflicting interests.

The Law

14 In *Hirschfield v Sinel* [1999] JLR 55, the Court (per Southwell Commissioner) held that the law of Jersey in this area was similar to English law as summarised in the leading English case of *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222. Both counsel in this case accepted that this was so.

15 The speech of Lord Millett in *Prince Jefri* explains the position so clearly and helpfully that it is worth quoting from it at some length. Having first touched upon the position where a solicitor is in a position of conflict of interest in relation to a current client, he moved on to consider the question of whether a solicitor could act against a former client. He said this at 235:-

"Where the court's intervention is sought by a former client, however, the position is entirely different. The court's jurisdiction cannot be based on any

conflict of interest, real or perceived, for there is none. The fiduciary relationship which exists 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 .

Accordingly, it is incumbent on a plaintiff who seeks to restrain his former solicitor from acting in a matter for another client to establish (i) that the solicitor is in possession of information which is confidential to him and to the disclosure of which he has not consented and (ii) 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. Although the burden of proof is on the plaintiff, it is not a heavy one. The former may readily be inferred; the latter will often be obvious. I do not think that it is necessary to introduce any presumptions, rebuttable or otherwise, in relation to these two matters. But given the basis on which the jurisdiction is exercised, there is no cause to impute or attribute the knowledge of one partner to his fellow partners. 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. In this respect also we ought not in my opinion to follow the jurisprudence of the United States .

The extent of the solicitor's duty

Whether founded on contract or equity, the duty to preserve confidentiality is unqualified. It is a duty to keep the information confidential, not merely to take all reasonable steps to do so. Moreover, it is not merely a duty not to communicate the information to a third party. It is a duty not to misuse it, that is to say, without the consent of the former client to make any use of it or to cause any use to be made of it by others otherwise than for his benefit. 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 risks; 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."

16 Lord Millett then goes on to consider the question of the degree of risk of disclosure which is permitted. He had this to say at 236:-

"My Lords, I regard the criticisms which have been made of the test supposed to have been laid down in *Rakusen's* ***case*** [1912] 1 Ch 831 ***as well founded.*** It imposes an unfair burden on the former client, exposes him to a potential and avoidable risk to which he has not consented, and fails to give him a sufficient assurance that his confidence will be respected. It also exposes the solicitor 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 .

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. Where in addition the information in question is not only confidential but also privileged, the case for a strict approach is unanswerable. Anything less fails to give effect to the policy on which legal professional privilege is based. It is of overriding importance for the proper administration of justice that a client should be able to have complete confidence that what he tells his lawyer will remain secret. This is a matter of perception as well as substance. It is of the highest importance to the administration of justice that a solicitor or other person in possession of confidential and privileged information should not act in any way that might appear to put that information at risk of coming into the hands of someone with an adverse interest .

Many different tests have been proposed in the authorities. These include the avoidance of 'an appreciable risk' or 'an acceptable risk.' I regard such expressions as unhelpful; the former because it is ambiguous, the latter because it is uninformative. I prefer simply to say that the court should intervene unless it is satisfied that there is no risk of disclosure. It goes without saying that the risk must be a real one, and not merely fanciful or theoretical. But it need not be substantial....."

17 We were referred to a number of cases in England and Guernsey as well as Jersey. This was helpful. However, many of them were what Mr O'Connell conveniently labelled as 'information barrier' cases; in other words there was no dispute in those cases as to whether the former solicitors were in possession of confidential information which was relevant to the new matter upon which they had been instructed. The sole issue was whether they had put in place sufficient measures or barriers (such as Chinese walls) to prevent the information known to some members of the firm from becoming known to those who were acting for the new client with an adverse interest. Indeed that was the issue in the *Prince Jefri* case itself.

18 That is not the case here. Mr O'Connell accepts that Appleby is in possession of confidential information received from Abacus. He also accepts that, given the wide dissemination of such information that has already taken place within Appleby by reason of the number of different members of the firm who were consulted by Abacus in connection with the Y Trusts, an effective information barrier would be impossible to construct. The sole issue therefore in this case is whether the confidential information received by Appleby from Abacus' in relation to the Y matters 'is or may be' (to use Lord Millett's words) relevant to the Baltic litigation. (Emphasis added)

19 Lord Millett did not elaborate on what he meant by 'may be' relevant because it was not necessary to do so in that case. We have not been referred to any case which addresses this point directly. However there are two cases which are of some assistance. The first is in *Re a firm of solicitors* [1997] Ch 1, a decision of Lightman, J. The facts in that case were that the firm of solicitors had acted for the plaintiff in very substantial international patent litigation. The first defendant ("the former partner") was a partner in that firm whilst it was acting for the plaintiff but had not been involved in the litigation. The former partner left and joined another firm. That second firm was two years later instructed by one of the defendants in the patent litigation and indeed the former partner was the individual instructed in the new firm. The plaintiff sought to restrain the new firm from acting for the defendant. Although the evidence showed that the former partner had no recollection of any communication to him of any confidential information whilst he had been a partner at the firm, the concern of the plaintiffs was that confidential information may have been communicated to him, that he might have forgotten it but that his memory might subsequently be triggered and he might inadvertently thereafter make use of it. The judge focused very much on the position of a partner in a firm (which undoubtedly held relevant confidential information) leaving that firm and moving to another which acted for a party with an adverse interest. In those circumstances he held that the burden lay on the new firm to show that there was 'no real risk' that the transferring partner held any confidential information. On the facts of the case he held that the former partner had satisfied him that there was no real possibility that relevant confidential information was ever communicated to him.

20 Secondly, in *Prince Jefri* itself, when considering the degree of risk that relevant confidential information might be disclosed, Lord Millett applied a strict test and held, in the passage cited at para 16 above, the court should intervene unless satisfied that there was no real risk of disclosure. The risk should not be fanciful or theoretical but it did not need to be substantial.

21 We accept that neither of these two cases is directly on point. Lightman, J was concerned with the degree of risk that a transferring partner might possess relevant confidential information and Lord Millett was concerned with the degree of risk that such information might be disclosed. Conversely, we are concerned with a somewhat different issue, namely the degree of risk that confidential information may turn out to be relevant for the purposes of the subsequent proceedings. However, it seems to us that two cases assist us in our task. In both cases great emphasis was placed upon the need to ensure so far as practicable that relevant confidential information obtained from a client was not subsequently used against that client. Hence, in each case, the degree of risk was fixed at a very low level. It seems to us that the same principle must apply in relation to the issue of whether the information may be relevant. Accordingly we hold that information 'may be' relevant if there is a real (as opposed to a fanciful or theoretical) risk that it is relevant.

22 Mr Le Cocq referred to a number of cases with the view to assisting the Court on the question of relevance.

23 *Les Pas Holdings Limited v Receiver General* [1995] JLR 163 was concerned with a dispute over ownership of the foreshore in Jersey. Les Pas had instructed a firm called Bois Labesse and Advocate Falle was the partner with conduct of the case. He discussed the merits of the company's claim with some of his partners and the partnership was also aware of the financial position of Les Pas. Subsequently Bois Labesse merged with Bailhache & Bailhache to become Bailhache Labesse, although Advocate Falle left immediately prior to that occurring, taking Les Pas with him as a client. Subsequently Bailhache Labesse (in the form of Advocate Bailhache who had come from the Bailhache & Bailhache side) was instructed to represent the Receiver General and Les Pas objected on the grounds that the firm was in possession of relevant confidential information. The Court found that the information in the possession of Bailhache Labesse related to the financial position of the company and that this could be relevant because knowledge of the financial resources (or lack thereof) of the company might well inform the manner in which the Receiver General conducted the litigation, which was very substantial. The Court held that this was relevant and that the information barrier put in place was insufficient. We agree that this was an obvious case where the confidential information in question was clearly relevant as it could clearly have influenced the conduct of the litigation by the Receiver General.

24 In *Credit Suisse (Guernsey) Limited v Perrot and Others* (4 th August 2003) the Royal Court of Guernsey considered an application by Credit Suisse to restrain Ozannes from acting for a Mr M in an action he was bringing against the bank for wrongful termination of his employment by the bank. The judgment of Carey, Bailiff suggests that the Credit Suisse Trust Company had almost exclusively instructed Ozannes in all contentious and non-contentious matters but that more particularly, Ozannes had acted for the bank in an action for wrongful dismissal brought against the bank by a Mr C. On that occasion Mr M had instructed Ozannes on behalf of the bank. It appears that the issues in both cases were similar in that both dismissals had arisen because of alleged failures (by Mr C in the first case and by Mr M in the present case) to respect the compliance and know your customer procedures required by the bank. Not surprisingly, the Royal Court held that, given that the two dismissals were for similar reasons, the knowledge acquired by Ozannes when acting for the bank in respect of the claim brought by Mr C was confidential information which would be relevant to the claim brought by Mr M against the bank. The Court therefore restrained Ozannes from continuing to act for Mr M.

25 Mr Le Cocq placed particular reliance on the case of *Marks & Spencer Plc v Freshfields* [2004] I WLR 2331. It appears from the judgment that Freshfields were one of a number of firms that, over the years, had been instructed by Marks & Spencer ("M&S"). In particular the judge found that Freshfields had acquired confidential information about the supply chain, including the term of supply of contracts, pricing policies, supply volumes and M&S's attitude to termination and renewal of the same. In addition, they had acquired information about logistical arrangements such as processes of transportation, dependency on food supply lines and the Per Una product range, including the terms of the contractual arrangements with Mr Davies in connection with that range and also information about senior management contracts. The Davies contract was a very important part of the M&S business. Freshfields were subsequently instructed by a consortium which wished to make

a bid for M&S. M&S sought to restrain Freshfields from so acting. The case was mainly concerned with whether there was a conflict of interest, because Freshfields were still acting for M&S on a number of matters, including the Davies contract. However the case was also put on the basis of possession of relevant confidential information. The judge gave a very brief conclusion on this topic as follows:-

> ***"On the second, and alternative, basis of the application, there is, obviously, a huge amount of confidential information relating to the affairs of M&S within Freshfields.*** Some of it is, plainly, material to a potential bid, if only to be discarded as not being sufficiently important."

26 Mr Le Cocq places particular reliance on the fact that information about M&S's attitude to certain matters was held to be relevant. He sought to draw an analogy with Mr de Figueiredo's evidence that Appleby had learnt about his attitude towards being a director and Abacus' attitude towards litigation. However, we regard the nature of the confidential information described in the M&S case as being very different. There was clearly detailed specific evidence about the confidential information held which enabled the judge to reach a clear view on relevance. We are not surprised that the judge reached the conclusion which he did in that case.

27 We were referred next to the Guernsey case of *Dinning v Ozannes* (2nd September 2004). The jurisprudential basis of the decision was very different to that which we are considering but Mr Le Cocq relies upon it to show the sort of confidential information which the Court may consider to be relevant. In summary Ozannes had been acting for some time for an Advocate G in his divorce proceedings. Advocate G was a partner in another firm of advocates and a shareholder in that firm's trust company. Ozannes were fully aware of his financial position. Miss Dinning (the applicant) was a partner and shareholder in the same firm of advocates and trust company respectively as Advocate G. Proceedings were subsequently launched against her by IFS Investments Limited seeking some £32m in damages. Ozannes (acting through the same advocate as represented Advocate G) acted for IFS. Thus Ozannes (through confidential information received by acting for Advocate G) were aware of the detailed financial position of the applicant, who was a defendant in the IFS proceedings. The applicant sought to restrain Ozannes from acting for IFS. Day, Lieutenant Bailiff, held that the information might be relevant. We refer to two paragraphs in his judgment:-

> ***"23 Of much more significance, in my view, and as Mr Collas argued, is the use to which knowledge of the applicant's financial partnership affairs might play in the general conduct of the litigation and in negotiations between the parties.*** This is an intangible factor. It is not just a question of what use of the information might, or might not, be made by IFS. It is equally, in my assessment, a question of the potential uncertainty on the part of the applicant as to whether or not that private information is in fact being used to inform the conduct of the litigation or the negotiations. It must also be remembered that such information might reveal either financial strength or weakness and the ongoing duty of disclosure by Mr G in the matrimonial proceedings might

provide a changing picture of the value of the firm and the trust company. As Mr Collas said, the impact of the litigation might be revealed .

....

31 Whilst it has to be admitted that there is no immediately obvious way which any private information Mr Ferbrache **[the partner in Ozannes]** ***has with regard to the financial Y affairs of the applicant can be relevant to the substantive litigation, I consider that its potential influence is more intangible and insidious.*** The fact that it may, at some time or times, during the course of this litigation impact to a greater or lesser extent on the position of the parties cannot be discounted. It seems to me that the wiser policy is to eliminate that possibility, which I certainly regard as more than fanciful, now and not have to address the problem again later."

Ozannes were therefore restrained from acting for IFS.

28 Mr O'Connell emphasised that it is not sufficient to make general allegations that a firm is in possession of relevant confidential information. He referred us to page 10 of the judgment of Lightman, J in *Re a firm of Solicitors* (referred to at para 19 above) where the judge said this:-

"On the issue whether the solicitor is possessed of relevant confidential information: (a) it is in general not sufficient for the client to make a general allegation that the solicitor is in possession of relevant confidential information if this is in issue: some particularity as to the confidential information is required: see *Bricheno v Thorp* Jac 300 and *Johnson v Marriott* (1833) 2 C & M 183. ***But the degree of particularity required must depend upon the facts of the particular case, and in many cases identification of the nature of the matter on which the solicitor was instructed, the length of the period of original retainer and the date of the proposed fresh retainer and the nature of the subject matter for practical purposes will be sufficient to establish the possession by the solicitor of relevant confidential information."***

29 Mr Le Cocq conceded the principle described above but countered with the decision of Timothy Walker J in *Re a Firm of Solicitors* [2000] 1 Lloyds LR 31. The case related to the insurance market and the facts are somewhat complicated; but in very simple terms the position appears to have been as follows. A club sued the P defendants for certain monies. The P defendants instructed the solicitors. The P defendants alleged by way of defence that the club had failed to disclose certain relevant matters. As a result the club gave notice of this potential claim to its insurers. This first set of proceedings was referred to as the P Proceedings. The club was also involved in other litigation. Having obtained a worthless judgment against reinsurers called Equihot, the club sued its brokers for negligence in recommending Equihot. It was met with a defence that the club itself had been negligent. Accordingly the club gave notice of this possible claim to its insurers. This second set of

proceedings was referred to as the Broker Proceedings. In connection with the possible claim arising out of the Broker Proceedings, the insurers instructed the same solicitors as were retained by the P defendants. However the solicitors were not (and never were) instructed by the insurers in relation to the possible claim arising out of the P Proceedings themselves. The club sought to restrain the solicitors from acting for the P defendants in the P Proceedings on the basis that, in their capacity as solicitors to the club's insurers in relation to the Broker Proceedings, there was a risk of the solicitors obtaining relevant confidential information belonging to the club.

30 The club alleged that there was in fact a link between the P Proceedings and the Broker Proceedings in that the failure of Equihot was one of the reasons which impacted on the amount claimed in the P Proceedings. It was said that the P defendants could rely upon the negligence of the club in failing to effect adequate reinsurance. The judge held that this was a somewhat tenuous link and that the relative weakness of the link was a matter which he should take into account when considering the existence of any real, as opposed to theoretical, risk of disclosure adverse to the club's interest. He nevertheless held as follows on page 34.

> ***"3 Relevance***
>
> ***Counsel for the club accepted that it is not enough for a client to make a general allegation that its solicitors were in possession of relevant confidential information, and that some particularity is required (see the judgment of Mr Justice Lightman in*** *Re a firm of Solicitors* [1997] 1 Ch 1 ***at p 10E to 10G).*** He was however not in a position to identify any specific relevant information. He invited me simply to infer that there was some .
>
> ***Having regard to the future as well as to the past, I am prepared to draw the inference that some of the existing (or future if the dormant file revives) information imparted by the club to the solicitors on behalf of the [insurers] is or maybe relevant to the proceedings.*** I am unable to specify the precise nature of the information, or the degree of its relevance. It can of course only be relevant to the extent of the "inter-twining of issues" on which the club relies, and its relevance is necessarily limited in that sense."

Having held that the solicitors may be in possession of relevant confidential information, the judge went on to hold that in fact there was an adequate information barrier in existence in that case and accordingly he refused to grant an injunction.

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.

32 It is in relation to the second principle that the small size of the Jersey Bar may be relevant. In the Guernsey case of *Cockram v Loyalty Brokers Limited*, (25 th June 1992) Carey, Deputy Bailiff, held that, when considering the application of the law in this area, the Court should have regard to the small size of the Guernsey Bar and to the public interest in ensuring free access to members of the Bar. It should accordingly adopt greater flexibility than was shown in larger jurisdictions. In *Ozannes v Beetle Holdings Limited* (10th April 2003) the Guernsey Court of Appeal held (admittedly in the context of information barriers), that the small size of the Guernsey Bar was a relevant consideration and that tests which may be appropriate in London should not be applied without changes appropriate to the different circumstances in Guernsey.

33 The only case in Jersey in which this matter appears to have arisen is the *Les Pas* case. Crill, Commissioner said this at page 175:-

> ***"The Court wishes to add this.*** It considered whether the size of the Bar in Jersey would have justified it in holding that, as in Guernsey, it should approach the instant case with a greater degree of flexibility than that adopted by the English courts. The Court felt unable to do so. In its opinion, the principle of justice being seen to be done outweighs the right of a litigant to choose his own advocate notwithstanding the relatively small size of the Jersey Bar."

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.

The parties' contentions

37 Mr Le Cocq and Mr O'Connell both put in detailed skeleton arguments and supplemented these with persuasive oral submissions. We have carefully considered all of the points that they made. What follows is merely the briefest summary in order to indicate the stance taken by each side.

38 Mr Le Cocq accepted that the evidence that Appleby was in possession of relevant information was very general but he emphasised that it nevertheless showed that there was a real risk of such information existing. The important factor was that, over a two year period immediately prior to Appleby being instructed by Gamlestaden in 2004, Appleby had, because of the Y matter, gained unparalleled insight into the way in which Mr de Figueiredo (and therefore Abacus) dealt with matters as a trustee and as a director of client companies. It was not surprising that Mr de Figueiredo could not recall the detail of what he had said. There had been some forty meetings over seventy nine hours together, no doubt, with umpteen telephone conversations. It was obvious that during that time, conversation would have taken place on a wide ranging basis because of the complete trust and confidence which Mr de Figueiredo placed in his lawyers. It was particularly significant that, in one area of the Y matter, Mr de Figueiredo's performance as a director had come under the microscope. Abacus and Mr de Figueiredo were entitled to be confident that information which they had provided in confidence to their lawyers should not inform the conduct of

subsequent litigation against them. Mr Le Cocq emphasised that there was no suggestion that any member of Appleby would deliberately use confidential information obtained from Abacus and Mr de Figueiredo, but the danger lay in inadvertent use. Information currently not remembered by members of the firm could be triggered by a future event. In short, the importance of protecting the principle described by Lord Millett in *Prince Jefri*, namely the overriding importance to the proper administration of justice that a client should be able to have complete confidence that what he tells his lawyer will remain secret and that this is a matter of perception as well as substance, pointed strongly in favour of Appleby's being prohibited from acting in this case.

39 Mr O'Connell, on the other hand, submitted that there was simply no evidence that anything relevant to the Baltic proceedings had been disclosed to Appleby. The firm had been instructed to advise on the Y matters. Those instructions required advice on the legal and factual issues in relation to those trusts and companies. Nothing said or done in relation to those entities could be relevant to whether Mr de Figueiredo had, when acting as a director of Baltic, acted in breach of his duties as a director in taking the particular steps complained of in the Baltic proceedings. There was simply no connection between the two matters. He accepted that it was possible to envisage an extreme case where confidential information obtained in relation to the Y matters might be relevant to the Baltic litigation - e.g. if Mr de Figueiredo had said to Appleby that the invariable policy of Abacus when it or any of its directors were sued, was to fight the matter all the way to the door of the court but then settle. That would clearly be capable of informing Appleby's conduct of the Baltic litigation on behalf of Gamlestaden. However there was no such allegation in this case. There was simply vague evidence about general discussions which Mr de Figueiredo thought he had had with members of Appleby. Abacus had simply not crossed the threshold of showing that there was a real risk of relevant information being in the hands of Appleby members and he referred to the affidavit of Mr Cushing confirming that, having spoken to the relevant partners, none of them could recall any information which they thought was capable of being used in the Baltic proceedings. Furthermore, the Court must consider the capacity in which Abacus was acting. Appleby's client was Abacus as trustee of the Y Trusts; alternatively the client was one of the companies within the Y trust structure. Conversely, the defendant in the Baltic proceedings was Mr de Figueiredo as an individual. He submitted that in all the cases to which the Court had been referred, there had been tangible evidence of relevant confidential information. It was not sufficient for a party to talk in such general terms; there had to be more specific evidence pointing to the existence of relevant confidential information.

Decision

40 We propose first to deal briefly with the point raised by Mr O'Connell concerning the identity of the parties. He points out that Appleby's client in respect of the Y affair was either Abacus in its capacity as trustee of the relevant trust or one of the companies within the trust structure. It was not Abacus in its own right. Furthermore the Baltic proceedings are - or are to be—against Mr de Figueiredo and the other two directors only, not against Abacus.

41 It is clear from the case in the English Court of Appeal of *Re a firm of Solicitors* [1992] 1 All ER 353 that the Court will take a pragmatic and commonsense view of the position in this respect. In that case a company called ASM was the client of the firm of solicitors. In the course of the retainer the firm received confidential information from companies (the A&A companies) which were wholly independent of but closely related to ASM. After the end of the retainer, one of the A&A companies commenced an action against a defendant who then instructed the firm. The relevant A&A company sought to restrain the firm from acting on the grounds that it was in possession of relevant confidential information obtained from the A&A companies. The Court of Appeal held that the A&A companies should be treated as informal clients such that the firm owed them similar duties to those which it would have owed if they had been clients in the strict sense.

42 We accept that in many cases the capacity in which a company such as Abacus instructs lawyers will be important. Thus if Abacus, as trustee of Trust A, instructs a firm of lawyers which subsequently acts for clients who sue Abacus in its capacity as trustee of Trust B, it is likely that in the vast majority of cases there will be no relevant confidential information in the hands of the lawyers because there will simply be no connection whatsoever between the matters and the fact that Abacus is in each case acting in a different capacity emphasises this point. However, each case must ultimately turn on its own facts. The Court must take a realistic approach and bear in mind the mischief (as summarised by Lord Millett) which the law is trying to address. In this case, the claim in the Baltic litigation is against Mr de Figueiredo and the other two directors personally. However the evidence shows that Abacus has an agreement whereby it indemnifies its directors and employees in respect of claims brought against them when acting as directors of client companies. Accordingly Abacus' economic interests are engaged by the Baltic litigation. If judgment is given against Mr de Figueiredo and the other directors, and assuming the indemnities to be valid, Abacus will be economically worse off by the amount of the judgment (subject to insurance). If we find that there is or may be relevant confidential information in the hands of Appleby i.e. information which would or might assist Gamlestaden in its claim against Mr de Figueiredo, it seems to us that it does not matter that the information may have been obtained from Abacus in its capacity as trustee of the Y trust rather than from Abacus in its own right. The damaging effect of allowing the risk of Appleby using relevant confidential information will be the same whether that information was obtained from Abacus in its capacity as trustee or in its own right. Indeed Mr O'Connell conceded that, in an extreme case, this would undoubtedly be so. Thus he accepted that if Mr de Figueiredo had informed Appleby that Abacus would always fight litigation up to the door of the court but then settle or if Mr de Figueiredo had admitted to Appleby in the Y matter that he never read draft board minutes which were placed before him for signature, that would clearly be relevant confidential information even if received from Abacus in its capacity as trustee of the Y trust or from Mr de Figueiredo as a director of one of the Y companies.

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?

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.

45 In coming to our conclusion we have taken into account two additional factors, the first of minor importance but the second of material significance.

46 The first is that, although Appleby has been acting for Gamlestaden since September 2004, this activity has expressly been limited to pursuing the appeal on a point of law to the Court of Appeal and the Privy Council. Appleby has not begun work on the Baltic proceedings themselves pending resolution of this application. Accordingly little or no costs or time will be wasted by reason of Gamlestaden having to instruct a different firm. Gamlestaden exercised its right in September 2004 to switch from Crill Canavan to another firm. It will make no difference in terms of cost and timing whether it is Appleby or some other firm which now has to get up to speed in relation to the facts of the Baltic litigation.

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.

Conflict of interest

48 As we mentioned in the earlier part of this judgment, Mr Le Cocq also relied upon a conflict of interest on the part of Appleby. In his skeleton he had referred us to an observation of Lord Millett in *Prince Jefri* where he said at 234:-

> ***"It is otherwise where the court's intervention is sought by an existing client, for a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position.*** A man cannot without the consent ***of both clients act for one client while his partner is acting for another in the opposite interest.*** His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation."

49 This suggests that there is an absolute prohibition on a firm acting for and against a client at the same time. The observation has been the subject of some criticism; see Hollander - Conflict of Interest and Chinese Walls at 2-55 - 2-60. In our judgment, particularly in a small jurisdiction such as Jersey, an absolute prohibition of this nature would be likely to cause substantial practical difficulties and there is in any event no justification for it. Bank A may invariably instruct a firm on its routine debt collection. There would not seem to be any reason of logic or principle why that firm should not act against the bank in an employment dispute which has nothing to do with the debt collection. Similarly, there cannot be any objection to a firm acting for X Trust Company Limited in its capacity as trustee of Trust A and against X Trust Company Limited in its capacity as trustee of Trust B unless there is some connection between the two trusts. Indeed the Court's own experience suggests that it is common for firms in Jersey to act for and against a large financial institution at the same time provided there is no connection between the matters.

50 We have not heard any argument and therefore do not think it right to develop the point any further. Suffice it to say that, as presently advised, we would think that there must be some reasonable relationship between the two matters before a firm should be prohibited from acting for a client on one matter and against the same client on another matter. We would refer also to the decision of the Court of Appeal in *Marks & Spencer Group Plc v Freshfields* [2005] PNLR 4 in this respect.

51 In any event we do not need to consider the matter further because, as we have already mentioned, Mr Le Cocq accepted that there must be some connection between the two matters and that any argument based on conflict of interest did not in this case advance his case beyond that based on the use of confidential information, so that if he could not succeed on the latter basis, he would not succeed on the former basis.