Neutral Citation Number: [2020] EWCA Civ 609

Case No: A3/2019/1785

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INTELLECTUAL PROPERTY ENTERPRISE COURT
HIS HONOUR JUDGE HACON
[2019] EWHC 1733 (IPEC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/05/2020

Before:

LORD JUSTICE DAVID RICHARDS
LORD JUSTICE FLAUX
and
LORD JUSTICE ARNOLD

- -

Between:

(1) GLENCAIRN IP HOLDINGS LIMITED **(2) GLENCAIRN CRYSTAL STUDIO LIMITED**	**Appellants**
- and -	
(1) PRODUCT SPECIALITIES INC (t/a FINAL TOUCH) **(2) JERAY (SALES) LIMITED (t/a ORIGINAL PRODUCTS)**	**Respondents**

Theo Barclay (instructed by **Stobbs**) for the **Appellants**
Stephanie Wickenden (instructed by **Virtuoso**) for the **Respondents**

Hearing date: 31 March 2020

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Approved Judgment

Covid-19 Protocol:
This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunal Judiciary website (press.enquiries@judiciary.uk). The date and time for hand-down is deemed to be 10:30am on Thursday 7 May 2020.

Lord Justice Flaux:

Introduction

1. The appellants appeal, with the permission of the judge, against the Order dated 5 July 2019 of His Honour Judge Hacon in the Intellectual Property Enterprise Court refusing the appellants' application for an Order restraining the respondents' solicitors, Virtuoso, from continuing to act. The appeal raises the issue whether and in what circumstances a firm of solicitors can be restrained from acting for a defendant where, in earlier similar litigation, the same firm has acted for another defendant against the same claimant, in circumstances where that earlier litigation has been settled through a mediation and/or confidential settlement.

The factual background

2. The second appellant is a company which designs, makes and sells glassware. The first appellant is a sister company which holds intellectual property rights used by the second appellant in the course of its business. I will refer to them together hereafter as "Glencairn". In September 2018 Glencairn brought an action against Dartington Crystal (Torrington) Limited ("Dartington") for infringement of a UK Registered Design. The product alleged to infringe was a whisky glass. Dartington were represented by Virtuoso, a small specialist IP solicitors firm.

3. In September 2018 Glencairn also became aware of another glass which in their view was too close to their design. It was manufactured by the first respondent, a Canadian manufacturer of glassware based in Ontario and was imported into and sold in this country by the second respondent. I will refer to the respondents together hereafter as "Final Touch". A letter before action was sent on 25 September 2018. Final Touch instructed Virtuoso to represent them. At that stage the lead solicitor from Virtuoso on both matters was Mr Philip Partington.

4. On 9 November 2018 Glencairn issued the claim form in the present action. It is for infringement of the Registered Design and also infringement of an EU Trade Mark for the three-dimensional shape of a whisky glass and for passing off.

5. At about the same time, Glencairn and Dartington agreed to conduct a mediation in an attempt to settle their differences. Position statements were exchanged a few days before the mediation. As is usual, they were stated to be confidential. The mediation took place on 11 December 2018 under a mediation agreement. Although Glencairn did not disclose the mediation agreement before the judge, the relevant provisions were disclosed by Glencairn to this Court following an Order by the Court at the appeal hearing. The body of the agreement was signed by Mr Partington of Virtuoso as solicitor for Dartington. There was then a separate declaration undertaking to keep information disclosed at the mediation confidential, which was signed by all those participating in the mediation, who were, so far as Virtuoso was concerned, Mr Partington, Mr Walawage and Mr Popa. It is to be noted that none of the solicitors at Virtuoso now acting for Final Touch was in attendance at the mediation or signed that declaration of confidentiality.

6. The Dartington matter did not settle at the mediation but after further discussions, a settlement was reached. This was set out in a confidential Settlement Agreement

annexed to a Tomlin Order dated 8 January 2019. Again, that was not disclosed before the judge, but following the Order of this Court referred to in the previous paragraph, Glencairn disclosed a redacted version to this Court. Clause 3 imposed a duty of confidentiality on the parties to the Settlement Agreement, who were Glencairn and Dartington, but not their solicitors.

7. By the time of the mediation, Virtuoso had taken the view that it would not be appropriate for their Dartington team to be involved in the Final Touch litigation. An information barrier was set up on 11 December 2018, the day of the mediation. On 19 December 2018 Mr Partington of Virtuoso, who headed the Dartington team, sent an email to Stobbs, the solicitors acting for Glencairn, stating that he and his colleagues, Mr Walawage and Mr Popa, would not be acting for Final Touch and that a 'Chinese wall' had been implemented within Virtuoso. Since the mediation, the Final Touch Team has been led by the principal of Virtuoso, Ms Elizabeth Ward. She has been assisted by Ms Lauren Waterman then a paralegal, now a trainee solicitor. She was also assisted by a solicitor, Ms Jordan Davies, but she left the firm on 22 February 2019, being replaced by Ms Gemma Wilson. Ms Davies had previously assisted Mr Partington on the Dartington matter, but prior to the mediation, Mr Walawage took over from her.

8. The evidence of Ms Ward before the judge, which he accepted, was that she and her team were based in the firm's Leeds office. Mr Partington and Mr Walawage were based in the London office. The firm used an online case management system, without paper files. The encryption in place meant that only Mr Partington, Mr Walawage and Mr Popa had access to the Dartington files. She confirmed that she, Ms Waterman and Ms Wilson had no knowledge of the terms of the Dartington Settlement.

9. On 13 or 14 February 2019, a telephone conversation took place between the parties' respective US attorneys, the content of which was disputed. Glencairn's attorney Mr Miller says in his witness statement that Final Touch's attorney, Mr Shapiro, called him and said that he had become aware of details of the Dartington Settlement and in particular that, as part of the Settlement, Dartington had obtained payment from Glencairn for redesigning its glass. Mr Miller says that Mr Shapiro indicated that Final Touch might be prepared to settle on similar terms. Mr Shapiro denies this account, saying he told Mr Miller that he did not know the terms of the Settlement, but that there was speculation on the part of Final Touch as to the terms and, if the speculation was correct, a similar deal might be the basis for productive discussions. Mr Miller told him that Glencairn had no interest in such discussions. Neither attorney was called to give evidence and the judge quite rightly said in [88] of his judgment that he could not reach a conclusion about this conversation and whether any confidential information was passed by Mr Shapiro to Mr Miller but that if it was, it did not subsequently reach the solicitors in the Final Touch team at Virtuoso.

10. On 14 February 2019 Mr Sleep of Stobbs sent a letter to Virtuoso stating that the Chinese wall at Virtuoso was inadequate and expressing doubt that any information barrier set up between the Dartington and Final Touch teams at Virtuoso could be effective. Mr Sleep was not aware at the time that letter was sent of the telephone conversation between Mr Miller and Mr Shapiro, whatever its content. In his letter, Mr Sleep requested that Virtuoso should cease to act for Final Touch. On 18 February 2019 Virtuoso declined to stand down. On 8 March 2019 Glencairn filed the application notice that is the subject of this appeal.

11. As the judge noted in [12] of his judgment, Glencairn's concern was that Virtuoso became aware of information disclosed by Glencairn during the Dartington mediation and during discussions both leading up to it and afterwards. This included Glencairn's negotiating position and the terms on which Glencairn was prepared to settle. Glencairn contended that there is a risk that this information or some of it will become known to Final Touch via Virtuoso and that this will provide Final Touch with an advantage in these proceedings, particularly in any settlement negotiations that may take place. This essentially remained Glencairn's concern before this Court as to the risk of information which is confidential to Glencairn becoming known to Final Touch.

The judgment below

12. Having set out the facts as I have summarised them above, the judge went on to consider the principles established by *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 (hereafter referred to as *Bolkiah*), the leading case on the potential for conflict of interest where professional advisers such as solicitors act for different parties. As he noted at [13], in that case KPMG had acted for the first party then ceased to act. They were then instructed by the second party in litigation against their former client, the first party. It was common ground that, although they had acted as litigation advisers and forensic accountants, their position was to be equated with that of solicitors. The central issue before the judge and, indeed before this Court, was whether the principles established in that case and, in particular, in the speech of Lord Millett, are applicable to a case such as the present where the solicitors never acted for the first party, here Glencairn, but acted for a second party in litigation against Glencairn in circumstances where confidential information emerged in a mediation and settlement discussions and the same firm of solicitors is now acting for a third party in litigation against the first party.

13. The judge summarised the principles to be derived from *Bolkiah* at [14]. It is not necessary to repeat that summary here, since, to the extent that the principles are applicable and relevant to this appeal, they are set out hereafter. The judge went on to the critical question whether the principles applied in the present case at [22], noting the essential distinction from *Bolkiah,* that Virtuoso had never acted for Glencairn. He then went on to consider the handful of cases here and in the Commonwealth which have involved similar factual situations to the present. At [23] he considered the decision of HHJ Hallgarten QC in *Adex International (Ireland) Limited v IBM United Kingdom* (2000). There, a claimant, Time, brought a claim against IBM in respect of defects in chipsets. Following settlement negotiations, a confidential settlement was reached. The same solicitor then acted for Adex in its claim against IBM in respect of defects in chipsets. IBM sought an order for Adex to be represented by alternative solicitors. HHJ Hallgarten QC accepted that, in any negotiations between Adex and IBM, the solicitor would not be able to put out of his mind the terms on which IBM had settled the first case and concluded that the solicitor should not continue to act. However, as the judge noted, it appears from the end of the judgment in that case that, subject to submissions from counsel, HHJ Hallgarten QC may have been prepared to allow the solicitor's firm to continue to act if an adequate information barrier was put in place.

14. At [24] to [27], the judge considered the decision of the Court of Appeal of New Zealand in *Carter Holt Harvey Forests Ltd v Sunnex Logging Ltd* [2001] 3 NZLR 343, a case upon which Glencairn placed particular reliance before the judge and before this Court. The judge summarised that case at [24]:

> "a plaintiff ('Rua') had issued proceedings against a defendant ('CHHF') arising out of the termination of certain contractual arrangements. There was a mediation attended by the parties' lawyers which was subject to a comprehensive confidentiality agreement. The mediation was successful and the claim was settled. Later another plaintiff ('Sunnex') started an action along the same lines against CHHF. Sunnex instructed the solicitors and counsel who had acted for Rua against CHHF. At first instance the judge held that the lawyers could continue to act for Sunnex as long as they took no part in any settlement negotiations. The New Zealand Court of Appeal allowed CHHF's appeal, restraining Sunnex from instructing the same solicitors or counsel or anyone from their respective offices."

15. The judge noted that Blanchard J in giving the judgment of the Court distinguished that case from cases like *Bolkiah* concerning whether lawyers can act against a former client. In that case, the lawyer's obligation arose only from the contractual undertakings of confidence which they had given in the mediation. Although that undertaking was express, an implied undertaking would probably have been sufficient.

16. At [26] the judge noted that the Court did not accept that there was no risk of disclosure and that Blanchard J had outlined a shifting burden of proof akin to that in *Bolkiah*. He cited [26] and [27] of Blanchard J's judgment:

> "[26] … Certainly a party seeking the exclusion of the other side's legal advisor must first show that there is an appearance of risk, going beyond the remote or merely fanciful, of conscious or unconscious use or disclosure by the lawyer of something relevant to the current dispute of which he lawyer gained knowledge as a result of participation in an earlier mediation. But if that threshold is reached, it is then for the lawyer to demonstrate that in fact no such risk exists or that, if it does, no damage, other than de minimis, could possibly result from use or disclosure.
>
> [27] The initial threshold is appropriately a low one because of the nature of the obligation of confidentiality which the lawyers accepted in their written agreements when undertaking the mediations. Beyond pointing to the general circumstances of the particular case – here the apparently overlapping claims arising out of a similar factual background of purchases of machinery and equipment on the basis, as alleged, of representations of CHHF – it should not be required of a party seeking to ensure the protection of its confidential information that it must spell out particular matters of concern. To ask it to do so might be to ask it to reveal the very matter it is seeking to keep to itself. Moreover, it may not be able to be sure exactly what the lawyers may have learned from their observations during the mediation process. The disadvantage it is seeking to prevent may be as subtle as something which may have been observed by the lawyers in the body language of one of its representatives. Even

> an observation of that kind might give the lawyers a tactical advantage in deciding how to pursue the claim of their other client."

17. The judge noted that both *Adex* and *Carter Holt* had been considered by the Court of Appeal in *Virgin Media Communications Ltd v British Sky Broadcasting Group plc* [2008] EWCA Civ 612; [2008] 1 WLR 2854. In that case there were three sets of proceedings: an action in the High Court, a review by the Office of Communications ('Ofcom') and proceedings before the Competition Appeal Tribunal ('the CAT'). Virgin instructed the same lawyers in all three. The lawyers instructed by Sky in the High Court were different from those instructed in the other proceedings. Disclosure took place in the High Court including of confidential documents only disclosed to external lawyers. Sky sought an order restricting disclosure to Virgin lawyers not acting in the Ofcom or CAT proceedings. The order was refused by Lewison J and the Court of Appeal dismissed an appeal, principally on the ground that the risk that information disclosed in the High Court proceedings would be improperly used in the CAT or in the Ofcom review was fanciful.

18. The judge cited [22] of the judgment of the Court given by Lord Phillips MR rejecting reliance by Sky on *Bolkiah*:

> "The passage in the speech of Lord Millett in *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222 relied upon by Mr Glick cannot be applied to a solicitor who has obtained information from an opponent by the process of disclosure. It is usually enough to rely upon the recognition by a solicitor of the duty not to make any ulterior use of information obtained by disclosure. The *Adex International* case (unreported) 17 November 2000 was correctly decided, but it is a rare example of a situation where a solicitor was precluded from acting for a different claimant against the same defendant in respect of a similar claim as a result of confidential information obtained about the defendant in the earlier proceedings. The approach of the Court of Appeal of New Zealand in the *Carter Holt Harvey Forests* case [2001] 3 NZLR 343 was adopted in a case involving an express confidentiality agreement in mediation. It is not an approach that can be generally applied whenever information has been obtained by lawyers in a case as a result of disclosure."

19. The judge went on to refer to the decision of the New South Wales Court of Appeal in *Worth Recycling Pty Ltd v Waste Recycling and Processing Pty Ltd* [2009] NSWCA 354, a case with similar facts to *Carter Holt*, save that the solicitors did not sign the confidentiality agreement. The Court nonetheless found that the solicitors were bound by an implied duty of confidence. As the judge noted the Court followed *Carter Holt* save as regards the burden of proof.

20. At [35] the judge said that at least two classes of case could be discerned from the authorities. He described the first class:

> "The first consists of actions like *Bolkiah* in which a former client seeks to restrain a solicitor (or equivalent professional

> advisor) from acting for a party with an interest adverse to the former client. In these circumstances there is a continuing fiduciary duty owed by the solicitor to the former client and a risk of disclosure of information which is both confidential to the former client and privileged."

21. At [36] he described the second class of case:

> "In the second class, information confidential to a party has come into the possession of solicitors who are acting for another party with an adverse interest to the first party. The solicitors have never acted for the first party and therefore owe him no fiduciary duty."

He said that the decision of Beatson J in *Stiedl v Enyo Law LLP* [2011] EWHC; [2012] PNLR 4 was an example of that class of case, as was *Virgin Media*.

22. At [38]-[39] the judge asked himself whether there was a third class of case into which this case fell, noting that the relevant class for the present case must also accommodate *Adex International*, *Carter Holt* and *Worth Recycling*. At [40] he said:

> "…there are clearly parallels in the policy underlying the ruling in *Bolkiah* and that behind the decision in *Carter Holt*. This was underlined by the New Zealand Court of Appeal... The policy in both cases is that parties must retain the freedom to be candid, in the one circumstance to their solicitors and in the other, in a mediation. Those freedoms should not be eroded. However, it seems to me that the two freedoms are not identical. Candour in a mediation will take the form of disclosing information to an adversary or potential adversary. Candour on the part of a client to his lawyer, whose duty and interest lies in promoting the cause of his client, is likely to be the product of little or no inhibition and a complete assumption that the information disclosed will go no further without the client's consent. It would follow that higher safeguards against the wrongful disclosure of information are proportionate in the *Bolkiah* type of case when compared to a case of the present type."

23. At [43] the judge said that the correct approach lay somewhere between *Bolkiah* and *Stiedl* and that the present case, together with *Adex, Carter Holt* and *Worth Recycling* was in a third intermediate class of case. However, he continued at [44]-[45]:

> "44. I would add that while it is convenient to divide cases into classes for the purpose of explaining why the relief in one class would not be proportionate if granted in relation to another class, it may be that the simpler and more accurate point is that each case must turn on its facts and the proportionate approach to granting relief is liable to vary accordingly.
>
> 45. For the foregoing reasons, in my view the *Bolkiah* approach should not be applied with full force to the present case. Equally,

> I do not believe that the relief can in no circumstances go further than an injunction restraining the solicitor from making use of the confidential information (as in *Stiedl*). Neither of those two approaches would be proportionate. In effect, therefore, I must decide which aspects of *Bolkiah* should be applied to the present case."

24. In the next section of the judgment headed "Balancing Exercise", the judge noted that Lord Millett in *Bolkiah* had ruled that the assessment was not a balancing exercise. Having cited what Lord Millett had said at 237B-F, the judge said at [50] that:

> "there were two strands to Lord Millett's reasoning. First, the impact on the new client of an order restraining the solicitor from acting is relevant only to whether the former client consented to the acceptance by the solicitor of the relevant instructions from the new client. Secondly, a fiduciary, the solicitor, must not put either his own interests or those of another client before the interests of his former client."

At [51] he said that where there was no fiduciary relationship, Lord Millett's reason for not taking into account the impact on the current client no longer applies so that the judge should take account of the likely impact of any order on the current client.

25. The judge turned to consider the burden of proof. He noted that in *Adex* the judge did not seem to have adopted the two-stage approach to the burden of proof in *Bolkiah*: "namely that once the former client has established that the solicitors are in possession of information which was imparted in confidence and that the firm is proposing to act for another party with an interest adverse to his in a matter to which the information may be relevant, the evidential burden shifts to the defendant firm to show that there is no risk that the information will cross the information barrier and come into the possession of those now acting for the other party." However, as the judge said, in *Carter Holt*, a shift of burden of proof similar to that in *Bolkiah* was adopted.

26. In *Worth Recycling* the New South Wales Court of Appeal rejected that approach, Hodgson JA saying:

> "[42] In my opinion, whatever may be the position where solicitors owe a fiduciary duty to the party seeking an injunction, or where (as in *Carter Holt*) they owe an explicit contractual duty, in a case such as the present the onus does lie on the party seeking the injunction to show a threat of misuse sufficient to justify the injunction; and I do not think the existence of a common factual element is sufficient to shift the onus of proof. However, proof of a real and sensible possibility of misuse may be sufficient to justify an injunction."

At [53] the judge said he agreed with that approach and the overall burden of proof in this case remained with Glencairn.

27. In considering the characteristics of an information barrier set out by Lord Millett in *Bolkiah* the judge had earlier noted that in *Young v Robson Rhodes* [1999] 3 All ER

524, Laddie J had said that Lord Millett's statement that an effective barrier needs to be part of the organisational structure of the firm was not to be taken too literally. The judge said at [56] that if Laddie J was right, it did not matter whether the information barrier was part of the organisational structure of the firm or an ad hoc arrangement. What mattered was whether it worked. At [57] the judge said that he would assume that the risk of disclosure across an information barrier was greater in a small firm like Virtuoso than in a larger firm.

28. The judge then went on to consider the evidence in the case, all of which it is not necessary to repeat here. He then set out his conclusions in the Discussion section. So far as relevant to the appeal, he considered first whether Virtuoso was in possession of information confidential to Glencairn. The judge had not had the benefit of seeing any of the relevant provisions of the mediation agreement or Settlement Agreement so, as he said, he had to fall back on inferences. He concluded at [84] that: "on the limited information I have I will assume that the Dartington team at Virtuoso is aware of the contents of the Settlement Agreement and that at least some of this is confidential to Glencairn. My assumption goes no further." He also accepted at [85] that the confidential contents of the Settlement Agreement would be particularly relevant to potential settlement discussions between Glencairn and Final Touch. It is to be particularly noted that the judge was therefore making a finding, on the limited information that Glencairn had chosen to disclose, that the only confidential information of any relevance was in the Settlement Agreement.

29. At [86] he turned to the risk that Final Touch would become aware of the confidential contents of the Settlement Agreement. In answer to Mr Sleep's suggestion that before the information barrier was in place, confidential information could have been passed by those in the Virtuoso Dartington team to those in the Final Touch team, the judge said that the short answer was:

> "Ms Ward's clear evidence that none of the Final Touch team – Ms Ward, Ms Wilson and Ms Waterman – have any knowledge of the confidential terms of the settlement. (Ms Ward rightly qualified her statement by reference to the 'confidential' terms since some terms, such as fact that the parties agreed to end their litigation, are public.) Mr Barclay did not invite me to decide that Ms Ward was not telling the truth about this. I have no reason to doubt Ms Ward's evidence and I accept it. It does not matter what was said before the information barrier came down. Nothing of relevance reached the Final Touch team."

30. In relation to Mr Sleep's point about those on both sides of the information barrier still working in close proximity, the judge said:

> "I accept that there is regular contact between members of the team on each side of the information barrier and that this is likely to continue. In argument Mr Barclay illustrated this by website pictures of Virtuoso's lawyers attending the same presentation, seated around the same table and other evidence of a similar nature recorded after the barrier was put in place. This is likely to be inevitable in a small firm and is one of the reasons why the risk in a small firm may be greater. But it also seems to me to be

> likely that all individuals are highly aware that nothing should be said about the Dartington litigation. The fact of this application having been made may well have made that understanding even more acute. It is also relevant that the Final Touch team works in Leeds whereas the Dartington team is for the most part in London. Ms Ward has explained that the Final Touch team cannot access the Dartington documents. Although Virtuoso does not run a completely paperless system, the Dartington litigation is now at an end so I have no reason to believe that there will be many, if any, new documents created on that subject or that they will be created in hard copy to which the Final Touch team will have access. I am satisfied that the likelihood that any confidential part of the Settlement Agreement will become known to any of the Final Touch team is very low."

31. At [87], the judge said that Mr Barclay had pointed out rightly that Final Touch's evidence did not deal in much detail with how the information barrier works and did not address Lord Millett's five requirements for such a barrier referred to in *Bolkiah* at 238C-E:

> "In their Consultation Paper on Fiduciary Duties and Regulatory Rules the Law Commission (1992) (Law. Com. No. 124) describe Chinese walls as normally involving some combination of the following organisational arrangements: (i) the physical separation of the various departments in order to insulate them from each other - this often extends to such matters of detail as dining arrangements; (ii) an educational programme, normally recurring, to emphasise the importance of not improperly or inadvertently divulging confidential information; (iii) strict and carefully defined procedures for dealing with a situation where it is felt that the wall should be crossed and the maintaining of proper records where this occurs; (iv) monitoring by compliance officers of the effectiveness of the wall; (v) disciplinary sanctions where there has been a breach of the wall."

32. The judge said of these:

> "(i) and (ii) are more appropriate to a firm of the size of KPMG. Arrangement (iii) assumes that some information will cross the barrier. I have found that the likelihood of this is very low. Again, it seems to me to be an arrangement appropriate to the circumstances of a case such as *Bolkiah* where the information in extensive and the number of individuals involved is large, so that some minor leak might be contemplated and may not matter provided that it is stemmed in good time. It would have been helpful for Ms Ward to have said something about (iv) and (v) – i.e. monitoring of the effectiveness of the barrier and disciplinary sanctions if there is a breach – but I can see that on the present facts the setting up of formal monitoring and discipline arrangements may not be necessary. Ms Ward's supervision is likely to be sufficient."

33. The judge then concluded that he could infer that Glencairn would suffer prejudice if relevant confidential information were to leak to Final Touch, but that he had little idea of the potential maximum extent of the prejudice. He also inferred that Final Touch would suffer prejudice if Virtuoso ceased to act for it. He assumed Final Touch had instructed Virtuoso for good reason and that they had a good working relationship. If Virtuoso ceased to act, Final Touch would have to instruct new solicitors with whom they might not be such a good working relationship.

34. In conclusion at [94] the judge said:

> "Taking all the foregoing matters into account, I have reached the conclusion that I should not grant an order restraining Virtuoso from acting as the solicitors for Final Touch. The likelihood of any confidential information at all being passed to Final Touch is very low. It may also be that any prejudice caused to Glencairn would only be significant if the entirety of the Settlement Agreement were disclosed and I believe that to be extremely unlikely, to the point of being fanciful."

At [96] he said the balance of justice was in favour of refusing the order sought.

The Grounds of Appeal and Respondent's Notice

35. The two grounds of appeal can be summarised as follows:

(1) The judge erred in not applying the *Bolkiah* test to the present situation and had he done so, he would inevitably have concluded Glencairn was entitled to the order it sought;

(2) Even if the Court concludes that the judge applied the correct test, his conclusion applying his own test that the balance of justice was in favour of dismissing the application was unsustainable and made several errors of law and fact, so that it should be reversed.

36. Final Touch by its Respondent's Notice contends that the Order made by the judge should be upheld on the basis that there was substantial delay in Glencairn making its application to restrain Virtuoso, which amounted to acquiescence. Final Touch had submitted before the judge that delay should bar an injunction but the judge did not reach a decision on the issue.

The parties' submissions

37. On behalf of Glencairn, Mr Theo Barclay submitted that the central question in the appeal arose from the passage in *Bolkiah* at 236G-H where Lord Millett gave the rationale for the strict approach:

> "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."

38. This emphasised that the strict approach was required in order to preserve and protect legal professional privilege. The present case concerned without prejudice privilege, but Mr Barclay submitted that it was no less deserving of protection. Unless the two species of privilege were to be ranked differently, the *Bolkiah* test should apply, at least where there was a contractual confidentiality agreement.

39. He submitted that the words "or other person in possession of confidential and privileged information" in the last sentence of the passage quoted above demonstrated that Lord Millett was not confining the principle he was enunciating to the scenario where a solicitor was seeking to act against a former client. The principle was not dependent upon the existence of a fiduciary relationship, as Lord Millett had said at 235C that the fiduciary relationship between a solicitor and his former client came to an end with the termination of the retainer. Accordingly, the so-called barring out jurisdiction does not stem from a duty of loyalty but a duty to protect privileged information imparted in circumstances of confidentiality.

40. Mr Barclay accepted that there was no authority binding on this Court which dealt with the position in what he described as a "former opponent" case as opposed to a "former client" case, but submitted that the question had been addressed here and in other Commonwealth jurisdictions and that in each case *Bolkiah* had been applied. He referred to the decision of HHJ Hallgarten QC in *Adex* and submitted that, at page 7 of the transcript of the judgment in that case, it was clear that the judge had applied the *Bolkiah* test in a former opponent case, holding that the Court should intervene unless satisfied that there was no risk of disclosure. There the judge held there was not only a risk of disclosure but that it would be bound to affect whatever advice the solicitor gave Adex.

41. He relied in particular on the decision of the New Zealand Court of Appeal in *Carter Holt* where, as he submitted the Court considered at [26], once the claimant had shown an appearance of risk, beyond the remote or fanciful, the burden shifted to the former opponent solicitor to demonstrate that no risk existed or if it did, no more than de minimis damage could result from disclosure. In other words the Court applied the *Bolkiah* test of burden of proof. The justification for this approach appeared from [27] of Blanchard J's judgment, quoted at [16] above.

42. Mr Barclay submitted that *Adex* was approved by Lord Phillips MR in the Court of Appeal in the *Virgin Media* case as correctly decided and he noted *Carter Holt* without disapproval.

43. He submitted that the *Bolkiah* test should apply wherever the former opponent solicitor was subject to an obligation of confidentiality, whether it was express or implied, although he submitted that judges had taken a stronger position in express cases. This was apparent from the Australian cases. In *Worth Recycling* Hodgson JA, giving the lead judgment in the New South Wales Court of Appeal, drew a distinction at [41] between cases where the solicitors owe a fiduciary duty to the person seeking the injunction or an express contractual duty of confidentiality, as in *Carter Holt*, and a case such as that case, where any obligation of confidentiality was implied, holding that in the latter case the onus lay on the party seeking the injunction to show a threat of misuse sufficient to justify the injunction. He said that: "I do not think the existence of a common factual element [between the first case and that before the Court] is sufficient to shift the onus of proof." Mr Barclay submitted that this distinction was difficult to justify.

44. In relation to the two authorities on which Ms Wickenden relied in her skeleton argument, whilst they showed that English courts were reluctant to apply the *Bolkiah* test too widely, neither was a former opponent solicitor case. *Meat Corporation of Namibia v Dawn Meats* [2011] EWHC 474 (Ch) concerned an attempt by the claimant to prevent an expert giving evidence for the defendant when she had previously briefly been instructed by the claimant and it was alleged she had had access to confidential information. Mann J refused to equate her position with that of a solicitor and to apply the full rigours of the *Bolkiah* test. Although she was contractually bound to keep privileged information she had seen confidential, none of that confidential material was of any relevance to her function as an expert.

45. In *Caterpillar Logistics v de Crean* [2012] EWCA Civ 156; [2012] F.S.R. 33 the appellant sought to obtain barring out relief against a former employee on the grounds that she may have owed them a fiduciary duty. This Court refused to apply *Bolkiah* to the former employee holding that she was not a fiduciary and concluding that barring out relief would only be granted against a former employee in the most exceptional circumstances, of which that case was not an example. Mr Barclay submitted that neither of those cases had any bearing on whether the *Bolkiah* test should be applied in former opponent solicitor cases.

46. Cases such as this were rare, as demonstrated by the fact that this was the first such case in this jurisdiction since *Adex* 20 years ago. Mr Barclay accepted that the right to choose one's own solicitor was an important consideration but submitted that it could not outweigh the need to protect confidential information. Confidential information which was subject to without prejudice privilege was entitled to the same protection as confidential information subject to legal professional privilege and the *Bolkiah* test in relation to the burden of proof should be equally applicable, all the more so because the solicitors at Virtuoso who had been involved in the mediation had signed express obligations of confidentiality. The judge should have concluded that, once Glencairn had shown the risk of disclosure, which they clearly had, the burden of proof was on Final Touch and Virtuoso to show that there was no risk because of the existence of an effective information barrier.

47. Mr Barclay submitted that the judge had misapplied the law as set out in the speech of Lord Millett in *Bolkiah* as to what is required to show an effective information barrier. At 238C-E Lord Millett had identified the elements required in the terms quoted at [31] above. Lord Millett went on to say at 239D:

> "In my opinion an effective Chinese wall needs to be an established part of the organisational structure of the firm, not created ad hoc and dependent on the acceptance of evidence sworn for the purpose by members of staff engaged on the relevant work."

48. Mr Barclay submitted that the judge had been wrong to adopt the approach of Laddie J in *Robson Rhodes* when he said at [56] of the judgment: "it does not matter whether the information barrier is an established part of the organisational structure of the firm as opposed to an ad hoc arrangement. What matters is whether it works." He submitted that Lord Millett was not saying that the question was will the barriers work, but making the point that, if there are ad hoc barriers which are not part of the structure of the firm, there is a risk that they will not work. In answer to the suggestion from the Court that the issue of the effectiveness of information barriers must be a question of fact not a question of law, he submitted that it was a binding proposition of law that the barrier needed to be in place as part of the structure of the firm.

49. Although Lord Millett was envisaging a global firm with a compliance department, the principle he was enunciating was of general application, which was why it was almost impossible for a small firm such as Virtuoso to put up an effective barrier. The judge had been right in [57] of his judgment when, under the heading: "The size of the firm" he said:

> "…there have been differing views on whether the risk of disclosure across an information barrier is more likely in a small firm or less likely. It seems to me, with great respect, that Neuberger J's observation in *Halewood International* was probably borne of careful guesswork, whereas the suggestion by the authors of both the *SRA Handbook* and the *The Solicitor's Handbook 2017* that there is a greater risk of inadvertent disclosure in a small firm is likely in both instances to be the product of experience, whether their own or that of solicitors to whom they have spoken in the course of preparing their text."

Mr Barclay relied upon a number of further authorities in support of his overall submission in relation to the ineffectiveness of the information barrier in this case but it is not necessary to set them out here.

50. Mr Barclay submitted in relation to the second ground of appeal that even if the judge was correct in rejecting the *Bolkiah* test, his factual findings were unsustainable and this was a case where this Court should intervene and overturn those findings, which also involved errors of law. He submitted first that the judge's reliance on Ms Ward's evidence was unjustified. She had said that none of herself, Ms Wilson and Ms Waterman had any knowledge of the confidential terms of the settlement and all came to the matter cold. However, Ms Waterman had in fact worked on the Dartington litigation previously which Ms Ward did not mention. Furthermore, it was not sufficient to deal with lack of knowledge of the terms of the settlement. The evidence had failed to address the question of knowledge gained prior to the settlement in without prejudice negotiations.

51. Ms Ward had also omitted to give any evidence about the fact that Ms Davies had also worked on both sides of the information barrier and was sent a copy of the mediation position statement, which was a lacuna in Final Touch's evidence. The judge had failed to address in his judgment that both Ms Waterman and Ms Davies had worked on both sides of the information barrier. In the circumstances, the judge should not have been satisfied with Ms Ward's evidence, but should have required statements from not just Ms Davies and Ms Waterman, but all the staff at Virtuoso who worked on either side of the barrier as to their state of knowledge.

52. Mr Barclay submitted second that the documents and the evidence in this case did show that there was a real risk of disclosure unless Virtuoso was restrained from acting. In particular: (i) there was no physical separation at Virtuoso. Staff on both sides of the barrier continued to share the Leeds office and Mr Partington was virtually present; (ii) there was no professional separation in that staff on both sides of the barrier continued to work together on other cases; (iii) the information barrier was set up too late, on the day of the mediation, but the mediation statement had been sent and seen by Ms Davies and (iv) it was clearly set up ad hoc.

53. His third submission was that there were three major incidents which made the information barrier unsustainable: (i) Ms Davies worked on the Dartington team and had privileged information in the form of the mediation position statement. The judge at [64] relied upon Ms Ward's evidence that Ms Davies was replaced by Mr Walawage before the settlement negotiations took place, but this was not correct because she had received the document recording the parties' agreement to mediate; (ii) As Ms Wickenden had accepted in oral argument before the judge, Ms Waterman had worked as a paralegal on the Dartington team. She had conducted minor research and sent a mediation position statement by email. Because she was a paralegal and not yet a qualified solicitor, the position was worse because there was a greater risk of disclosure by her; and (iii) the conversation between Mr Miller and Mr Shapiro demonstrated that there might have been a breach of confidence. Mr Barclay submitted that whilst the conflict of evidence could not be resolved, its existence pointed to the risk of there having been a breach.

54. In relation to delay, the issue raised by the Respondent's Notice, Mr Barclay submitted that if he was right on the law, absent very severe delay, which there was not in this case, the need to protect confidential information was paramount and the injunction should be granted. Part of the explanation for what was a relatively short delay was that the Final Touch litigation was stayed pending the settlement of the Dartington litigation which did not formally occur until 9 January 2019. Once the stay was lifted, Glencairn started to consider the issue of whether there was a conflict of interest, sent the letter of 14 February 2019 setting out potential concerns and sought counsel's advice the following day. Virtuoso sent a reply letter on 18 February 2019 and this application was made less than three weeks later on 8 March 2019. Any delay was modest.

55. On behalf of Final Touch, Ms Stephanie Wickenden's primary submission on the first ground of appeal was that Glencairn's case that the *Bolkiah* jurisdiction (and specifically that the burden of proof was on the solicitor not the applicant) should apply in former opponent cases was wrong in law and entailed a flawed understanding of the nature of the *Bolkiah* jurisdiction. It was simply not possible to read what Lord Millett had said at 235-6 in the context of solicitors who had formerly acted for the applicant

as applying to all privileged and confidential information, even where the party who had obtained it had never acted as solicitor for the applicant.

56. She submitted that the law was correctly stated by the authors of *Hollander and Salzedo: Conflicts of Interest* 5th edition at [8-007], that the *Bolkiah* jurisdiction placing the burden of proof on the solicitor should only apply in cases where there is or was a "true" fiduciary relationship, that expression being used to distinguish cases where the only prior relationship was an obligation of confidentiality as opposed to a prior retainer. Ms Wickenden submitted that the authors were also correct to say at [9-012] that other than in cases of a prior professional and thus fiduciary relationship, the general law of confidentiality should apply, under which the burden remained on the applicant throughout to establish that there was a risk of disclosure.

57. Ms Wickenden submitted that attempts in English courts to extend the *Bolkiah* jurisdiction beyond former client relationships by praying in aid the existence of confidential, privileged information had failed. She referred to *Meat Corporation of Namibia* and *Caterpillar Logistics* to which I have already made reference. Although the factual circumstances of both cases were different from the present case, in both cases the Courts had rejected the extension of the *Bolkiah* jurisdiction beyond cases where there was or had been a true fiduciary relationship such as between a solicitor and his former client.

58. Furthermore, in *Virgin Media*, although the Court of Appeal had referred to *Carter Holt* without disapproval, at [21] and [22] of its judgment the Court had rejected the argument that the duty not to make ulterior use of disclosed documents was identical in principle to the obligation of confidentiality that exists between a solicitor and his own client and said that the *Bolkiah* principle could not be applied to a solicitor who has obtained information from an opponent by the process of disclosure.

59. Ms Wickenden submitted that in *Adex*, the judge had not dealt expressly with the burden of proof shifting to the opposing solicitor under the *Bolkiah* test, whereas *Carter Holt* had held that the burden sifted to the opponent solicitor, so that case was wrongly decided so far as the burden of proof was concerned. Other cases, including *Worth Recycling*, had approached the issue of whether injunctive relief should be granted on the basis of actual or threatened misuse of confidential information on the correct basis that the burden of proof was on the applicant for the injunction. The judge had been correct in the present case to conclude that the burden of proof remained on Glencairn to show the risk of misuse of confidential information, including the risk that the information barrier erected was not effective. The first ground of appeal should be dismissed.

60. Ms Wickenden noted that, in his skeleton argument, Mr Barclay had contended that where there was an express obligation of confidentiality assumed by the opposing solicitor who participated in the mediation, that created a fiduciary duty on the opposing solicitor which was of equal status to the fiduciary duty owed by a solicitor to his own client, which was not an argument which he had advanced orally, although he had stressed the importance of an express obligation of confidentiality, such as had been signed by Mr Partington, Mr Walawage and Mr Popa in the declaration to the mediation agreement. However, as Ms Wickenden pointed out, the judge had made a finding, in the section of his judgment at [79] to [84], repeated in the various sub-paragraphs of [86], that the only confidential information of relevance was contained in the Settlement

Agreement. Glencairn was now seeking to argue that there was confidential material in the mediation and what led up to it but no evidence to that effect was advanced before the judge and if Glencairn had wanted to contend that there was confidential information other than in the Settlement Agreement, it was incumbent on it produce evidence detailing that confidential information.

61. The Settlement Agreement contained a confidentiality provision at clause 3, but Virtuoso was not a party to that Agreement. During the course of argument, Arnold LJ put to her that if Mr Partington or other solicitors at Virtuoso had read clause 3 they would have been under an equitable duty of confidence, which she was inclined to accept, but emphasised that so far as the only confidential information found by the judge was concerned, there was no express contractual obligation of confidentiality assumed by any solicitor at Virtuoso.

62. In relation to the second ground of appeal, Ms Wickenden submitted that this involved an attack on the judge's findings of fact and evaluation of the evidence, with which this Court should be reluctant to interfere. She cited the authorities set out in 52.21.5 of the White Book. The crucial point was in relation to Ms Ward's evidence that she and her team had no knowledge of the terms of the Settlement Agreement or of any confidential information. As the judge recorded at [86 (b)], Mr Barclay had not challenged the credibility of her evidence, nor had Glencairn put in contrary evidence. Since her evidence was not contested, the judge was entitled to place weight upon it. It was at this point in the oral argument that Mr Barclay confirmed that his criticism of Ms Ward's evidence was only pursued if he was right that the *Bolkiah* test applied.

63. In relation to the points made about Ms Davies and Ms Waterman, she submitted that these were of no relevance unless the time when the confidential information arose i.e. at the time of the Settlement Agreement, was other than as the judge found. In any event, the assertion that they had worked on both sides of the information barrier was incorrect. Whilst Ms Davies had worked on the Dartington matter, she had ceased to do so by the time of the mediation, so that when the information barrier was erected she was on the Final Touch side of the barrier and left the firm shortly thereafter. So far as Ms Waterman was concerned, she had been a paralegal. She sent a draft mediation agreement in July 2018 but had seen nothing confidential to Glencairn and had not been involved with the legal work on the Dartington matter.

64. In relation to the issue of delay raised by the Respondent's Notice, Ms Wickenden submitted that this was a relevant factor in an application for an injunction of this kind. Glencairn had known prior to and during the mediation that Virtuoso was acting for both Dartington and Final Touch and had raised no objection. Virtuoso had informed Glencairn on 19 December 2018 that an information barrier had been erected but again no objection was raised to Virtuoso continuing to act nor as to the appropriateness of the information barrier. Accordingly, Final Touch continued to instruct Virtuoso, incur legal costs and develop their working relationship.

65. The first objection to Virtuoso acting for Final Touch was raised in a letter of 14 February 2019, two months later. No explanation was given for the two months delay and this application was not made for a further month. Ms Wickenden submitted that the injunction sought should be refused in any event on the basis that Glencairn had acquiesced in Virtuoso continuing to act.

Discussion

66. Attractively though Mr Barclay's submissions on the first ground of appeal were presented I cannot accept them. The fallacy in Glencairn's argument is that it seeks to equate the position of a solicitor who formerly acted against the applicant (the former opponent case) with that of a solicitor who was formerly acting for the applicant (the former client case). However, the former client case is essentially at one end of the spectrum. In such a case, the information which the applicant wishes to keep confidential was imparted to the solicitor when he was acting for the applicant, when there was a fiduciary relationship of trust and confidence. It is clear from what Lord Millett said in *Bolkiah* that although the fiduciary relationship between a solicitor and his client comes to an end with the termination of the retainer, the solicitor remains subject to a strict duty of confidentiality because the information was imparted to him during the course of the fiduciary relationship: see 235C-D and 236F-H. In the latter passage, Lord Millett stated that the rationale for this strict rule in these terms:

> "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."

67. That Lord Millett was recognising that in the former client cases, the solicitor has obtained the privileged confidential information in the context of the fiduciary relationship under the retainer is also clear from 237D-F where he said:

> "Absent such consent [by the former client to the solicitor now acting against the former client], the considerations which the Court of Appeal took into account cannot in my opinion affect the nature and extent of KPMG's duty to protect confidentiality or convert it into a duty to do no more than take reasonable steps to protect it. This would run counter to the fundamental principle of equity that a fiduciary may not put his own interest or those of another client before those of his principal. In my view no solicitor should, without the consent of his former client, accept instructions unless, viewed objectively, his doing so will not increase the risk that information which is confidential to the

> former client may come into the possession of a party with an adverse interest."

68. At the other end of the spectrum is the case where there is no prior relationship between the solicitor and the applicant and the solicitor has not acted against the applicant in prior litigation, but in the current litigation has come into possession of privileged information of the applicant's, usually but not always because of inadvertent disclosure by the applicant or his lawyers, cases such as *English & American Insurance Co. Ltd. v. Herbert Smith* [1988] F.S.R. 232. The difference between the cases at either end of the spectrum was highlighted by Lightman J in *Re a Firm of Solicitors* [1997] Ch 1 at 13:

> "The grant of an injunction and the form of any injunction are discretionary, regard being had to the perceived threat to the client's rights: see *Lock International Plc. v. Beswick* [1989] 1 W.L.R. 1268, 1281. Where there has been the previous relationship of solicitor and client and the solicitor at the date of his proposed new retainer possesses relevant confidential information, in the ordinary course the court will in my view grant an injunction restraining the solicitor acting, as in *In re A Firm of Solicitors* [1992] Q.B. 959. (The contrast in this respect between the court's approach in the case of this confidential relationship and other confidential relationships is brought out by the judgment in *G.D. Searle & Co. Ltd. v. Celltech Ltd.* [1982] F.S.R. 92.) But, in the case where without any such previous relationship a party's solicitor illegitimately becomes possessed of confidential information of the other party to the suit or dispute, in the ordinary course the court will merely grant an injunction restraining the solicitor making use of that information: it will not prohibit his continuing to act: see *English & American Insurance Co. Ltd. v. Herbert Smith* [1988] F.S.R. 232 and *Goddard v. Nationwide Building Society* [1987] Q.B. 670."

69. As Arnold J (as he then was) noted in *Shlosberg v Avonwick Holdings Ltd* [2016] EWHC 1001 (Ch); [2017] Ch 210 at [148], Lightman J was setting out the relief normally granted in the "no relationship case" and was not suggesting that there would not be cases where, in the particular circumstances, it would be appropriate to grant an injunction restraining the solicitor from continuing to act even in a "no relationship" case. *Shlosberg* was such a case. However, what is important for present purposes is that in "no relationship" cases where a solicitor for the opposing party has come into possession of the applicant's privileged information, the courts have not applied the special *Bolkiah* jurisdiction, imposing the burden of proof on the solicitor to show that there is no risk of disclosure of the confidential information. Rather the general law on confidentiality has been applied, that the burden of proof is on the applicant to show that there is a real risk of prejudice to him from the other party's solicitor having had access to confidential or privileged information. That is precisely why in the usual case, the appropriate remedy is not an injunction to restrain the solicitor from acting but an injunction to restrain use of the confidential or privileged information, which adequately protects the applicant. For example, in *Stiedl v Enyo Law LLP* [2011]

EWHC 2649 (Comm); [2012] PNLR 4, although Beatson J does not expressly mention of the burden of proof, he clearly proceeded on the basis that the burden of proof was on the applicant throughout.

70. It seems to me that cases such as the present, where there has been disclosure to the opposing solicitors firm of privileged confidential information during a mediation or settlement discussions in previous litigation where the firm acted for the opponent against the current applicant, lie somewhere in the middle of the spectrum. Unlike cases such as *English & American Insurance Co. Ltd. v. Herbert Smith* the case is not one of inadvertent disclosure to the opposing firm. Rather, disclosure has been made in the context of a mediation or settlement. Mr Barclay argued that this was a case like *Carter Holt* where the opposing solicitor had entered an express confidentiality agreement contained in the declaration to the mediation agreement. Although he did not press the point orally, in his skeleton argument he contended that such an express contractual obligation of confidentiality was a fiduciary duty of an equal status to that imposed by a solicitor-client retainer, relying on what Lord Woolf MR said in *Attorney-General v Blake* [1998] Ch 439 at 454E-H and extra-judicial observations by Lord Millett in an article in the Law Quarterly Review: *Equity's place in the law of commerce* (1998) 114 LQR 214.

71. There are two answers to this point. The first is that, as Ms Wickenden submitted, the judge made a finding that the only confidential information was in the Settlement Agreement so that unless Glencairn could overturn that finding (an issue to which I return below in the context of the second ground of appeal) it is of no relevance that the solicitors involved in the mediation signed the declaration of confidentiality in the mediation agreement. Virtuoso was not a party to the Settlement Agreement and thus to the confidentiality provision in clause 3. Accordingly, the highest it could be put is that if Mr Partington, Mr Walawage and Mr Popa saw clause 3, they came under an equitable duty of confidence.

72. Second, whilst one of the categories of fiduciary relationship described by Lord Millett in his article (and by Lord Woolf MR in *Blake)* is the relationship of confidentiality, it is clear that he was drawing a distinction between that type of fiduciary obligation and that arising from what *Hollander & Salzedo* describe as a true fiduciary relationship such as that arising under a solicitor-client retainer, and did not regard the opposing solicitor who acquires confidential information as being in a fiduciary relationship with the party seeking to protect confidentiality. Thus, in the relevant section of the article at 220-221 Lord Millett said:

> "The third category [of fiduciary relationship] is the relationship of confidentiality. This arises whenever information is imparted by one person to another in confidence. The obligation to respect confidentiality has several jurisdictional bases. It may be contractual or equitable. It may arise from the circumstances in which the information was imparted, or from the obviously confidential nature of the information. It may arise even if the information was improperly or accidentally obtained: the principle that "the information must have been imparted in circumstances importing an obligation of confidence" obviously applies only where the information is voluntarily imparted.

> Finders and thieves, who are not fiduciaries, are bound to respect the confidentiality of the document they have found or stolen. So is the solicitor to the party opposite, who is not in a fiduciary relationship with the party seeking to protect confidentiality. There is nothing fiduciary, or even relational, in the principle which compels the return of documents mistakenly given on discovery… It is unconscionable for one party to take advantage of an obvious mistake by another; but this does not put the parties into any kind of fiduciary relationship…." (my underlining)

73. Furthermore, although in the passage in *Blake* relied upon, Lord Woolf MR describes the employer-employee relationship as a fiduciary one, he clearly did not intend to imply that the whole range of fiduciary obligations was engaged by such a relationship: see the passage from the judgment of Elias J (as he then was) in *University of Nottingham v Fishel* [2000] ICR 1462 approved and applied by the Court of Appeal in *Caterpillar Logistics* at [58] to [59]. After citing that passage, Stanley Burnton LJ warned against the labelling of duties as "fiduciary":

> "As these examples all illustrate, simply labelling the relationship as fiduciary tell us nothing about which particular fiduciary duties will arise. As Lord Browne-Wilkinson has recently observed:
>
> > '[T]he phrase "fiduciary duties" is a dangerous one, giving rise to a mistaken assumption that all fiduciaries owe the same duties in all circumstances. This is not the case.'"

74. In my judgment, even if in one sense a duty of confidence (whether by express or implied agreement or in equity) is a fiduciary one, its existence is not sufficient as a matter of English law to bring into play the *Bolkiah* jurisdiction imposing the burden of proof on the solicitor for the opposing party to show that there is no risk of disclosure or prejudice. The *Bolkiah* jurisdiction should be limited to cases where there is or was a true fiduciary relationship, of which a paradigm example will be the case of a solicitor who formerly acted for the applicant and who came into possession of the relevant privileged confidential information during the course of the retainer.

75. Furthermore, contrary to Mr Barclay's submission, there is an obvious distinction between legal professional privilege and without prejudice privilege in the context of the present debate. In the former case, the former client has imparted privileged information to his solicitor during the course of a true fiduciary relationship, in circumstances where the solicitor now wishes to act against the former client. In those circumstances, the strict *Bolkiah* test and the placing of the burden of proof on the solicitor are clearly justified. In the case of without prejudice privilege, the applicant and his legal advisers will have chosen to share privileged information with his opponent and the opponent's legal advisers during the course of a mediation or settlement discussions. Whilst the opponent and his legal advisers cannot use the privileged information other than for the purposes of the mediation or settlement discussions, they have not received it in a fiduciary capacity, as the underlined passage from Lord Millett's article makes clear. If, for whatever reason, the information is misused and/or openly disclosed or there is some threat that it will be, the remedy of restraining the opponent and his legal advisers from misusing the information is usually

sufficient protection. If the applicant wishes to obtain wider injunctive relief such as sought in this case, the burden of establishing that such relief is necessary should be on the applicant as it would be in the general law of confidentiality, without what might be described as presumptions in favour of the applicant such as apply under the strict *Bolkiah* test.

76. As for the cases relied upon by Glencairn, Mr Barclay submitted that in *Adex* HHJ Hallgarten QC had applied the *Bolkiah* test of burden of proof. However I consider that the judge's analysis in the present case (to which I have already referred at [25] above) is correct, that, although in *Adex* HHJ Hallgarten QC cited *Bolkiah*, he does not seem to have adopted the approach to the burden of proof advocated by Lord Millett. It follows that the case overall may have been correctly decided on its own particular facts, as this Court thought in *Virgin Media*. In any event, the judgment was *ex tempore* and is of limited assistance, not least because it is apparent from the end of the judgment that the judge may not in fact have imposed an injunction restraining the opposing solicitors firm from acting, but may have accepted an undertaking that the particular partner involved in the previous Time mediation would not be involved in any settlement discussions in the Adex litigation.

77. However, I consider that the decision of the Court of Appeal of New Zealand in *Carter Holt* does not represent English law. It erroneously applies the *Bolkiah* approach to the burden of proof. Furthermore, the actual order made as it appears from [36] of the judgment is surprising, as it imposed an injunction not just on the three lawyers involved in the previous mediation but the entire firm.

78. It also follows that, although the decision of the New South Wales Court of Appeal in *Worth Recycling* that the *Bolkiah* jurisdiction should not apply, accords with what I have concluded is English law, the ground of distinction the judgment in that case draws with *Carter Holt*, that unlike *Carter Holt* that case was not one where the opposing solicitor was under an express duty of confidentiality, is not a necessary ground of distinction as a matter of English law. As I have already held, the fact that the opposing solicitor may have assumed an express obligation of confidentiality is not sufficient to justify the application of the *Bolkiah* burden of proof in former opponent cases.

79. In my judgment, limiting the *Bolkiah* jurisdiction in this way to cases where there is or was a true fiduciary relationship between the applicant and the relevant solicitor does not affect deleteriously the public interest in the mediation and settlement of disputes. Indeed, as *Hollander and Salzedo* point out at [9-014], the effect of *Carter Holt* if it represented English law would be to act as a disincentive to the mediation of disputes.

80. Accordingly, the judge was right to conclude that the *Bolkiah* jurisdiction did not apply in cases such as the present where the solicitor for an opposing party has previously acted for another opposing party against the same applicant and had access to privileged confidential information in the course of the mediation. The judge was therefore right to conclude that the burden of proof was on Glencairn throughout to show that there was a risk of misuse of privileged confidential information and of prejudice to Glencairn. Of course, in an appropriate case, an applicant in the position of Glencairn may be able to satisfy the Court that the risk of misuse and prejudice is sufficiently great that an injunction to restrain the opposing party's solicitor should be granted. However, as the judge rightly concluded, whether or not such an injunction should be granted involves, as in any other case of alleged breach of confidence outside the scope

of the *Bolkiah* jurisdiction, a balancing exercise taking account of the prejudice to the opposing party if such an injunction were to be granted and of whether some less onerous form of injunctive relief, such as an injunction to restrain the use of the privileged, confidential information, would protect the applicant sufficiently.

81. In my judgment the first ground of appeal should be dismissed and I turn to consider the second ground, under which Glencairn essentially seeks to argue that the judge erred in not concluding that this was a case where Glencairn had established that the risk of disclosure of privileged confidential information and of prejudice to it was sufficiently great that the injunction it sought should be granted. I agree with Ms Wickenden that this ground is seeking to attack and overturn findings of fact, inferences and evaluative assessments which are quintessentially matters for the judge at first instance with which this Court will be reluctant to interfere. The proper approach in the light of the authorities summarised at 52.21.5 of the White Book was summarised by this Court recently in *Scott v Potamianos* (also known as *Re Sprintroom*) [2019] EWCA Civ 932:

> "… on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, 'such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion'".

82. At the outset of consideration of this ground of appeal, I consider three important points need to be emphasised. First, Mr Barclay fairly accepted in argument that his criticism, that the evidence of Ms Ward about the Virtuoso Final Touch team having no knowledge of any confidential information was inadequate and that statements from the other lawyers were required, was only applicable if he was right on his first ground of appeal, that the *Bolkiah* test applied. Given that I have concluded that the first ground of appeal must be dismissed, that criticism falls away. Although no formal concession was made by Mr Barclay, it seems to me to follow that, given that the burden of proof remains on Glencairn to show sufficient risk of misuse and prejudice to justify an injunction, it is not sufficient for Glencairn to submit that the information barrier put in place failed to comply with the elements required by Lord Millett as set out at [31] above. In other words, the judge was right to conclude that the critical question was whether the information barrier put in place worked, which is a question of fact, in relation to which the burden of proof to show that it did not work was on Glencairn. There is no question of there being any binding proposition of law that the information barrier has to be part of the structure of the firm.

83. Second, although Mr Barclay sought in his submissions to make much of potential breaches of confidentiality prior to the information barrier being put in place, for example Ms Davies' receipt of the mediation position statement, because Glencairn had not produced evidence as to the confidential information which it was alleging might have been disclosed, the judge made a finding that the furthest he could go was to conclude that the only relevant confidential information was in the Settlement Agreement (see [84] of his judgment). Contrary to Mr Barclay's submissions, I consider that the judge was right in the finding he made. If Glencairn wanted to make good a case that there was confidential information in the mediation position statements or other without prejudice communications before or after the mediation or in what

occurred at the mediation, it was incumbent on it to produce evidence detailing the confidential information in question. Mere assertion, which is what Mr Barclay's submissions on this issue necessarily were in the absence of such evidence, is not sufficient. If it were to be suggested by Glencairn (which I do not understand that it was before this Court) that this would have entailed disclosing confidential information not just to the Court but to Final Touch and its lawyers, there are arrangements which could have been made to avoid that consequence, for example the appointment of special counsel to represent Virtuoso such as occurred in *Stiedl v Enyo Law LLP*.

84. Third, Mr Barclay's reliance on the telephone conversation between Mr Miller and Mr Shapiro as somehow showing that there was a risk that there had been a breach of confidence was misconceived. The judge rightly concluded that there was a conflict of evidence between the two US lawyers as to what had been said which could not be resolved because neither had been called to give evidence and to be cross-examined, so that, as he said at [88], he could not reach a conclusion as to whether confidential information was disclosed. However, as Arnold LJ pointed out to Mr Barclay in the course of argument, by serving the evidence of Mr Miller openly, Glencairn had impaled itself on the horns of a dilemma. Mr Miller's evidence in his witness statement is that Final Touch's attorney, Mr Shapiro, called him and said that he had become aware of details of the Dartington Settlement and in particular that, as part of the Settlement, Dartington had obtained payment from Glencairn for redesigning its glass. Mr Miller does not say that what he alleges Mr Shapiro said to him was inaccurate. Moreover, if it was inaccurate, it is difficult to see why Glencairn would be concerned. Mr Miller's evidence therefore implies that the statement as to the terms of the settlement attributed to Mr Shapiro was accurate. From all this it follows that by serving its evidence, Glencairn has "let the cat out of the bag" as to what confidential information was contained in the Settlement Agreement. I agree with Ms Wickenden that this is a very important factor militating against the grant of an injunction.

85. In a very real sense those three points, whether taken individually or collectively, are a complete answer to this ground of appeal and demonstrate that the judge was quite right to conclude that confidential information had not passed to Ms Ward or the others on the Final Touch team at Virtuoso and that the likelihood of it doing so in the future was "very low" ([94] of the judgment). However, I will deal with the specific points made by Mr Barclay criticising the judge's analysis.

86. Mr Barclay's criticism of the judge's reliance on Ms Ward's evidence as being unsustainable cannot stand, not just because of Mr Barclay's confirmation that the criticism was only made if he was right on the first ground of appeal, which I have held he is not, but because, since Glencairn did not challenge Ms Ward's credibility or put in any contrary evidence, it not open to it to criticise the judge for relying and placing weight on her evidence as he was entitled to do.

87. Next Mr Barclay criticised the information barrier put in place but, as I have already said, in a case such as the present where the *Bolkiah* test does not apply, there is no need for Virtuoso to show that its information barrier complies with the stringent test adumbrated by Lord Millett in that case. Rather the question is whether the barrier works and the burden of proof is on Glencairn to show it does not. The evidence of Ms Ward shows clearly that the barrier does work and Glencairn have not put forward any evidence to the contrary. The points made are no more than assertion and supposition.

The judge was entitled to conclude that the likelihood of any confidential information being passed to the Virtuoso Final Touch team was very low.

88. As for Mr Barclay's so-called "major incidents", none of them is of any significance. The first concerns Ms Davies, but, given that the only confidential information found by the judge was in the Settlement Agreement, there is nothing in the point about what she might have known prior to being on the Final Touch side of the barrier and she left the firm soon after the settlement was concluded. In any event, there is no evidence that she ever had access to any confidential information, let alone that she passed it to anyone else in the firm. Such evidence as there is shows that although she was only a trainee solicitor she understood her responsibilities. As Ms Wickenden said, her integrity was tested on 18 December 2018 when Mr Haig of Glencairn's solicitors attempted to speak to her to confirm the office address, but perhaps with an unnecessary abundance of caution, she refused to speak to him because of the information barrier.

89. The second "major incident" concerned Ms Waterman but this too is a non-point given that the only confidential information the judge found was in the Settlement Agreement. She only ever worked on the Dartington matter as a paralegal before the mediation and there is simply no evidence whatsoever that she ever had access to confidential information. Mr Barclay's suggestion that she may have done is unsustainable speculation.

90. The third "major incident" concerned the conversation between Mr Miller and Mr Shapiro. Mr Barclay recognised that he cannot suggest that the judge should have accepted Mr Miller's evidence, but tried to use the fact of the conversation having taken place as somehow demonstrating that a breach of confidence may have occurred. That again is pure speculation, but in any event, as I have already held, by putting in this evidence openly, Glencairn has effectively disclosed what the confidential information was, militating against the grant of an injunction.

91. In my judgment, the judge's evaluation of the evidence is not open to criticism and he carried out the balancing exercise correctly. His conclusion that the balance of justice was against the grant of an injunction was unimpeachable. The second ground of appeal should also be dismissed.

92. I should add that, if I had considered that it was appropriate to grant an injunction, I would not have concluded that the delay in bringing the application, which was relatively short, should lead to the application being refused. As it is however, I consider that the judge was right to refuse to grant an injunction and that the appeal should be dismissed.

Lord Justice Arnold

93. I agree.

Lord Justice David Richards

94. I also agree.