Can you sack your opponent's solicitor? You can try… *Glencairn IP Holdings Ltd v Product Specialities Inc (t/a 'Final Touch')* [2020] EWCA Civ 609

Introduction

It is well established that a litigant may restrain his former solicitors from acting for his opponent where: (i) those former solicitors are in possession of relevant, adverse confidential information and (ii) there is even a slight risk of that information being disclosed (*Bolkiah v KPMG*).[1] But the issue in *Glencairn*, was whether a litigant could prevent solicitors from acting for his current opponent because that firm had acted for a former opponent in similar litigation which was settled on confidential terms. Did the solicitors' knowledge of the applicant's confidential settlement strategy in similar litigation (against a different party) give an unfair advantage which meant the solicitors should be prohibited from acting?

First, the law. There are normally two types of case where solicitors become privy to confidential information:

- First, where the solicitors used to act for the applicant (the 'former client' case, such as *Bolkiah*).[2] In those cases, it is important to reassure clients that they can be open and transparent with their lawyers, confident that the information so imparted will never be used against them. Accordingly, the Court would not permit the lawyer to act against the former client if doing so increased the risk of leakage of confidential information. The burden of proving that there was no risk of disclosure was on the professional and, in practice was a very heavy one. This was chiefly because Lord Millett had set out a requirement that information barriers should include "some combination" of: (i) physical separation of departments; (ii) an educational programme; (iii) strict and carefully defined procedures; (iv) monitoring by compliance officers and (v) disciplinary sanctions;[3]

- Secondly, there were those cases where the confidential information had been obtained when there was no prior relationship between the applicant and the firm of solicitors (such as *Stiedl v Enyo Law LLP*).[4] In those cases, the ordinary remedy would be an injunction merely preventing the firm from making use of the adverse confidential information which it possessed. As in the general law of confidentiality, the burden of proving that an injunction was necessary

[1] [1999] 2 AC 222

[2] Although it was a firm of accountants, KPMG, which the applicant was seeking to restrain in *Bolkiah*, the House of Lords explicitly stated that the same considerations were to apply as if it were a firm of solicitors (see Lord Hope at 226H and throughout Lord Millett's speech)

[3] *Bolkiah* at p.238C. See also Lord Millett's statement at p.239D: *"an effective Chinese wall needs to be an established part of the organisational structure of the firm, not created ad hoc"*

[4] [2012] PNLR 4, where Enyo, solicitors for Mr Stiedl's opponent, had been sent privileged documents in error by Mr Stiedl himself

would rest on the applicant and the Court would engage in a balancing exercise between the interests of the former client and the current client.

In *Glencairn*, the Court of Appeal recognised that there was a spectrum, with *Bolkiah* at one end and *Stiedl* at the other.[5] Accordingly, the Court confirmed that there are cases where it may be appropriate to restrain solicitors from acting even though there was no prior relationship between the applicant and the solicitors. The Court declined, however, to extend *Bolkiah* so that, even in such intermediate cases, the burden of proof remained on the applicant to prove that there was a real risk of disclosure.[6] *Glencairn* was an intermediate case, the applicant had failed to prove that there was a real risk of disclosure and so no injunction was granted.

Facts

Glencairn makes glassware. In September 2018, it wrote two letters of claim, one to Dartington and another to Final Touch, intimating separate (but similar) allegations that each had infringed its design regarding a whisky glass. Dartington and Final Touch both instructed Virtuoso solicitors to defend the intimated claims.

In December 2018, Glencairn attended a mediation with Dartington ("the Mediation"). On the same day as the Mediation, Virtuoso put up an information barrier between the teams acting for Dartington and Final Touch, under which:

- The two teams were headed by different solicitors and staff would no longer work across the two cases;
- The two teams were based "for the most part" in different offices (one in Leeds, the other in London);
- The firm's case management system restricted access to the Dartington files to the members of the Dartington team.[7]

Although the Dartington claim did not settle at the Mediation, in January 2019 a confidential settlement was reached ("the Dartington Settlement"). Virtuoso was therefore in possession of: (i) information disclosed for the purposes of the Mediation (which was subject to without prejudice privilege); and (ii) the terms of the Dartington Settlement (which were confidential).

In February 2019, a conversation took place between Glencairn's and Final Touch's US attorneys. The contents of that conversation were disputed but Glencairn alleged that Final Touch's attorney had revealed that it was aware of the terms of the Dartington Settlement.

[5] *Glencairn* (CA), at [66] to [70]
[6] See in particular *Glencairn* (CA) at [75]
[7] *Glencairn* (CA), [7] and [8]

In March 2019, Glencairn made an application for an injunction restraining Virtuoso from acting for Final Touch. Glencairn alleged that the information barrier put up by Virtuoso was deficient and that this was shown by what Final Touch's US attorney had said in February 2019.

First Instance

In the High Court,[8] HHJ Hacon dismissed the application. In summary, his reasoning was as follows:

1. The facts of this case fell somewhere in between *Bolkiah* and *Stiedl*. It would not, however, be right to place the burden of proof on Virtuoso because Virtuoso had never acted for Glencairn. The burden of proof therefore remained with Glencairn to show that there was a real risk of disclosure;[9]

2. The judge found as a fact that, on the evidence available to him, the only adverse confidential information that he could infer Virtuoso was in possession of was that contained in the Dartington Settlement agreement. The judge did not find that Virtuoso had in its possession any without prejudice material provided for the purposes of the Mediation;

3. The judge did not resolve the factual issue as to whether Final Touch's US attorneys had revealed his knowledge of any details of the Dartington Settlement;

4. The test for the sufficiency of Virtuoso's information barrier was simply whether it worked but the Court would have regard to the factors laid down by Lord Millett in *Bolkiah*. He found that the risk of disclosure was greater in a small firm and that there was continuing regular contact between the members of the Dartington and Final Touch teams. The judge nonetheless concluded, however, that the risk of disclosure was "very low", for reasons including that the Final Touch team were aware of the Dartington litigation and that they were unable to access the Dartington files;[10]

5. Considering the relative likely prejudices to Glencairn and Final Touch, the balance of justice lay in favour of refusing the application for an injunction.

Appeal

On appeal, Glencairn argued principally that the judge should have applied *Bolkiah,* placing the evidential burden of proof on Virtuoso regarding the risk of disclosure. The Court of Appeal, however, disagreed for the following reasons:

[8] [2019] EWHC 1733 (IPEC)
[9] *Glencairn* (HC), [35] to [51]
[10] *Glencairn* (HC), [86](e)

1. The judge was correct to have distinguished *Bolkiah*, because Virtuoso had never been instructed by Glencairn. In former client cases, although the fiduciary relationship between the solicitor and his client had ended, *"the solicitor remains subject to a strict duty of confidentiality because the information was imparted to him during the course of the fiduciary relationship."* [11] In former opponent cases, however, there never was any such fiduciary relationship.[12] In essence therefore, the information imparted in the former client cases is worthy of the enhanced protection provided by *Bolkiah,* whereas the information imparted in former opponent cases is not;

2. Where the *Bolkiah* test does not apply, it is not necessary to consider Lord Millett's factors for the sufficiency of an information barrier. The Court need only ask itself whether the information barrier works;[13]

3. In the circumstances of this case, the judge was entitled to decide that the likelihood of any confidential information being disclosed to Final Touch was very low.[14] His refusal to grant the injunction was therefore unassailable.

Discussion

This decision will be welcomed warmly by litigation solicitors and barristers. It would be extremely inconvenient for them if their involvement in confidential settlement discussions meant they could be easily conflicted out of working in related matters. Smaller firms of solicitors will be particularly pleased that the Court did not extend the *Bolkiah* jurisdiction, because of the practical impossibility faced by them in complying with Lord Millett's criteria regarding information barriers. This judgment also serves as a helpful reminder to legal professionals that conflicts of interest can arise in this manner and that such conflicts should be addressed by the creation of effective information barriers. A failure to do so may well render a firm susceptible to an injunction forcing them to take such measures.

In any event, following *Glencairn*, if a litigant wishes to remove opposing solicitors on these grounds, then not only will they bear the burden of proving that there is a real risk of disclosure but, in so doing, they will have to show that any information barrier put in place does not work, and they will be unable to rely on the *Bolkiah* criteria. In light of those formidable obstacles, it seems unlikely that many litigants will take up the mantle of such an application – but they can at least write threatening letters demanding effective barriers be put in place.

And it is for these reasons that it is submitted that this decision is correct. Mediation is a good thing. But if the confidentiality attached to it could too readily conflict firms out of acting on similar cases, that would be a serious deterrent to participation. Generally

[11] *Glencairn* (CA), [66]
[12] *Glencairn* (CA), [72]. Flaux LJ also went on to say, at [73] and [74] that even if there were a fiduciary relationship, it was not to be equated to the 'true fiduciary relationship' which exists or had existed as between the solicitor and client.
[13] *Glencairn* (CA), [87]
[14] *Glencairn* (CA), [87]

speaking, litigants should be free to instruct solicitors, barristers and expert witnesses of their choice and those same professionals should be able to act against the same opponents more than once. This builds expertise and trust, whilst also saving money.

On the other hand, however, some of Flaux LJ's obiter comments might be said to have placed the bar too high for a prospective applicant. Where a litigant seeks an injunction on the grounds that the solicitor is in possession of without prejudice material (such as a mediation position statement), the Court was forceful in advocating the appointment of special counsel so that the confidential information could be placed before the Court without being disclosed to the other side.[15] This was the procedure used in *Stiedl*, however, that was an application in the context of commercial litigation worth many millions of pounds.[16] Such an exercise is very likely simply to be unaffordable for most litigants. Indeed, *Glencairn* was a claim started in the Intellectual Property Enterprise Court, where recoverable costs for the entire claim are strictly limited to a total of £50,000.[17] There is, however, no discussion in Flaux LJ's reasoning regarding proportionality.

Furthermore, sophisticated litigators could use confidentiality as a weapon. In group claims or mass tort litigation where a particular cohort of claimants settle and others continue, the opposing party might be able to use the fact of confidential settlement to exclude the individual lawyer acting for the other claimants. If a tertiary lender brought a large number of professional negligence claims, a defendant panel law firm might find a large number of fee-earners conflicted out if they had learnt about the lender's settlement strategy. This may be an inevitable consequence of learning confidential information but could be a trap for the unwary and a potentially powerful weapon for the shrewd.

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[15] *Glencairn* (CA), [83]
[16] *Brown & Ors v Innovatorone Plc & Ors* [2012] EWHC 1321 (Comm)
[17] CPR 45.31(1)(a)