

JERSEY / JUDGMENT

Between v Geoffrey Crill [2021] JRC 295 (18 November 2021)

[2021] JRC 295

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judgment

the bailiff:

Introduction

1. This is an application by Hunters Investments Limited (HIL) to remove Carey Olsen as legal representatives of the Defendants in the above captioned proceedings (2021/066) other than Mr Crill who is already separately represented. If I accede to HIL's application it is possible that a similar result may follow in the case between David Banks (DB) and Sanne Holdings Limited (Sanne Holdings) and Sanne Fiduciary Services Ltd (Sanne Fiduciary) (collectively Sanne) (2019/65). 2. I have before me affidavits from Jane Constance Sappé of 2 nd June 2021, and David John Banks of 3 rd June 2021, both filed on behalf of HIL and an affidavit of Samantha Frances Maureen Hoare of 12 th May 2021 filed on behalf of the Defendants. Whilst I have of course read the affidavits I do not propose to refer to them further within this judgment although they have informed much of the information contained herein. The first two affidavits are from those who were involved to varying degrees in the subject matter of the proceedings contemporaneously. The last affidavit is from an Advocate working at Carey Olsen who is one of the main fee earners in the proceedings. 3. The application was made by HIL on 9 th June 2021, and was followed by further applications in these proceedings on 2 nd July 2021, seeking an extension of time for the filing of an answer in proceedings 2021/066 and an appeal against a decision of the Judicial Greffier in those proceedings. On 8 th July 2021, I gave my decision on all matters other than the application to disqualify Carey Olsen but indicated on 8 th July 2021, that any disqualification, should I so order it, would not take place before the Defendants had filed their Answer.

Background

4. HIL's Order of Justice is extensive and detailed. There are also a number of affidavits before me. Whilst I set out a synopsis of the claims made by HIL, I do so mindful of the fact that not all of the material averments are accepted by the Defendants nor indeed is any allegation of wrong doing. Nonetheless, in order to consider the potential for a conflict such as I should

accede to HIL's application, I should have regard to the pleadings as they stand. The background to the claim is alleged by HIL to be as follows: (i) Between 2010 and 2012 Sanne consisted of Sanne Holdings and Sanne Fiduciary. The voting shares and the majority of the non-voting shares were owned by two companies, Ivegill Investments Limited (Ivegill) and HIL. HIL held the majority of the voting shares. In 2010 and 2011 Sanne bought out the shareholders. In 2010 Ivegill was bought out and in 2011 HIL was bought out. Both of these corporate shareholders gave up their equity interests in Sanne and Ivegill received 10% preference shares worth £4 million and HIL received 12% preference shares worth £9.6m. HIL's claims relate to those two buy outs; (ii) The purpose behind the buy out of Ivegill was that it was perceived that its beneficial ownership of Sanne would harm Sanne's business. The issue arose as to how the purchase of Ivegill's interests was to be paid for. Sanne needed to reflect that debt on its balance sheet but that was done in an unlawful way and there was a material misstatement in the accounts as a result. It is alleged by HIL that that misstatement was deliberate; (iii) HIL's case is that all of the Defendants knew that Sanne Holdings was balance sheet insolvent from March 2010 onwards. Sanne Holdings had issued £4m preference shares to Ivegill in March 2010 and this constituted a liability to be recorded on Sanne Holdings balance sheet. Sanne Holdings did not have the financial resources and, it is alleged, it therefore determined to wrongly account for the shares at a nominal value only of £681,843 and not the correct liability which it created of £4m. It is further alleged that the Defendants kept this financial information from HIL, its largest single shareholder. There are allegations of fraudulent silence (dol) and false accounting including the backdating of minutes and the issuing of misleading correspondence. These, so it is alleged, were done in order to keep Sanne Holdings' insolvency a secret from HIL; (iv) It is alleged that this deceit was necessary and central to the story as without it the Defendants would not have been in a position to demand that HIL sell its equitable interests. It is further alleged that had the true position been disclosed to HIL, it would have been clear that Sanne Holdings needed significant financial help to correct the treatment of the Ivegill transaction and HIL would then have retained its equity interests in Sanne Holdings after 2011 before selling them in materially different circumstances between 2012 and 2016 for a much greater value; (v) During 2011, Carey Olsen were instructed to act for HIL in respect of the 2011 transfer deal. Advocate Michael Jeffrey, a partner at Carey Olsen at the time, acting for HIL had attended a meeting on HIL's behalf on 19 th May 2011. The Defendants attended that meeting and the purpose was to discuss the proposed issuing by Sanne Holdings of £9.6m worth of 12% preference shares as part of the 2011 HIL transfer deal; (vi) It is alleged that Carey Olsen advised Sanne that its proposed accounting treatment of any newly issued 12% preference shares was unlawful because the Defendants intended to issue the new 12% preference shares and wrongly account for those shares at the nominal value of HIL's existing shares (£901,704) rather than the actual liability created of £9.6m. It followed from that meeting, so it is alleged, that the Defendants must have known at that point at the latest that exactly the same treatment of the shares issued to Ivegill in March 2010 must have been equally unlawful. It is alleged that notwithstanding this knowledge the Defendants continued their silence and proceeded to sign off the Sanne Holdings 2010 accounts in breach of the law and

deliberately misstating the position with regard to the 10% preference shares and thereby concealing Sanne Holdings' balance sheet insolvency and failing to reveal the true financial position to its own main shareholder, HIL; (vii) With regard to the 2011 HIL transfer, Carey Olsen advised HIL to structure the proposed deal by a conversion of most of HIL's existing shareholders into 9.6m 12% preference shares with each new preference share said to have been paid up to only 9p each. Sanne Holdings required legal representation to amend its articles of association to give effect to this new scheme. A letter from Bedell Cristin of 8 th April 2011 on behalf of DB raised the possibility of litigation and a fraud on the minority. Carey Olsen acted for both HIL and Sanne Holdings in respect of the 2011 HIL transfer. All of the Defendants knew about the letter from Bedell Cristin; (viii) Advocate Coltman of Carey Olsen was instructed to act for Sanne Holdings for the purposes of the 2011 HIL transfer deal and Advocate Jeffrey briefed Advocate Coltman as to the background of that deal and why it was necessary for the proposed transaction to be materially restructured. (ix) The proposed restructuring put forward by Carey Olsen was fundamentally wrong because the Sanne Holdings accounts were still misstated in respect of the creation of the 12% preference shares. The preference shares still generated a new liability of £9.6m on the balance sheet and the Sanne Holdings 2011 and 2012 financial statements were thus misstated with the total liabilities in respect of the 10% and 12% preference shares recorded at a nominal value of approximately £1m whereas the liabilities were in fact greater than £13m. Sanne Holdings was at that time hopelessly insolvent. (x) Further allegations are made about Advocate Coltman's involvement in the case including that he signed early pre-action correspondence in the present litigation. Advocate Coltman of course remains a partner at Carey Olsen. (xi) Without going into the full detail, it is also correct to note that HIL's full case on liability pleads additional misconduct which includes breaches of an agreement known as the DB Settlement Agreement mentioned hereunder which was drafted by Advocate Kelleher. Numerous breaches of the agreement are pleaded in the Order of Justice. (xii) There were a significant number of misrepresentations made to HIL in November 2010 onwards that ultimately resulted in the 2011 transfer deal. The misrepresentations, included repeated suggestion by the Defendants that there was an urgent crisis in the Sanne business and that members of Sanne Management were about to walk out "en masse". That was incorrect. It is instead alleged that the proposal to acquire HIL's interests in Sanne Holdings had been triggered by the proposed merger of the law firms Crill Canavan and Collas Day and that the Defendants saw this as an opportunity to acquire HIL's interests at a significant discount by raising a number of concerns. (xiii) During negotiations the Second and Third Defendants threatened HIL on a number of occasions with the use of Article 41 of the Sanne Holdings Articles of Association. I do not need to go into the technical explanation of this allegation but it is further asserted that when the Jersey Financial Services Commission raised concerns and questions in 2012 the Defendants lied to the Commission and denied that the use of Article 41 had been threatened. (xiv) It is alleged that Advocate Coltman in particular, and Carey Olsen in general, continued to act for Sanne Holdings during the period 2011 - 2015, including on the issuing, in 2013, of new 12% preference shares to a third party which were fully recorded in

the balance sheet of Sanne Holdings that year. This accounting treatment was different from that which happened in 2010-2012 with regard to the 10% and 12% preference shares. (xv) In 2015 a prospectus for Sanne Group PLC was published and featured a report from Deloitte London that confirmed that the Sanne Holdings accounts required material correction in respect of the previous accounting treatment of 10% and 12% preference shares. This confirms that the restructuring in the 2011 transfer deal as advised on by Advocate Jeffrey and Advocate Coltman of Carey Olsen was fundamentally wrong; and (xvi) In December of 2018 Advocates Coltman and Kelleher of Carey Olsen promoted a complaint to the Law Society on the basis that allegations of fraud made against Sanne Holdings and Sanne Fiduciary, made by HIL's counsel, had no evidential basis. It was said to the Law Society in the complaint that Sanne Holdings 2010 Accounts were accurate and the complaint contained other material inaccuracies. It is now admitted that those assertions put before the Law Society were wrong and in any event the Law Society rejected the complaint at the preliminary stage as revealing no case to answer and indeed suggested that a prima facie case of fraud was made out. The 2019/165 proceedings were commenced in June 2019 and DB, the Plaintiff, sought summary judgment. It was shortly before the Defendants in the 2019/165 proceedings were due to file evidence in reply that Sanne admitted that the accounts were materially misstated and in breach of the Companies Law. HIL now pleads the incorrect averments made to the Law Society as an admission by conduct. 5. I have not gone into full detail nor have I done justice to HIL's pleading. I have taken the above statement to a significant extent from the skeleton argument provided by HIL but also from other material. I was referred to correspondence and other documentation that, it is averred, supports some of the allegations made in the HIL Order of Justice. 6. An argument on the part of HIL in this application is that the First, Second and Third Defendants must have understood that criminal offences may have been committed in not accounting for the Ivegill shares in 2010 but nonetheless they signed off on the accounts in June 2011. 7. It is appropriate to make some reference to the procedural history and, in particular, that part of it which relates to the claim that Carey Olsen should step down from acting for the Defendants. 8. The question of conflict had been raised by DB and another as long ago as July 2012, in which it was claimed that it was inappropriate for Carey Olsen to act for Sanne, the Second and the Third Defendants. The issues there raised were not dissimilar to the issues currently argued before me. In July 2012, Advocate Coltman responded to that email saying that he did not accept that this was a conflict of interest. The nature of the claim then in prospect to the extent that it was clear is different from the claim in the present proceedings. 9. In a pre-action letter dated 14 th September 2018, in the proceedings under reference 2019/165, DB indicated an intention to bring legal proceedings against Sanne. The letter before action made personal claims alleging, inter alia , breach of contract and seeking substantial damages. In a letter of 18 th September 2018, DB's legal adviser wrote that Carey Olsen could not act in the threatened proceedings because Advocate Kelleher had advised the remaining partners of Crill Canavan on the terms of the DB's Settlement Agreement and that Carey Olsen had advised HIL on the 2011 HIL transaction. The letter sought confirmation that any privileged advice given to HIL or another would not be

disclosed and that Carey Olsen would cease acting. Carey Olsen refused in a letter of 24 th September 2018 to step aside on the basis that it was not satisfied that there was any real prospect of conflict arising. There then followed an exchange of correspondence in which the Plaintiff's legal advisers sought confirmation that Carey Olsen would step aside and Carey Olsen declined to do so. On 12 th June 2019, the proceedings under reference 2019/165 were commenced and in a letter from the Plaintiff's legal adviser dated 28 th June 2019 the Plaintiff again raised the issue of Carey Olsen acting for Sanne. It was suggested that at some point early on in the proceedings there would be an application to remove Carey Olsen from the record on grounds of conflict. It was said that Advocate Coltman and Advocate Jeffrey were material witnesses of fact and that Advocate Kelleher had drafted and advised the remaining Collas Canavan partners on the DB settlement agreement. Carey Olsen was expressly put on notice of such an application. 10. No such application to remove Carey Olsen from acting in the proceedings under reference 2019/165 has ever been made. The action has continued for a significant period and a number of procedural steps have been undertaken at, it is to be supposed, some significant cost. 11. In late 2020, there was pre-action correspondence that was followed by the 2021/066 claims being commenced by HIL. In a letter dated 12 November 2020, Carey Olsen wrote to HIL's legal adviser saying that it acted, as it did at that stage, for all of the intended Defendants and in response on 20 November 2020 the Plaintiff's legal advisers raised again the issue of conflict. It raised the prospect that some of Carey Olsen's lawyers may be witnesses in relation to a meeting of 19 th May 2011, and a further warning was given in that letter relating to the position regarding the Defendants' legal representation in order to "avoid wasted costs". 12. On 4 th December 2020, the dissolution of HIL was declared void so that HIL could pursue its claims against the Defendants. 13. It is apparent, accordingly, that DB and more latterly HIL have at various times raised the question of conflict and Carey Olsen's continued involvement in the case. Some of the issues were raised back in 2012 - 2013, and all of the issues were raised in correspondence in or around 18 th September 2018. Although it was suggested that an application would be made in the early part of the proceedings 2019/165 that has not happened. It is urged upon me that this inaction on the part of DB and/or HIL should be taken into account in considering the merits of a HIL's current application. Of course, as mentioned above, HIL would not itself have been in a position to advance this argument until its dissolution was declared void. 14. In the Defendants' skeleton argument it is accepted that Advocate Kelleher advised the remaining Crill Canavan partners in early 2005, in the settlement of the partnership proceedings brought by DB against them in relation to his departure from the Crill Canavan partnership for which the remaining CC partners issued an unconditional letter of apology as part of the settlement. The DB Settlement Agreement contains a number of clauses which impose obligations on the remaining partners in relation to HIL but neither HIL nor Sanne are parties to the DB Settlement Agreement. The Defendants dispute, however, that Advocate Kelleher will or may be a witness in connection with the DB Settlement Agreement on the basis that, firstly, any advice Advocate Kelleher gave would be subject to legal privilege and he cannot therefore give evidence; and, secondly, it is argued that Advocate Kelleher will have no difficulty

addressing the Court should it be necessary to do so on the meaning and scope of any clauses in the DB Settlement Agreement as any such submissions will simply be matters of interpretation of the clauses on their face. They will not involve reference to evidence or matters confidential to HIL. It is argued as well that the relevance of the DB Settlement Agreement to the HIL Order of Justice is far from clear and it is said that there is little prospect of Carey Olsen's files containing relevant confidential information nor indeed of Advocate Kelleher recollecting confidential information from 2005 relevant to the HIL proceedings. It is suggested in the Defendants' skeleton argument that there is "simply no real risk". 15. It is clear that the 2010 Sanne Holdings accounts were materially misstated in relation to the recording of the 10% preference shares created as part of the Ivegill transaction. In *Banks v Sanne*

[2019] JRC 222A (DB's summary judgment application) the Court found: "22. Having regard to all the reasons above, the decision of the court is to grant summary judgement to the plaintiff on the following terms:- (i) The SHL 2010 accounts do not properly account for the 4 million, fully paid, redeemable cumulative 10% preference shares of £1 each that SHL issued to Ivegill Holdings Limited in March 2010. The SHL 2010 Accounts were therefore materially misstated in this regard. (ii) The consolidated balance sheet at page six of the SHL 2010 Accounts is materially wrong and misstated. It records positive net assets of £3,011,321 whereas the consolidated balance sheet should have recorded a deficit of net assets having regard to the liabilities created in respect of the Ivegill Transaction. (iii) In the light of the findings above:- (a) SHL acted contrary to Article 103 of the 1991 Law in that the company failed to keep accounting records that are sufficient to show and explain the Ivegill Transaction. (b) SHL acted contrary to Article 105(4) of the 1991 Law in that the SHL 2010 Accounts failed to give a true and fair view of the state of the company's affairs at the end of the period." 16. Sanne does not accept, however, as alleged by HIL that adopting a position in pre-action correspondence and/or in the complaint to the Law Society, which was subsequently shown to be incorrect in relation to the Sanne Holdings accounts, could amount to "admission by conduct". It is argued that Sanne has simply resiled from a position previously adopted and that is not untypical in litigation. 17. I repeat that my statement of the facts set out above is far from complete and that many of the material averments made by HIL or inferences to be drawn by HIL from facts as admitted are not accepted by the Defendants. The basis of the application 18. HIL applies for the removal of Carey Olsen, on the basis that Carey Olsen have a conflict of interest and/or there is a significant risk of such conflict. In its summons HIL summarises those conflicts as follows: (i) That Carey Olsen acted for HIL in respect of the 2011 transfer deal which is at the heart of HIL's claims pleaded in its Order of Justice; (ii) Advocate Kelleher, a partner in Carey Olsen drafted the DB Settlement Agreement and advised the remaining CC Partners as to its meaning and effect. The Order of Justice pleads breaches of the DB Settlement Agreement as part of the claims against the Defendants; (iii) Advocates Michael Jeffrey and Guy Coltman, both partners at the material time in Carey Olsen, are key witnesses to the lawfulness of the accounting treatment used by the Defendants in May 2011 and

whether the Defendants were conspiring to commit dol , fraud (within the meaning of AG v Foster) and other unlawful conduct towards HIL. Advocate Coltman is still a partner in Carey Olsen; (iv) Advocate Coltman is also a witness of fact to key events in 2011 - 2015 when a large part of HIL's interest in Sanne Holdings acquired by the Defendants in 2011, was sold on for a "massively increased value" some 12 months later; (v) Advocates Coltman and Kelleher promoted a complaint to the Jersey Law Society on behalf of Sanne in December 2018, that was rejected at the preliminary stage as revealing no case to answer. A number of materially false statements of facts were made to the Law Society and this conduct is now pleaded in the Order of Justice as an admission by conduct. Advocates in Carey Olsen are accordingly witnesses of facts to those events. 19. The summons also pleads that Carey Olsen cannot act for both Sanne and also their former senior directors, the above named second and third defendants, in the face of allegations of fraud. There is a conflict of interest between these clients. The Legal Principles 20. In *Les Pas Holdings Limited v Receiver General and States Greffier*

[1995] JLR 163 the Royal Court, considering a case in which an advocate who had joined a firm which had previously acted for the opposing party could remain as counsel said this: "Held, dismissing the representation: Although B had acted perfectly properly and the court had no doubt that he would abide by his undertakings in future, the plaintiff had a justifiable fear that if he continued to act for the defendants there was a possibility that information relating to its business affairs (not necessarily linked to the legal or factual arguments to be put forward) might fall into his hands, however, innocently, and would affect his handling of the case. In these circumstances the principle that justice had to be seen to be done outweighed the right of a litigant to choose his own advocate, notwithstanding the size of the Jersey Bar and it followed that the court would be no less rigorous in requiring an advocate to case to act than would an English court. Applying the test of whether a reasonable man (as represented by the court) would consider the plaintiff's confidentiality adequately protected merely by a "Chinese wall" the court would not in the present circumstances authorize B to continue to act as the defendant's advocate". 21. In *Geveran Trading Co. Ltd v Skjevland* [2003]1 WLR 912 the Court said this: "39. We accept that the circumstances, other than those where he has relevant confidential information, where an advocate may be restrained by the court from acting as an advocate in litigation are likely to be very exceptional. However, such circumstances have occurred in the past. Thus in *R v Smith (Winston)* (1975) 61 CR App R 128, a pupil barrister met the accused and discussed his case with him and then subsequently appeared behind prosecuting counsel at the accused's trial. The Court of Appeal assumed that no information which the pupil had obtained from the accused was divulged to the prosecution. Nevertheless, this court held that it was impossible to say that in the circumstances justice had been seen to be done. Accordingly, the conviction was set aside." ... "42 Where a party objects to an advocate representing his opponent, that party has no right to prevent the advocate from acting based on the Code of Conduct as the content and enforcement of that Code are not a matter for the court. However, the court is

concerned with the duty of the advocate to the court and the integrity of the proceedings before it. The court has an inherent power to prevent abuse of its procedure and accordingly has the power to restrain an advocate from representing a party if it is satisfied that there is a real risk of his continued participation leading to a situation where the order made at trial would have to be set aside on appeal. The judge has to consider the facts of the particular case with care: However, it is not necessary for a party objecting to an advocate to show that unfairness will actually result. We accept Mr Jones' submission that it may be difficult for the party objecting so to do. In many cases it will be sufficient that there is a reasonable lay apprehension that this is the case because, as Lord Hewart CJ memorably said in *R v Sussex Justices, Ex p McCarthy*

- [1924] 1 KB 256, it is important that justice should not only be done, but seen to be done. Accordingly, if the judge considers that the basis of objection is such as to lead to any order of the trial being set aside on an appeal, ... he should accede to an order restraining an advocate from acting. But we stress that the judge must consider all the circumstances carefully. A connection, for instance, between counsel for one party and a witness on the other side may be an important factor where the evidence is of fact but, depending on the nature of the connection, it may be less important where the evidence is of an expert nature and the cross-examination is likely to be on questions of technical expertise. The judge should also take into account the type of case and the length of the hearing, and any special factor affecting the role of the advocate for instance, if he is prosecuting counsel, counsel for a local authority in care proceedings or as a friend of the court. 43. a judge should not too readily accede to an application by a party to remove the advocate for the other party. It is obvious that such an objection can be used for purely tactical reasons and will inevitably cause inconvenience and delay in the proceedings. The court must take into account that the other party has chosen to be represented by the counsel in question." 22. In *Brian Connelly v Law Society*
- [2007] EWHC 1175 (Admin) the Court said this: "A solicitor has a duty to examine his own position with the utmost care when he agrees to act for a claimant litigant against a defendant litigant who has been a client of his firm. It would in every case be a question for the judgment of the solicitor. Clearly a prudent solicitor, if there were any vestige of doubt, would conclude that he should not act in such circumstances" 23. In *Hirschfield v Sinel*
- [1999] JLR 55 at page 65 the Royal Court said this: "The position in Jersey law is the same as in England and Wales. A Jersey advocate is not to be permitted to act on behalf of a client and to appear as a witness, except where the advocate's evidence is purely formal." (Further references to *Hirschfield* are cited in the authorities following) 24. In the case of *Takilla v Olsen Bachurst & Dorey*
- [2004] JLR 219 the Court said: "The court's jurisdiction to prevent an advocate or solicitor for a party is founded (i) in cases where information confidential to one or other of the parties may be imperilled, on the protection of substantive legal rights; *Bolkiah (Prince Jefri) v*

KPMG (2); and (ii) in most, if not all, other cases on the inherent jurisdiction of the court to control its own process and the conduct of its officers and to prevent abuse of its procedure: " Gerveran Trading (3), and In re L (Minors) (Care Proceedings: Solicitors) (5), per Wilson J. (2001) 1 W. L. R. at 105). No issue of confidentiality arises in either of the two areas of challenge in the present case: both fall to be dealt with under the second of these two heads. 22. In such cases, the court's jurisdiction is a discretionary one, to act as it thinks best in the interest of justice in the action in question. In some extreme cases, such as where counsel finds himself in a position of plain and serious conflict of interest, there may in practice be little scope for the exercise of such discretion and the outcome in such instances is more or less a foregone conclusion. In general, however the discretion has to be exercised in the light of the facts and other circumstances of each individual case; with due regard for the principle that justice needs not only to be done but to be seen to be done and with regard to the possibility of an appeal if the practitioner in question were permitted to continue to act. But it also needs to be exercised with restraint: per Arden L. J. giving the judgment of the court in Geveran Trading [2003] 1 W. L. R. at We922 - 924): "We accept that the circumstances, other than those where he has relevant confidential information, where an advocate may be restrained by the court from acting as an advocate in litigation are likely to be very exceptional ... A judge should not too readily accede to an application by a party to remove the advocate for the other party. It is obvious that such an objection can be used for purely tactical reasons and will invariably cause inconvenience and delay in the proceedings. The court must take into account that the other party has chosen to be represented by the counsel in question". 23. The codes of conduct of the professional bodies can be a convenient point of reference in so far as they crystalise or otherwise embody principles of law or practice that a court would itself adopt in any event, or in so far as they reflect rulings of courts in particular cases (this being the way in which such codes and guides tend to grow); to that extent they can be a legitimate factor in the exercise of the court's discretion. It is not, however, for the court to enforce these codes and guides as such 24. The primary consideration in most cases where problems such as those presently under consideration arise (and confidential information is not in issue) is the duty that every advocate owes to the court, a duty that overrides that owed to his own client; the judgment of the court in Geveran Trading gives a number of illustrations of what this means in practice [2003] 1 W. L. R. at 922). Fundamental to the effective discharge of that duty in general is the need for the advocate to be independent as far as possible of any and all external interests and motives, whether financial, professional or personal. Both of the Jersey Law Society of Conduct and the Bar Council Code of Conduct expressly reflect these ideas as basic tenets of practice, the purpose being to ensure that whatever professional advocates are employed the court can be reasonably confident that the case whatever its ultimate merits will be presented fairly and responsibly. Wherever circumstances arise that suggest that that independence may be open to question and that counsel's freedom to discharge his duty could be in jeopardy, other parties and the court itself will rightly be concerned. At the same time, it needs to be recognised that litigation is a far from perfect process, the

ideal is not always attainable, and one principle sometimes has to be balanced against other considerations of equal weight and against the practicalities of everyday life. It is not uncommon, for example, for counsel to build up a close professional relationship with a particular client, sometimes extending over many years. Yet it must be rare if ever that objection is taken to someone in such a position appearing as advocate for such a client, even where this entails as witnesses persons who are well known to him and who may even be the effective source of his regular work for that client. With these principles and considerations in mind I return now to the two objections raised in the present proceedings. Conclusions

25. Two specific statements are relied on by Jenners in relation to the representation of OBD. The first is a provision of the Law Society Guide to the Professional Conduct of Solicitors, 8th ed., para. 21.12, at 379 (1999): "A solicitor must not accept instructions to act as advocate for a client if it is clear that ... a member of the firm will be called as a witness on behalf of the client....." 26. The second is a passage from the judgment of Haslam J in *Barrot v Barrot* (1), a decision of the Supreme Court of New Zealand, in which the partner of counsel for the respondent was called as a witness in the case of [1964] NZLR at 990). "Again, Mr McKay's partner was called as a witness to give the full narrative as he knew it, but despite my careful warning beforehand, Mr. McKay chose to appear for the respondent and the woman entitled to intervene. The fact that, in the main, a fused profession suits our needs in this country must not obscure the importance of counsel being personally remote from the subject-matter of the dispute before the Court Again, without criticism of anyone concerned here, I suggest that a practitioner should not appear as barrister for a party when his partner's conduct is a fact relevant to the issue before the Court. From loyalty to his firm he stands committed in advance to a degree that may well detract from his detachment of judgment and freedom of action, and both the client and the cause of justice may suffer if the inherent danger not be heeded. Fortunately, in the ultimate result here, no damage was done." 27. As a matter of general practice, the observations of Haslam, J appear to me to be entirely right. It also seems to me that although the circumstances of the present case are different, in that the firm of lawyers and the client are (to some extent) one and the same, the point of objection is, in principle, the same. Advocate Chapman may not be a partner in the firm but he is a member of it and the witnesses that he will be calling are the principles of the firm by which he is employed. This, undoubtedly, is a less than satisfactory state of affairs and one of a kind that ought wherever possible to be avoided, blurring as it does the distinction between the role of counsel and that of litigant in person. In the present case, however, this state of affairs had to be weighed against a number of other considerations.: (ii) To oblige OBD to find other advocates to act for it at this late stage would almost certainly result in an application for a substantial adjournment of the trial date which it would be impossible for the court to refuse: the cost implications would also be likely to be very considerable. How quickly someone could be found to take over the task of representing them at trial is not a matter on which I am in a position to make any informed judgment and, unless and until they themselves were to inquire, it may well be

that OBD equally would have no idea. There may appear to be other firms which, on the face of things, would have no conflict of interest in accepting instructions on behalf of OBD (as Jenners asset), but experience tells one that potential conflicts often emerge only after detailed inquiry. And, in any event, the field of choice in Jersey is relatively restricted. Mourant it is true, were instructed on behalf of Jenners only relatively recently; but they were no strangers to the litigation, having acted in the past for at least on other party in the earlier actions." " 25. Where the application is made to remove counsel on the basis of possession of confidential information belonging to the applicant, the leading case in this jurisdiction is that of *Abacus (C. I.) Ltd and De Figuereido v Bisson and others* (practising as Appleby)

[2007] JLR 499 which, again, is appropriate in my view to refer to at some length: "15. In *Hirschfield v Philip Sinel & Co.* (6), the court (Southwell, Commr) held that the Law of Jersey in this area was similar to English law as summarised in the leading English case of *Prince Jefri Bolkiah v KPMG* (1). Both counsel in this case accepted that this was so. 16. The speech of Lord Millett in *Prince Jefri* explains the position so clearly and helpfully that it is worth quoting from it at some length. Having first touched upon the position where a solicitor is in a position of conflict of interest in relation to a current client, he moved on to consider the question of whether a solicitor could act against a former client. He said this [1999] 2 A. C. at 235-236; Where the court's intervention is sought by a former client, however, the position is entirely different. The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence. Accordingly, it is incumbent on a plaintiff who seeks to restrain his former solicitor from acting in a manner for another client to establish (i) that the solicitor is in possession of information which is confidential to him and to the disclosure of which he had not consented and (ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own. Although the burden of proof is on the plaintiff it is not a heavy one. The former may readily be inferred; the latter will often be obvious. I do not think that it is necessary to introduce any presumptions, rebuttable or otherwise, in relation to these matters. But given the basis on which the jurisdiction is exercised, there is no cause to impute or attribute the knowledge of one partner to his fellow partners. Whether a particular individual is in possession of confidential information is a question of fact which must be improved or inferred from the circumstances of the case. In this respect also we ought not in my opinion to follow the jurisprudence of the United States. The extent of the solicitor's duty. Whether founded on contract or equity, the duty to preserve confidentiality is unqualified. It is a duty to keep the information confidential, not merely to take all reasonable steps to do so. Moreover, it is not merely a duty not to communicate the

information to a third party. It is a duty not to misuse it, that is to say, without the consent of the former client to make any use of it or to cause any use to be made of it by others otherwise than for his benefit. The former client cannot be protected completely from accidental or inadvertent disclosure. But he is entitled to prevent his former solicitor from exposing him to any avoidable risk; and this includes the increased risk of the use of the information to his prejudice arising from the acceptance of the instructions to act for another client with an adverse interest in a matter to which the information is or may be relevant". 17. Lord Millett then goes on to consider the question of the degree of risk of disclosure which is permitted. He had this to say (*ibid*, at 236 - 237); "My Lords, I regard the criticisms which have been made of the test supposed to have been laid down in *Rakesen's case* [1912] 1Ch. 831 as well founded. It imposes an unfair burden on the former client, exposes him to a potential and avoidable risk to which he has not consented, and fails to give him a sufficient assurance that his confidence will be respected. It also exposes the solicitor to a degree of uncertainty which could inhibit him in his dealings with the second client when he cannot be sure that he has correctly identified the source of his information. It is in any case difficult to discern any justification in principle for a rule which exposes a former client without his consent to any avoidable risk, however slight, that information which he has imparted in confidence in the course of a fiduciary relationship may come into the possession of a third party and be used to his disadvantage. Where in addition the information in question is not only confidential but also privileged, the case for a strict approach is unanswerable. Anything less fails to give effect to the policy on which legal professional privilege is based. It is of overriding importance for the proper administration of justice that a client should be able to have complete confidence that what he tells his lawyer will remain secret. This is a matter of perception as well as substance. It is of the highest importance to the administration of justice that a solicitor or other person in possession of confidential and privileged information should not act any way that might appear to put that administration at risk of coming into the hands of someone with an adverse interest. Many different tests have been proposed in the authorities. These include the avoidance of "an appreciable risk" or "an acceptable risk". I regard such expressions as unhelpful; the former because it is ambiguous, the latter because it is uninformative. I prefer simply to say that the court should intervene unless it is satisfied that there is no risk of disclosure. It goes without saying that the risk must be a real one, and not merely a fanciful or theoretical. But it need not be substantial. (viii) We accept the good faith of the partners of *Appleby* and that none of the partners believes that he or she is in possession of any relevant confidential information. However, as a number of the cases have made clear, the risk is that such information is stored away subconsciously and can then be triggered subsequently. As Sir David Croom-Johnson put it in the case of *In re a firm of Solicitors* (11) referred to at para 41 above (although this was in the context of an information barrier, the point remains the same) [1992] 1 All E. R. at 369); "The staff and personnel who are handling the present litigation are not those who were concerned in the earlier cases. But in view of the complexity of the issues in all the cases, the reasonable man

knowing of the overlap could not be confident that in the course of the present case some inadvertent revelation might not take place, caused perhaps by the awakening of memory, by someone consciously or unconsciously availing himself of information which had in the past been obtained from A & A and communicated to him in the course of his work or even in social meetings with others of the firm. He might well not appreciate the origin of the information, but the risk is there." 26. At paragraph 31 of the Judgment in that case, the Court said: "..... In the counter veiling public interest of the choice of lawyers open to the public should not be unduly or unnecessarily restricted. A client should be free to go to the lawyer of his choice unless there is good reason to the contrary." 27. A further citation from this case appears to me of value. It suggests that the Court should not, in applying the principles set out above, be blind to the practical consequences of making any such order. In particular, at paragraph 36 of the Judgment the Court said this: "In our judgment, the Court may in appropriate circumstances, take account of the small size of the Jersey bar and the nature of the different firms within that profession. Clearly, in some cases, the small size of the bar cannot make any difference. For example, if there were a case where a firm was undoubtedly in possession of a substantial amount of highly relevant confidential information and if it was clear that an information barrier could not possibly provide the necessary protection, the Court would be left with no alternative but to restrain the firm from acting. However, where the relevance of the confidential information may be borderline where the information barrier may be effective, it seems to us that the court must take into account the consequences of any order it makes. If the consequences an Order prohibiting a firm from acting for a plaintiff were that the plaintiff would find it difficult or impossible to find an appropriate replacement firm, that must be a relevant factor in deciding how the court should exercise its discretion.... Each case turns on its own

facts.

In some cases, the small size of the Jersey bar would be irrelevant and with others it may be a material consideration. Ultimately, the Court has to do its best to ensure protection at both the competing principles referred to above but, given the small size of the Jersey bar, the significance of the second principle may be somewhat more material in Jersey than in the United Kingdom if clients are not to be seriously disadvantaged in bringing claims against financial institutions in the Island." 28. With regard to the application of legal professional privilege and whether or not it falls away in certain circumstances HIL puts before me the case of *Addlesee & Others v Dentons Europe LLP*

[2020] EWHC 238 Ch , a decision of the High Court, in which at paragraph 29 et seq the Court said: "29. Legal professional privilege does not attach to communications between lawyer and client if the lawyer is instructed for the purpose of furthering crime, fraud or iniquity ("the fraud exception"):..... 30. Instructions to give for such a purpose fall outside the ordinary scope of a lawyer/client relationship, and are an abuse of that relationship; 31. The fraud exemption may apply equally to communications after the wrongdoing itself,

where the lawyer is still being instructed for the purpose of furthering the wrongdoing, for example, by concealing the wrongdoing or its proceeds. 32. The fraud exception applied whether or not the solicitor is aware of the wrongful purpose. ... 34. In order for the court to order that disclosure and evidence should be given of otherwise privileged material on the basis of the fraud exemption, it is not necessary for the alleged wrongdoing to be established by way of final determinations made on the balance of probabilities. What is required is sufficient prima facie evidence of the wrongdoing;". 29. The Defendants put before me the case of *Beggs v Attorney General*

[2006] 2 NZLR 129, a case from the High Court of New Zealand in Wellington, which related to the jurisdiction of the Court to restrain a barrister from acting when the interests of justice so required. The head note to that case provides a useful statement. It is in the following terms: "Held: The Court's inherent jurisdiction extended to restraining a barrister from acting where the interests of justice so required. The question in any case was whether removal was necessary to safeguard the future conduct of the litigation. The jurisdiction existed where counsel had sworn an affidavit on a contentious matter or intended to give evidence. The interests of justice might also require the Court to remove counsel who elected not to give evidence, but where the Court considered that person to be a necessary witness for the client. However, the Court should take care when contemplating removal of counsel who were already acting, at the instance of an opposing party that said that it might wish to call them. It was incumbent on such an application to do more than speculate that it could call counsel. Rather, it had to establish that counsel was likely to be required, which required a plausible assertion that counsel was a material witness and confirmation that the applicant intended to call that witness. In the present case, there was no complaint that Messrs Ellis and Shaw ought to have declined instructions at the outset; only recently had the defence indicated that it might call them. The issues in respect of which they could give evidence formed a relatively minor part of the case. Neither was a necessary witness for his clients and the plaintiffs did not intend to call them; nor had the defendants shown that they were likely to be required as defence witnesses. These were sufficient reasons to decline the application but the matter was put beyond doubt by countervailing considerations such as the delay by the defendants in raising the issue and the hardship to plaintiffs if counsel were removed." 30. At paragraph 40 and 41 the Court said: "40. Accordingly, the ethical obligation to withdraw when it becomes apparent that existing counsel may be required as a witness does not operate inflexibly. Wise counsel would choose to withdraw if possible, and the Law Society might regard the failure to do so as worthy of disciplinary action. But there are sound reasons why the Court should take care when contemplating removal of counsel who is already acting, at the instance of an opposing party that says it may wish to call counsel. It is commonplace for lawyers to become involved in position taking or attempts at compromise before litigation begins, or when difficulties arise during its course. Such events may become peripherally relevant during trial, but that seldom causes difficulty.

The same issue arises in the Court's criminal jurisdiction; it is commonplace for evidence to be led about interviews with the accused in which counsel was involved. Prosecuting counsel may also be involved in decisions or advice relating to criminal proceedings, and must be especially sensitive to the appearance of impropriety: see *Schlaks v Gordon* (High Court, Auckland, M 636/98, 15 May 1998, Giles J) and cases cited there. But in the ordinary way counsel is unlikely to be required as a witness either because the record speaks for itself or because another witness is equally able to give evidence on what is typically a secondary issue. Counsel also may be a hazardous witness for the opposing party. He or she is unlikely to submit to briefing, and in the case such as the present not all of his or her evidence will be helpful. The client's preference for counsel of choice should not lightly be interfered with. And removing counsel may cause hardship for the client, particularly if it occurs at a late stage. The Court also must be conscious of a risk that such applications may be brought for improper reasons. 41. Because the Court will not lightly remove existing counsel at the instance of an opposing party, it is incumbent on the applicant to do more than speculate that it will call counsel. It must establish that counsel is likely to be required as a witness. There are two elements to that requirement; a plausible assertion that counsel is a material witness and confirmation that the applicant presently intends to call counsel." 31. A number of other authorities were referred to me and whilst I have considered them and taken them into account, the above appear to me to distil the appropriate principles in this jurisdiction. HIL's Arguments 32. HIL argues that Advocate Kelleher is the lead advocate for the Defendants, the draftsman of the DB Settlement Agreement and provided legal advice to the beneficial owners of HIL (with the exception of DB) and those same clients have a direct interest in the outcome of the litigation through HIL. It is argued that Advocate Kelleher or Carey Olsen cannot really make submissions as to the scope meaning and effect of the DB Settlement Agreement, and the pleaded breaches of the contract as set out in the HIL Order of Justice, given the duty of confidentiality that is owed by Advocate Kelleher to his former clients and having regard to the terms of Rule 6/7 of the Code of Conduct of the Jersey Law Society. Rule 6/7 of the Code of Conduct is in the following terms: "Apparent conflict between duty of confidentiality to former clients and duty to new clients A member or their firm may act for the adversary or counter party (client A) of a client (including a former client, Client B) provided that such member or firm is not privy to confidential information in respect of client B that is materially relevant to such dispute or matter, or can protect such confidential information effectively by the use of safeguards and, in the latter case, inform written consent that has been obtained from client A and where possible client B, and, in any event, effective safeguards including information barriers, are put in place and it is reasonable in all the circumstances for the member of the firm to act for client A with such safeguards in place." 33. It is perhaps worth at this point adding that G6/20 of the Code of Conduct is in the following terms: "A member must not appear as an advocate at a trial or otherwise act in the litigation if it is clear or probable that the member, or anyone within their firm, will be called as a witness, unless they are satisfied that this will not prejudice the member's independence as an advocate (or that of the employee) or the

interests of their client or the interests of justice. The fact is to consider and include: (1) The nature of the evidence, its importance to the case and whether it is purely formal or likely to be contested; (2) Whether there is likely to be a conflict of interest between the member or their firm and the clients; (3) The effect on the client if, having already accepted instructions to act, the member (or employee) has to stop acting." 34. It is further argued by HIL that Carey Olsen are proposing to act against them, and it is a former client in respect of actual events that directly relate to when Carey Olsen acted for HIL concerning the 2011 transfer deal that is, so it is argued, at the heart of HIL's claims. Further, it is argued that the meeting of 19 th May 2011 was an important one which Carey Olsen attended on HIL's instructions. It is HIL's case that Carey Olsen made it extremely clear to the Defendants that their proposed conduct was unlawful and the meeting is accordingly material and probative evidence as to the alleged fraudulent conduct in this case. HIL points out that the Answer filed in the 2019/165 proceedings contains, at paragraph 104.1, the denial that Advocate Jeffrey identified to Sanne Holdings and its directors that a company could not issue shares for less than their nominal value and thereby have a legal obligation to have in their reserves the full value of the preference shares that were to be issued. There is a dispute, therefore, as to what Carey Olsen said to the Defendants when acting as HIL's lawyer on that occasion. There is, accordingly, at least a significant risk that Advocates from Carey Olsen's litigation department are now disputing the contents of a Carey Olsen letter issued by its own corporate department dated 20 th May 2011 concerning this meeting. There is the prospect of former or present partners of Carey Olsen coming to Court to give evidence and perhaps even being cross examined by their colleagues as to what did or did not happen. 35. The meeting of 19 th May 2011 which Advocate Jeffrey attended representing HIL was, it is alleged, recorded in Carey Olsen's letter of 20 th May 2011. Part of the letter reads as follows: "On further discussion of this point with Sanne, it became clear that Sanne were under the impression that they were able, for accounting purposes, to ascribe a value of £901,704 (being the nominal value of the shares) to the 12% preference shares. More particularly, Sanne thought that they would only need to transfer the sum of £901,704 from their profit and loss account to share capital account in respect of the 12% preference shares being issued by HIL. Pursuant to the Companies (Jersey) Law 1991, it is an offence to issue shares for less than their nominal value. In our view, this means that the minimum amount which requires to be transferred by Sanne to share capital account in respect of 9,600,000 12% preference shares of £1 each is £9,600,000. A transfer of any lesser sum may give rise to a number of implications In discussing this issue with Sanne, it became clear that that they were keen to minimise the impact of the transaction on their profit and loss account." 36. If, it is argued, this letter is an accurate record of what took place at the meeting, the Court may well conclude that the misstated accounts, that were signed and approved by the Defendants on 10 th June 2011, were misstated deliberately and were not an "innocent error". It is asserted that this evidence goes to the heart of HIL's case. 37. Paragraph 63 of the Defendant's skeleton argument is in the following terms: "It is accepted that what Advocate Jeffrey may have said to PM and SY (if anything) about the need to change the

proposed terms of the 2011 HIL transaction is likely to be a materially relevant issue (i.e. the content of what - if anything - was actually communicated to and understood by them at the meeting of 19 May 2011." 38. This, so it is argued by HIL, raises the prospect of denials or disputes as to what was said on 19 th May 2011 at the meeting. It is possible, therefore, that Carey Olsen, if acting, would challenge the accuracy of the content of a Carey Olsen letter of 20 th May 2011. Advocate Jeffrey, in any event, will inevitably need to give evidence as to what was said at that meeting. It is further argued that, as it appears to be accepted, there was a conversation between Advocate Jeffrey and Advocate Coltman providing the latter with background information before Advocate Coltman was engaged by Sanne. Advocate Coltman may well have relevant evidence as to what was told by Advocate Jeffrey to him about the 19 th May 2011 meeting. 39. Furthermore, so it is argued, the advice of Carey Olsen concerning the restructuring in connection with the 2011 transfer deal was fundamentally wrong. As a result the 12% preference shares issued to HIL were not properly accounted for in Sanne Holdings accounts. 40. With regard to the position of Advocate Jeffrey, who met with Sanne officials on 19 th May 2011, an issue of confidentiality arises. On 28 th February 2012, Carey Olsen then acting for Sanne said: "You are correct that Mr Jeffrey advised HIL in 2011. He was instructed to advise HIL by [the First Defendant] on behalf of HIL on 27 April 2011. Advice was given in relation to a transaction that you incorrectly refer to as an "MBO". It would be more accurate to describe the transactions and restructuring of share capital. Advice that Mr Jeffrey gave was not "extensive" as you suggest. The scope of the advice was reasonably narrow in its ambit and related to contractual matters and not the commercial terms of the agreement. Your statement "HIL was not aware that you were acting for HIL" is not understood." 41. HIL now suggests the contents of that letter raise concerns as to whether Carey Olsen have protected or are capable of protecting HIL's confidential information in respect of which they continue to owe a duty of confidentiality. 42. It is also argued that Advocate Coltman is likely to be a material witness relating to what he was told about the background of the 2011 restructuring and the 19 th May 2011 meeting; his involvement in the 2011 HIL transfer deal and its restructuring; the Sanne corporate transactions during 2011 - 2015, during which time Advocate Coltman was involved in an acquisition of what had been part of HIL's equitable interests in Sanne Holdings for £31.25m in 2012 and the materially different accounting treatment with regard to the issue of those shares. It is also alleged that Advocate Coltman is likely to be asked questions about the position of the accountants and the correction of the treatment of the 10% and 12% preference shares and what was said to the Jersey Financial Services Commission in 2012 about the Article 41 threats. 43. It is also suggested that Advocate Coltman and Advocate Kelleher are likely to be witnesses in respect of any alternative set of the Sanne Holdings 2010 accounts that may exist which then resulted in the complaint to the Law Society. 44. Moreover, it is argued, Carey Olsen's involvement in the case is further complicated in that they are acting for not only Sanne but their former directors, the Second and Third Defendants. Given that there are allegations of fraud it is argued that the potential for conflict in acting for all these defendants is evident. In summary, in HIL's skeleton argument at paragraph

38 it states: "If one takes a step back, Carey Olsen are a consistent feature in the background history of [HIL's] claim and have at one stage or another, represented all parties before the court in respect of the various contractual arrangements, transactions and material issues that will be ventilated and carefully considered at any trial. Carey Olsen were at the centre of events in 2011 when they acted for HIL and its partners are likely to be witnesses as to the Defendants' knowledge relevant to the allegations of fraud . As a law firm they have become witnesses of fact and face insurmountable hurdles of conflict in what is a high value claim featuring serious allegations....." 45. It is further stated that Advocate Coltman was involved on behalf of Sanne in the purchase for £31.25m by a third party of an interest in Sanne Holdings. This has been characterised as a "business expansion" but it is stated by HIL that this was an action by the third party to rescue Sanne Holdings from its own balance sheet insolvency. If, it is asserted by HIL, the Defendants wish to put forward an argument that seems in some manner to qualify what appears to be the effect of documentation disclosed in connection with this transaction then inevitably witnesses will be called and those witnesses may very well include Advocate Coltman. 46. HIL also argues that the issue of the complaint to the Law Society made on Carey Olsen letterhead, but containing materially wrong statements, may also be of significance. The Plaintiff averred that the complaint, underpinned by materially inaccurate statements, could well be seen as an attempt by Sanne to obstruct or delay HIL's claims. If that becomes an area of dispute, which it appears to be, so it is argued, then Advocates Coltman and Kelleher, the authors of the complaint, may well be material witnesses. Privilege does not apply, so it is argued, to communications between a lawyer and client if the lawyer is instructed for the purpose of furthering crime, fraud or inequity. It is argued that no proper explanation has been forthcoming as to how the 2010 accounts came to be misstated or why false statements were made to the Law Society and HIL alleged that it is reasonable to infer that the first was by fraud and the second in order to conceal that fraud. Defendants Arguments 47. The Defendants argue that the delay in bringing any application to disqualify Carey Olsen is a cynical manoeuvre brought for tactical reasons. Although HIL's ability to make the application is relatively recent, the Defendants' point out that in reality the application has been threatened by DB for a significant period and HIL's proceedings are commenced at DB's instigation. 48. There is little doubt that the issue of the ability of Carey Olsen to continue properly to represent the Defendants has been in play, in terms of the correspondence, for a significant period. DB has made no such application in his own name but, so it seems to me, I must look at the HIL application distinctly. Although it may be that HIL is engaged in proceedings at DB's behest or instigation, it is independent in the sense that it has distinct beneficial owners and its rights are as much to be protected as are those of DB. 49. The Defendants point out the number of procedural steps that have been taken with Carey Olsen acting for the Defendants after the issue of their continued involvement had been raised by DB. They have dealt with DB's application for summary judgment, the filing of an answer and reply; an application by DB to amend his order of justice; an extensive discovery exercise; and a number of interlocutory summonses relating to discovery, directions hearings and an

appeal deriving from those directions and, so I am informed, substantial work on the preparation of witness statements and the background material in relation to the DB proceedings. Much of this, it is to be supposed, will also be relevant to the HIL proceedings. I am informed that since June 2019, the total billed fees incurred by the Defendants are approximately £1.9m comprising of some 1,460 partner hours and 4,500 hours by other fee earners. 50. This is a substantial amount indeed although it is to be supposed that a significant amount of this related to the DB claim and not the HIL proceedings. 51. It is pointed out by the Defendants, in connection with the DB Settlement Agreement, and as stated above, that neither HIL nor Sanne are parties to the DB Settlement Agreement. The obligations accordingly are not binding on them and HIL cannot enforce them. It is argued that Advocate Kelleher will not be an important witness for HIL. It is asserted that the terms of the DB Settlement Agreement are set out in the agreement itself and it reflects an agreement reached following a mediation which it is to be assumed had been conducted on a without prejudice basis. Advice given by Advocate Kelleher in relation to the meaning and effect of any particular proposed clause would be subject to joint legal privilege of the remaining CC partners including the First Defendant. It is asserted that this will make testimony by any party or their advocates in relation to the meaning and intent of the provisions "off limits". It is argued, in that context, that there is nothing that Advocate Kelleher can be called to answer to as a witness of fact. Nor is it accepted that he could not address the Court on the meaning and scope of the clauses in the DB's Settlement Agreement without being in breach of his duty of confidentiality. Any submissions as to the interpretation of particular clauses will be made considering the clauses on their face and will not refer to evidence or matters confidential to HIL. 52. It is further asserted that it is not apparent what relevance the DB Settlement Agreement has to the claim by HIL in its Order of Justice. To the extent that it is alleged, so it is further argued, in HIL's Order of Justice the terms of the DB Settlement Agreement had been broken, these are in effect allegations of a breach by the First Defendant of his obligations under it to DB. 53. It is argued that neither the prospect of Carey Olsen's files containing relevant confidential information, nor indeed of Advocate Kelleher recollecting confidential information from 2005 relevant to HIL's proceedings amounts so the Defendants say, to "no real risk". 54. I pause at this point to recall the statement above from Lord Millet cited in Abacus above where he says: "It is 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....." and in reviewing the tests relating to risk, Lord Millet states: "I prefer simply to say that the Court should intervene unless it is satisfied that there is no risk of disclosure. It goes without saying that the risk must be a real risk one, and not merely at fanciful or theoretical. But it need not be substantial." 55. I accept, where confidential information is concerned, that if Advocate Kelleher says he can recall nothing that is confidential to HIL then I take that at face value. However, that does not seem to me entirely to be the point. It is not what Advocate Kelleher or indeed members of his firm can remember now but what may be remembered later, even during the trial, or what

may inform in some way his understanding and hence conduct of the case. I would not suggest that Advocate Kelleher would act in any way that was improper or unconscionable. Indeed I completely accept that the contrary would be true. However, I believe the authorities point to the principle that if confidential information belonging to HIL is held by Carey Olsen or by Advocate Kelleher in particular then there is some risk that that confidential information will inform the conduct of the case. I do not need to decide how material that risk is - I must instead be satisfied that there is no risk of disclosure. As Lord Millet states: "the risk is that such information is stored away subconsciously and can then be triggered subsequently." 56. It is further argued by the Defendants that any relevant confidential information is, quoting from the skeleton argument, "clearly borderline at most". It can be managed by information barriers given Carey Olsen's commitment not to access files that are long since closed. The Defendants remind me that were I to accede to HIL's application there would be considerable consequences in terms of costs already incurred and there will be a considerable delay. It is disputed that there is any plausible assertion that Advocate Kelleher is a material witness and is likely to be called. 57. It is argued that the admission that the statement in the complaint to the Law Society relating to the 2010 accounts of Sanne Holdings was wrong could not amount to admission by conduct. It is stated as being simply a change of position. The way that HIL addresses the issue is to ask whether the Defendants went well beyond inter partes correspondence and deliberately lied to the Law Society on Carey Olsen letterhead and, if so, why? As I mentioned above it is, so HIL argues, open to the Jurats to conclude that this was an attempt to cover up earlier fraudulent conduct even if the attempt failed. 58. The case of *Grove Park Properties Limited v Royal Bank of Scotland*

- [2018] EWCH3521 (Comm) was put before me in the following terms: "31. Conversely, I see no reason why the claimant should not rely on the fact, if it can prove it, that the bank knowingly advanced a false case in the Wyatt Proceedings and that its witnesses told lies in the witness statements which were served. That is or may be a fact from which an inference is capable of being drawn. Mr Lance Ashworth QC for the claimant referred to the Lucas direction (*R v Lucas* [1981] QB 720) which is given to juries in criminal cases when the defendant has told a lie. It explains the dual relevance of such a lie. First, as with any witness, it may damage the witness's credibility. Second, however, it may - depending on the circumstances and if other explanations can be excluded
- constitute some evidence of guilt or, as it might equally be put, a fact from which an inference of guilt may be drawn." That Judgment goes on to say at paragraph 34.1: "I consider that it can. In the absence of any explanation of why a false allegation against Mr Wyatt was made, it is a reasonable (although not necessary inevitable) inference but that this was done knowingly, and in any event Mr Taylor accepts that this should be the working assumption for the purpose of this application) and that the reason why this was done was in order to conceal reprehensible conduct. Whether it is right to draw that inference will be a matter for the trial judge in the light of all the evidence in the case, including what at present appears to be the puzzling evidence (from the claimants point of view) about the December

2008 meeting. But in my judgment the point can be pleaded." 59. There is an argument, of course, as to whether the privilege applies and to what documents. 60. With regard to the role of Advocate Jeffrey the Defendants' argue that he was HIL's legal adviser and the Defendants themselves are unlikely to call him although it would be open to HIL to do so. It is pointed out that the Authorities and guidance are principally concerned with the preservation of an advocate's independence as regards a current partner of the firm who will be called as a witness on behalf of the client and not otherwise. 61. With regard to the potential possession by Carey Olsen of relevant confidential information relating to HIL and its instruction of Advocate Jeffrey it is said that this may be ruled out because it cannot be established that there is a real risk that there is relevant confidential information that might be disclosed to the Defendants Advocate Jeffrey retired in June 2016 and between him and Advocate Coltman there was a Chinese wall/information barrier at the time of the instruction. The HIL matter was closed within Carey Olsen a long time ago and Advocate Coltman has confirmed that he has not looked at it and members of the Carey Olsen litigation department cannot access those files. In any event, whatever information there might be that it would not be relevant as attendance notes where both parties were present would not be privileged and it does not appear that Advocate Jeffrey prepared meeting notes as, according to his statement of June 2012, he did not prepare any attendance notes because no advice was given which was not recorded in emails. 62. It is pointed out that HIL's assertion that it wishes to be protected in regard to confidentiality should be seen in the light of the fact that the line of communication between HIL and Carey Olsen was between Advocate Jeffrey and the First Defendant in any event. 63. It is also pointed out that Advocate Jeffrey retired from partnership with Carey Olsen at the end of June 2016 and this was a sufficiently long length of time ago for it to be no longer a factor in terms of Advocate Kelleher's independence and cross examining him at trial should he eventually be called as a witness. 64. With regard to Advocate Coltman's role in representing Sanne it is said on the part of the Defendants that it was a limited role and that Advocate Coltman was instructed by Sanne to advise specifically on the variation of class rights - whether the creation of a 12% HIL preference shareholding would amount to a variation in the rights of the existing 10% preference shares held by Ivegill. This, it is said, was the limited nature of his instructions. 65. With regard to Advocate Coltman's involvement in subsequent transactions that occurred in 2012-2015, against HIL's claim for "loss of a chance" it is argued that it is difficult to see how, as the lawyer advising on the transactions during those periods, he could have any relevant information or evidence to give. 66. There is, accordingly, it is argued no plausible basis to assert that Advocate Coltman has relevant evidence to give in this regard. 67. The argument raised by HIL to the effect that Carey Olsen cannot act for the Sanne Defendants and for the other Defendants in the face of allegations of fraud is not accepted. There is no requirement that they be separately represented and there is no inherent conflict. It is entirely obvious that a corporate entity can only act by its directors and there is no rule that they should be separately represented nor indeed that there is an inherent conflict. This argument, so the Defendants assert is tactical game playing. 68. Lastly, the Defendants assert that if the removal application was successful it would result in Carey Olsen

continuing to act for Sanne in the DB proceedings but be excluded with regard to HIL.

Conclusion

69. Looking at the matter in the round it seems to me that Carey Olsen as a law firm have been involved throughout in not only of course the conduct of this case on behalf of the Defendants but in many of the factual matters that gave rise to the litigation. 70. Through its former partner Advocate Jeffrey, Carey Olsen was involved in advising the Defendants with regard to the 2011 transaction which saw HIL give up its shares. Advocate Coltman advised Sanne and clearly some information could have passed between them in connection with the meeting on 19 th May 2011 in which Advocate Jeffrey may well have advised Sanne on the way that the preference shares needed to be treated which would have showed that what Sanne was proposing was illegal and would also have cast material doubt on an earlier transaction relating to Ivegill and the 10% preference shares. That meeting may well be highly significant. 71. It seems to me that Advocate Jeffrey may well be called upon to give evidence. It will, in my view, notwithstanding the passage of time, be difficult for Advocate Kelleher to cross examine him particularly should things be raised by Advocate Jeffrey in evidence which may be prejudicial to Carey Olsen itself or its conduct. Similar considerations relate to Advocate Coltman and it is at this point uncertain what information he may have picked up directly or indirectly from Advocate Jeffrey in connection with advice given in and around the 2011 HIL transaction. 72. There is real prospect in my view that Advocate Jeffrey and Advocate Coltman may be called upon to give evidence and even if it is unlikely that Advocate Kelleher will so be required, he could have relevant information and may be faced with the prospect of cross-examining Advocate Jeffrey on the contents of the letter that followed on from the 19 th May 2011 meeting. This was a letter written on Carey Olsen letterhead by a then partner of Carey Olsen. 73. Advocate Coltman also acted during a period that might eventually be seen as a financial rescue operation to cure Sanne's insolvency. Advocate Kelleher drafted the DB Settlement Agreement, breaches of which are alleged as part of HIL's claim. 74. I accept that it is difficult to be certain as to what confidential information, if any, may be in play in this matter. However, Carey Olsen acted for HIL and may very well have been privy to confidential information which, even if it cannot be recalled either by Advocate Jeffrey or by Advocate Kelleher or Advocate Coltman at the present time, it may still in some way affect the manner in which the litigation might be conducted in the manner referred to in the Abacus case above. 75. Similarly, although I do not think it is appropriate in the context of this application to make any determination relating to admission by conduct, the fact is that such an issue may be raised in circumstances in which Advocates Kelleher and Coltman themselves promoted the complaint by Sanne to the Law Society against HIL's legal adviser which clearly was inaccurate in material respects. As one of the authors of the complaint it is in my view potentially difficult for Advocate Kelleher to deal with any potential challenges in that regard. 76. This is a matter that is highly contentious, complex, and contains serious allegations of wrong doing. It is unlikely that much evidence given in this case is going to be

formal or non-contentious. It is likely to be highly contentious in all its aspects. 77. Justice must not only be done but must be seen to be done and in my judgment the complexities of this case, interwoven throughout with advice from or representation by partners of Carey Olsen means that it is difficult to think that the potential conflict between that firm as representative and legal adviser to the Defendants and the obligations of an independent legal representative to the the Courts would not exist during the course of a trial. 78. In these circumstances, in my Judgment, Carey Olsen should no longer act for the Defendants and alternative legal representation should be obtained. 79. I appreciate, however, in the light of statements set out in Abacus relating to the size of the Jersey Bar it may be some period before alternative legal representation can be secured and it seems to me that there could conceivably be circumstances in which it is difficult to secure suitable alternative representation. I was not addressed on this point and the consequences of potentially leaving the Defendants without effective representation is something that I must of course take into account. 80. In my judgment, therefore, whilst Carey Olsen should step down I give liberty to apply should it be impossible to secure alternative representation. In those circumstances, rather as transpired in the Abacus case, it may be necessary to deal with the matter differently. 81. I appreciate that this decision will mean that that there will inevitably be a significant further delay whilst alternative representation is found. I anticipate that the larger part of the prejudice that might ensue from that delay would be suffered by HIL whose application this is. I understand that the answers of the parties have now been filed in this case and it may be that now is the appropriate times for Carey Olsen to step down. However, if there are procedural steps currently in train, where there would be no difficulty in Carey Olsen concluding them, then I would be open to argument as to timing of any handover. To my mind whilst it should happen as quickly as is reasonably possible it is essential that it happens in sufficient time for any new legal advisers to review the case, review discovery in the case, make any interlocutory applications that are needed, and of course to prepare for trial. *Authorities Banks v Sanne*

[2019] JRC 222A . *Les Pas Holdings Limited v Receiver General and States Greffier*

[1995] JLR 163 . *Geveran Trading Co. Ltd v Skjevslund* [2003]1 WLR 912. *Brian Connelly v Law Society*

[2007] EWHC 1175 (Admin) . *Hirschfield v Sinel*

[1999] JLR 55 . *Takilla v Olsen Bachurst & Dorey*

[2004] JLR 219 . *Abacus (C. I.) Ltd and De Figuereido v Bisson and others (practising as Appleby)*

[2007] JLR 499 . *Addlesee & Others v Dentons Europe LLP*

[2020] EWHC 238 *Ch Beggs v Attorney General* [2006] 2 NZLR 129. *Grove Park Properties Limited v Royal Bank of Scotland*

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