Case No: HQ17X02473

Neutral Citation Number: [2017] EWHC 2650 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/10/2017

Before :

HIS HONOUR JUDGE CURRAN QC
(Sitting as a Judge of the High Court)

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Between :

(1) WESTERN AVENUE PROPERTIES LIMITED **(2) KALPESH PATEL**	**Claimant**
- and -	
(1) SADHANA SONI **(2) DENNING SOTOMAYOR LIMITED**	**Defendant**

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Mr Mark Warwick QC (instructed by **Judge Sykes Frixou**) for the **Claimants**
Mr Stuart Cutting (instructed by **Kennedys Law LLP**) for the **Defendants**

Hearing dates: 10 October 2017

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Judgment

His Honour Judge Curran QC :

Introduction

1. By a claim form issued on 13 July 2017 the Claimants began proceedings against the Defendants for an injunction and damages on the ground of breach of duty owed to the Claimants as their former solicitors. By the particulars of claim filed and served in the proceedings it is alleged that in about February 2015 the Second Claimant, Mr Patel, retained the First Defendant as his solicitor, in connection then with criminal proceedings which had been brought against him in respect of an alleged fraud. It is averred that whilst she was retained as his solicitor the First Defendant became privy to substantial confidential information relating to the Second Claimant's businesses, which included property ownership and development.

2. Further, it is claimed that in 2015 the First Defendant was also retained by the First Claimant, the company, to act on its behalf in relation to property owned by the company in West London.

3. It is now alleged that in breach of contract or fiduciary duty, or both, the First Defendant, as an employee of the Second Defendant, has accepted instructions from former business associates of the Claimants to act in contemplated proceedings against them both.

4. There are three applications before the Court:

    i) An application by both Claimants for an injunction restraining the Defendants from acting as solicitors in proceedings concerning the Claimants;

    ii) an application by both Claimants for disclosure of a "waiver" signed by a Mr Aman Thukral; and,

    iii) an application by both Defendants for the Claimants to answer the Defendants' Part 18 Request for Further Information, together with an extension of time for service of the Defence.

Factual summary

5. Ms Soni is a solicitor who was admitted on 15 January 1998, and was employed as an "in-house lawyer" for the First Claimant ("WAPL") and also for the Second Claimant ("Mr Patel") from March 2015 until February 2016. It is not suggested that her duties as an in-house lawyer were confined to any single project or restricted to any specific matter. In view of the post in which she was employed she would during the eleven months or so of her employment have had access to confidential information in respect of the assets and financial and legal affairs of the WAPL and also to confidential information in respect of the personal assets and financial and legal affairs of Mr Patel.

6. In particular, it is both Claimants' case that during the course of her employment Ms Soni acted on behalf of WAPL in respect of some freehold land and premises owned by the company at 600 - 610 Western Avenue, London W3. Documents in the

application bundle show that Ms Soni was involved in the negotiation of leases of the property, and arranging for its insurance, and also in preparing tax returns for WAPL.

7. So far as Mr Patel is concerned, the case is put upon the basis that in acting as his solicitor, in particular when preparing his defence in respect of the fraud allegations, Ms Soni inevitably acquired detailed confidential information in respect of Mr Patel's business and personal affairs.

8. Ms Soni now works as a solicitor nominally employed by the Second Defendant company. That company was incorporated on 16 October 2015 and at all material times Ms Soni has owned all its issued shares. Since 28 April 2016, from about the time that it received authorisation from the Solicitors Regulation Authority ("the "SRA"), she has been the Second Defendant's sole director. From the dates alone it is clear that neither of the Claimants has ever been a client of the Second Defendant company. The basis of the case against the Second Defendant, as I understand it, is that it can only act through Ms Soni and is fixed with knowledge of matters known to her.

9. As a matter of history, from February 2015, Mr Patel was the subject of an investigation by Lincolnshire Police in relation to allegations of money laundering and fraud, involving some £12 million. He was charged with criminal offences of money-laundering and fraud arising from that investigation. In due time he was tried at the Crown Court at Leicester, between October 2016 and December 2016, and was acquitted. However, the Crown Court had made a restraint order in respect of his assets pending the resolution of the criminal proceedings, and Mr Patel had been in breach of that order, which he admitted. As a result, in March 2017 he was sentenced to 12 months' imprisonment and was fined £330,000.

10. Ms Soni resigned as in-house lawyer for WAPL and Mr Patel in or around February 2016 for "professional reasons". Her case is that she was owed a considerable amount of money by the Claimants in terms of salary and disbursements.

11. The premises at Western Avenue were formerly used as a car showroom, which at some stage had been demolished leaving the land as a vacant lot. Mr Aman Thukral, who is said to have been a car dealer, is alleged to have permitted another company to occupy the premises, and after the First Defendant's resignation, proceedings in the County Court were taken by WAPL against Mr Thukral resulting in an order for possession being made on 8 March 2017 against him. For the avoidance of doubt it should be made clear that there is no suggestion that the First Defendant had any involvement, even on a preparatory basis, with that litigation on either side.

12. Unusually, a subsequent claim for damages arising out of the same cause of action as that in the possession proceedings – trespass – has subsequently been brought by WAPL against Mr Thukral in the Central London County Court. The First Defendant in this case, Ms Soni, has signed a statement of truth in respect of the Defence settled by counsel instructed by her on behalf of Mr Thukral.

13. It is the case for the Defendants that in or about the 20 March 2017, they were approached both by Mr Aman Thukral and members of his family ("the Thukrals") with a request to act for them professionally. The Thukrals were, it seems, formerly business associates of the Claimants. The request they made of the Defendants was to

advise them (1) on "matters relevant to the share ownership of WAPL"; and (2) on matters which might possibly involve litigation consequential to the possession order in respect of the land owned by WAPL which had been made against Mr Thukral at the Willesden County Court, where he had been represented by another firm of solicitors, MT (UK). It is said that those solicitors provided documents to the Defendants in respect of the County Court possession proceedings.

14. Before accepting instructions from the Thukrals, Ms Soni contacted the SRA by telephone on 20 March 2017 and sought their guidance as to whether she could act for the Thukrals against WAPL or Mr Patel. Following the provision of oral guidance, the Defendants told the Thukrals that they could act for them professionally, but only if they signed the document described as a waiver, disclosure of which is the subject of the second application notice from the Claimants. Ms Soni prudently decided to obtain confirmation of the oral advice she had received from the SRA by emailing a letter setting out her request for advice and inviting the SRA to restate its advice in writing. That email was sent on the 7 May 2017 and the response from the SRA is dated 12 May 2017.

The request for and advice given by the SRA

15. In her letter Ms Soni said that the telephone advice which she had received had been that,

> *"…conflict-of-interest can only exist between two current clients and/or with a current client."*
>
> *"… confidentiality and non-disclosure applied to any relevant information Ms Soni received whilst acting for a previous client, which was relevant to a current client. Ms Soni agreed and said she was aware that the duty of confidentiality to all clients must be reconciled with the duty of disclosure to a current client and that any relevant information she received whilst acting for a previous client could not be disclosed to a current client." [Emphasis added.]*

16. However, the letter from the SRA dated 12 May 2017, whilst confirming that the author did not consider that a conflict of interest arose between two or more current clients (which is not controversial, given that neither of the Claimants in the present case is a current client), gave this opinion in respect of chapter 4 of the code of conduct of the SRA in respect of former clients:

> *"… you owe a duty of confidentiality to your client (including former clients) and this requires you to keep that client's affairs confidential and not to disclose them to anybody unless you have the client's consent or disclosure is required by law. [The code of conduct] requires that you disclose to any existing client all information that is relevant and material to their matter. Therefore you would be obliged to disclose to your new clients (the Thukral family) any relevant and material information you are aware of as a consequence of acting for WAPL and [Mr Patel] but couldn't because this information is*

> *confidential to that former client. Outcome O (4.3) [of the code of conduct] requires that where these two duties come into conflict your duty of confidentiality takes precedence and we would usually advise that you should not act for the new client." [Emphasis added.]*

The author of the letter, the Ethics Adviser at the SRA, then made reference to the fact that Ms Soni had said that all the information she had received whilst acting for the Claimants

> *"… had in fact been provided by the Thukral family"*

and that she would not be relying on any information from the Claimants' files. The letter continues,

> *"I advised that if this was the case and you were satisfied that you would not have recourse to information confidential to [the Claimants] then you could act. But there remains a danger in adopting this course of action, particularly if you became aware that there is additional information (which you are only aware of because of acting for [the Claimants]) and which is not replicated in the information provided by the Thukral family. Such a situation would give rise to a conflict between your duties of confidentiality and disclosure… and would result in your having to stop acting."*

> *"We also discussed how it is possible to vary your duty of disclosure … and this you have sought to do. Although it is not impossible for you to do this it would be more usual to adopt such an arrangement when the person with the relevant confidential information could be isolated from the fee earner handling the case. Again there remains a risk to you. That risk is that you will subconsciously use confidential information to the advantage of the Thukral family."*

17. From the passages underlined above from both the emailed letter to the SRA and the letter in response, Mr Warwick QC, for the Claimants, submitted that it was clear that Ms Soni must have misunderstood the original telephone advice given by the SRA in one critical respect. Whilst she was saying that she understood any relevant information received whilst acting for the Claimants could not be disclosed to the Thukrals, the SRA was pointing out the practical impossibility of her professional position in such circumstances:

> *[The code of conduct] requires that you disclose to any existing client all information that is relevant and material to their matter. Therefore you would be obliged to disclose to your new clients (the Thukral family) any relevant and material information you are aware of as a consequence of acting for WAPL and [Mr Patel] but couldn't because this information is confidential to that former client." [Emphasis added.]*

18. The SRA drew attention to "*IB [Indicative behaviour] 4.4*" evidently with regard to the 'waiver' which Ms Soni had asked the Thukrals to sign:

> *"... where you are an individual who has responsibility for acting for a client or supervising a client's matter, you disclose to the client all information material to the client's matter of which you are personally aware, except when:*
>
> *a) the client gives specific informed consent to non-disclosure ...."*

No specific comment was made by the SRA upon the validity or otherwise of the waiver, but the point was made that a risk remained, and that risk was that Ms Soni might subconsciously use confidential information to the advantage of the new clients and the disadvantage of her previous clients.

The nature of the litigation in contemplation

19. Whilst it seems that litigation generally is in contemplation, in addition to the particular matter of the defence to the damages claim in the Central London County Court, the precise nature of such litigation is unclear. Ms Soni has given an undertaking not to act as solicitor for the Thukrals pending resolution of the application which is at present before the court, and a firm called CK Solicitors are acting for them instead. A letter from that firm in the application bundle at page 402 makes reference to "*... contentious matters ... between the parties together with various litigations.*" Reference is made in the same letter to an issue involving the transfer of shares in the Claimant company in the year 2007 from a member of the Thukral family to (*inter alios*) Mr Patel. It is suggested that there may have been circumstances which amounted to undue influence involved in that transaction. Reference is also made to the possession case at the Willesden County Court, which is said to "*underline* [sic] *a much larger dispute over the ownership/control of the claimant company which gives rise to an overriding interest in the land and therefore consequently, there has been no trespass* [sic]."

The Law

20. Counsel agreed that the principles to be applied in any case where the court has to consider granting an injunction against solicitors or other similar professional advisers on the ground that there would be a risk of the unauthorised use of confidential information were those stated by Lord Millett in *Bolkiah v KPMG* [1999] 2 AC 222 at 235D to 236A; 236F to 237B and 337G to 238A, and reviewed and restated by Field J in the case of *Georgian American Alloys Inc v White and Case LLP* [2014] 1 CLC 86 at [67] and [74] as follows.

> '74 Lord Millett's formulation of the applicable legal principles is well known. He said at pp. 235 -238:
>
> "[It] is incumbent on a plaintiff who seeks to restrain his former solicitor from acting in a matter for another client to establish (i) that the solicitor is in possession of information which is confidential to him and to the disclosure of which he has not

consented and (ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own. Although the burden of proof is on the plaintiff, it is not a heavy one. The former may readily be inferred; the latter will often be obvious…

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 instructions to act for another client with an adverse interest in a matter to which the information is or may be relevant.*

….

It is … difficult to discern any justification in principle for a rule which exposes a former client without his consent to any avoidable risk, however slight, that information which he has imparted in confidence in the course of a fiduciary relationship may come into the possession of a third party and be used to his disadvantage. Where in addition the information in question is not only confidential but also privileged, the case for a strict approach is unanswerable. Anything less fails to give effect to the policy on which legal professional privilege is based. It is of overriding importance for the proper administration of justice that a client should be able to have complete confidence that what he tells his lawyer will remain secret. This is a matter of perception as well as substance. It is of the highest importance to the administration of justice that a solicitor or other person in possession of confidential and privileged information *should not act in any way that might appear to put that information at risk of coming into the hands of someone with an adverse interest.* … Many different tests have been proposed in the authorities. These include the avoidance of "an appreciable risk" or "an acceptable risk." I regard such expressions as unhelpful: the former because it is ambiguous, the latter because it is uninformative. *I prefer simply to say that the court should intervene unless it is satisfied that there is no risk of disclosure.* It goes without saying that the risk must be a real one, and not merely fanciful or theoretical. But it need not be substantial. … *In my view no solicitor should, without the*

> *consent of his former client, accept instructions unless, viewed objectively, his doing so will not increase the risk that information which is confidential to the former client may come into the possession of a party with an adverse interest.*
>
> Once the former client has established that the Defendant firm is in possession of information which was imparted in confidence and that the firm is proposing to act for another party with an interest adverse to his in a matter to which the information is or may be relevant, the evidential burden shifts to the Defendant firm to show that even so there is no risk that the information will come into the possession of those now acting for the other party." (Emphasis added)

Having quoted that passage, Field J said a little later on:

> '78. It is trite law that a final injunction is a discretionary remedy, but it does not follow that the court must weigh the interests of the other client against the interests of the client who has otherwise satisfied the requirements for the grant of an injunction against his former solicitors to protect his confidential information. Instead, the discretion must be exercised in accordance with established principles and it is clear from Lord Millet's disapproval of the balancing exercise undertaken by the New Zealand Court of Appeal in Russell McVeagh McKenzie Bartleet & Co v Tower Corporation [1998] 3 NZLR 641 that the impact of the claimed injunction on Mr Pinchuk is not a relevant consideration when deciding whether to grant the Claimants' application.'

21. The key principles are therefore as follows:

i) The Claimants must show that the Defendants were, or had been, in possession of information that is confidential to the Claimants, and to the disclosure of which they have not consented.

ii) They must then show that the information is or may be relevant to the matters in which the interest of the Thukrals is, or may be, adverse to that of the Claimants.

iii) The burden of proof is on the Claimants, but it is not a heavy one.

iv) The Court's jurisdiction to grant an injunction against a solicitor arises out of the Court's equitable jurisdiction to protect confidential information.

v) The Court must consider whether the Defendants have any confidential information received from the Claimants, which is or may be relevant to the dispute between them and the Thukrals. If there is confidential information, but it is clear that it is not relevant to the dispute, there is no risk of the misuse of the confidential information (*E-Clear (UK) Plc v Elias Elia [2012] EWHC 1195 (Ch) at [20]-[21]*)

vi) If the Claimants establish that the Defendants are in possession of confidential information that is, or may be, relevant to the dispute the evidential burden shifts to Ms Soni and her firm to establish that there is no risk of misuse or disclosure. The risk must be more than "fanciful or theoretical", but need not be "substantial".

Submissions by the Defendants on the application of the Bolkiah principles

22. Mr Cutting, for the Defendants, submitted that the application for an injunction was misconceived, as the Claimants had failed to show that such information as Ms Soni had received from the Claimants was confidential. They had also failed to show whether any such confidential information came from the Claimants or from a third party. Moreover, the Claimants could not show how the confidential information was relevant to the current dispute between either of the Claimants and any of the Thukrals.

23. Counsel illustrated his point by making reference to the particulars of claim and to the allegation that confidential information had already been misused. The information which was particularised consisted of a Note prepared by counsel instructed by Ms Soni in an application to the Crown Court at Leicester for disclosure of documents from the criminal proceedings. A witness statement from the member of the Bar involved made it clear that he had other sources of information from which he had prepared the note, and that none of it came in the form of confidential information provided by Ms Soni. So far as the allegation of threatening to misuse the Claimants' confidential information, which was also made in the particulars of claim, Mr Cutting submitted that the Claimants were simply unable to identify the nature of such confidential information. They could not point to anything which could be relevant to any issue which might arise in the litigation in contemplation.

24. In those circumstances, counsel submitted, it was impossible for the Claimants to satisfy the *Bolkiah* principles: the Claimants had failed to discharge the burden upon them.

25. However, submitted Mr Cutting, if the court did not accept that, the Defendants had discharged the burden of proving that there was no risk of any confidential information being misused by them.

26. This was amply illustrated, counsel submitted, first, by the fact that Ms Soni had conscientiously approached the SRA for advice, disclosing her professional concerns in detail, and by her obtaining the waiver which had been referred to.

27. Secondly, counsel who had made the application to the Crown Court had shown that the information referred to in the note had not come from confidential sources.

28. Thirdly, Ms Soni was well aware of her continuing professional obligations to maintain confidentiality in respect of any confidential information provided to her whilst she was employed as an in-house lawyer for WAPL and Mr Patel. It was submitted that if Ms Soni had any intention of flouting her professional obligations it was inherently improbable that she would have sought guidance from the SRA, or have made the application to the Crown Court.

29. Finally, counsel submitted that if the court concluded that it was necessary to prevent the Defendants from misusing confidential information, the relief granted to the Claimants should not extend to preventing the Defendants from acting for the Thukrals in respect of any proceedings or disputes with either of the Claimants. This would deny the Thukrals their choice of legal representation.

The case put by the Claimants – hearing in private under CPR 39.2 (3)

30. Mr Warwick QC began by submitting that the court should entertain an application for the hearing to be in private in order to protect the confidentiality of such information as might emerge, and to prevent any privileged document or other source of confidential information becoming disclosable upon the basis that anything referred to at a public hearing is within the public domain. If the court did not make an order for a private hearing there was also the prospect of ancillary applications being made by the Thukrals to obtain information to which they would not be entitled directly thus defeating the primary relief being sought by the Claimants. As to this application, I understood Mr Cutting to concede that it stood or fell with the substantive application for an injunction.

Identification of the confidential information and its source

31. Taking Mr Cutting's main point against him head-on, Mr Warwick submitted that the absence of a list of all the information which would have been available to Ms Soni during the eleven months when she was acting as the Claimants' solicitor was hardly surprising. Counsel made reference to the documents in the bundle in respect of property belonging to the Claimants, and in respect of income tax returns and other business documents, as illustrations of the fact that it was obvious that she had had a great deal of information about the Claimants' assets, liabilities, business dealings, and financial affairs. It would simply not be practicable to identify by list each and every item of confidential information which would have been available to a solicitor acting as a full-time in-house lawyer over a period of almost a year.

32. Mr Warwick pointed to three detailed witness statements made by Ms Soni on behalf of Mr Patel for the purposes of the proceedings in the Crown Court, making detailed reference to his assets, at pages 253, 290, and 304 of the application bundle. Her knowledge of matters relating to the Claimant company's affairs and its assets could be illustrated by a reference to a loan granted to the company by the Lancashire Mortgage Corporation in respect of which the mortgagees held a charge over certain property which was subject to restraint by the order of the Crown Court as property which was thought to belong to Mr Patel. Further, there were emails in January 2016 (see pages 327 and 326 of the application bundle) in which Ms Soni refers to insurance matters in respect of the Western Avenue land that was the subject of the possession proceedings.

33. These, it was submitted, were merely examples of the fact that Ms Soni had undoubtedly had confidential information belonging to the Claimants in her possession, or at the very least had knowledge of it, as a direct result of her employment by them as their in-house legal adviser.

34. Other illustrations were given: at page 346 there was a letter dated 28 January 2016 from the First Defendant in her capacity as adviser to WAPL, enclosing tax returns

for companies including the First Claimant. Ms Soni had herself completed the tax return, as appears from page 360 where she has signed the return on behalf of the company.

35. In those circumstances Mr Warwick submitted that it was clear beyond doubt that the first stage of the *Bolkiah* test was passed, as there could be no doubt that Ms Soni was, or had been, in possession of information which was confidential to the Claimants, and to the disclosure of which they have not consented.

36. Turning to the second stage of the *Bolkiah* test, and the question of whether such information was or might be relevant to any possible proceedings involving the Thukrals, the case for the Claimants is encapsulated in words used by counsel instructed by Ms Soni in making the disclosure application at the Crown Court, to be found at page 34 the application bundle in paragraph 2:

> *"[The Thukrals] wish to pursue a claim arising from the possession order obtained by Western Avenue Properties Limited … over the valuable freehold land and property situate at 600 to 610 Western Avenue …."*

37. Precisely what the nature of such a "claim" may be is not clear. The time for appealing against the possession order has expired, as has the time for making any application to set the order aside. It is possible that some kind of action may be attempted to prevent enforcement of the order. It is also possible that proceedings may be taken for declaratory or other relief upon the basis that there is evidence to show that those upon whose instructions the possession proceedings were taken for the Claimant company did not have proper authority to give such instructions. Whether any such litigation is legally feasible, absent any appeal, was not the subject of discussion at the hearing.

38. Mr Cutting went so far as to say that the claim which is contemplated as "arising from the possession order" involved some issue over the beneficial ownership of shares in the Claimant company. For the purpose of those contemplated proceedings it is necessary for the potential Claimants to know who the beneficial owner of the shares may be. They suspect that the ultimate beneficiary is Mr Patel, whether through nominees or otherwise, but need to have this confirmed.

39. The Claimants' case is that they are potentially exposed to litigation the focus of which is not defined, but which may involve "… *a much larger dispute over the ownership/control of the claimant company."* Ms Soni may not have been in the employment of the Claimants at the time of a transfer of shares in the Claimant company involving the Thukrals and Mr Patel in about April 2007, (which seems to be one issue which has been articulated upon which there may be future litigation) but Mr Warwick submitted that there was no reason why she should not have been in receipt of information about that transfer at the stage when she was involved as in-house legal adviser: "… *she would have had access to all the files* ...", as he put it.

Conclusion

40. I accept the submissions made on behalf of the Claimants that they have established that Ms Soni, and through her the Second Defendant company, have been in

possession of information which was confidential to the Claimants, and to the disclosure of which they have not consented. In my judgment it is not necessary for the Claimants to particularise each and every item of such information in order to establish the point, nor would it have been practicable for them to have done so.

41. From the indubitable fact that Ms Soni spent some 11 months as in-house full-time legal adviser to the Claimants, the inference is irresistible that she would have acquired a very extensive familiarity with every aspect of their legal and financial affairs. Absent a complete catalogue of all the business documents that may be still in existence, and those documents to which Ms Soni would have had access but which are no longer in existence, it would be impossible to compile such a list. There is no suggestion that any such catalogue has ever existed. The first stage of Lord Millett's test is therefore passed.

42. As to the second stage, the question is whether or not the information is *or may be* relevant to the dispute or disputes between the Claimants and the Thukrals, who are now clients of Ms Soni. Although the burden of proof is on the Claimants, it is not a heavy one. Lord Millett said it may often be obvious, and in my view in the instant case it is.

43. I agree with Mr Warwick that Ms Soni may have misunderstood the advice which she was given by the SRA

> *"[The code of conduct] requires that you disclose to any existing client all information that is relevant and material to their matter. Therefore you would be obliged to disclose to your new clients (the Thukral family) any relevant and material information you are aware of as a consequence of acting for WAPL and [Mr Patel] but couldn't because this information is confidential to that former client. Outcome O (4.3) [of the code of conduct] requires that where these two duties come into conflict your duty of confidentiality takes precedence and we would usually advise that you should not act for the new client."*

44. Insofar as Ms Soni attempted to deal with the problem by the execution of the (undisclosed) "waiver" document by the Thukrals, it was suggested at the hearing that there may be significant potential difficulties over the validity of such a document. However, even if the document were valid, there remains the continuing risk to which the Ethics Adviser at the SRA wisely drew to Ms Soni's attention,

> *"[the] risk is that you will subconsciously use confidential information to the advantage of the Thukral family."*

45. Applying Lord Millett's formulation, it is of the highest importance to the administration of justice that Ms Soni, as a solicitor who has been in possession of confidential and privileged information, should not act in any way that might appear to put that information at risk of coming into the hands of someone with an adverse interest. Thus the court should intervene unless it is satisfied that there is no risk of disclosure. Ms Soni should not, without the consent of her former clients, the Claimants, have accepted instructions from the Thukrals unless, viewed objectively,

her doing so would not increase the risk that information which is confidential to the former client might come into the possession of the Thukrals.

46. Once the Claimants have established that the Defendants are in possession of information which was imparted in confidence, as in my judgment they have, then, as the Defendants are proposing to act for the Thukrals, who have an interest adverse to the Claimants in a matter to which the information is or may be relevant, the evidential burden shifts to the Defendants to show that there is no risk that the information will come into the possession of the Thukrals.

47. Mr Cutting attempted to deal with the discharge of that burden by submitting that the waiver dealt with the risk of any subsequent realisation by Ms Soni that she was in possession of confidential and privileged information, but, he said, "there is none." Asked why, if there were none, there was any need for the waiver, counsel candidly responded by saying that it was "just in case there might be." That does not begin to address the risk. Nor is there any way of satisfactorily dealing with the risk of subconscious use of information alluded to by the Ethics Adviser at the SRA.

48. I accept that Ms Soni made a conscientious attempt to resolve the ethical difficulties which she faced by approaching the SRA for advice and by disclosing her professional concerns. I also accept that the waiver was regarded as being a potential solution to the problem. For the reason I have just given, however, in my view it could not have resolved the problem, and indeed might itself have been the cause of potential problems with the Thukrals, for the reasons which Mr Warwick gave, including their right to independent advice before executing it. Whilst I do not think it is necessary to decide the point as to whether or not legal professional privilege applied to the waiver, the points made by Mr Warwick in that respect seemed to me to carry considerable force.

49. I accept Mr Cutting's point that Ms Soni is well aware of the continuing professional obligations in respect of confidentiality and legal professional privilege, and I see the force of the point that seeking guidance from the SRA made it improbable that she would have entertained any conscious intention of breaching her professional obligations. The difficulty is that none of that avoids or even reduces the risk of subconscious use of confidential information. That risk alone in my judgment amounts to the sort of risk which Lord Millett had in mind when he spoke of the difficulty of discerning any justification for a rule which exposes a former client, without his consent, to any avoidable risk "… however slight …" that confidential professionally-privileged information may come into the possession of a third party and be used to the former client's disadvantage. As he put it in the same paragraph, in such circumstances "… the case for a strict approach is unanswerable."

50. Lastly I must deal with the submission that the court should not grant relief to the Claimants which extends to preventing the Defendants from acting for the Thukrals, in respect of any proceedings or disputes with the Claimants, as to do so would deny the Thukrals their choice of legal representation. In my view the law was restated clearly by Field J in the *Georgian American Alloys* case (*supra*): *i.e.* that no form of balancing exercise is appropriate in cases of this kind. The impact of the injunction upon the Thukrals is not a relevant consideration.

51. In my judgment the Claimants have established the right to obtain the injunction which they seek.

52. All the parties accept that in those circumstances the court should grant the application for a private hearing (albeit *ex post facto*) in order to protect the confidentiality of any information which might emerge, and to prevent any privileged document or other source of confidential information becoming disclosable, for example, should this matter go any further.

The applications for disclosure of the waiver, for further information, and for an extension of time

53. In the circumstances it does not seem to me to be necessary to deal with the application for disclosure of the waiver. Whilst I would have been minded to grant the application, in view of my ruling in respect of the injunction it would seem that the application is unnecessary. If counsel wish me to deal with the matter nevertheless, and to give my reasons for granting the application, I shall do so upon notice being given.

54. So far as the application that the Claimants be ordered to respond to the Part 18 Request for Further Information on the Particulars of Claim is concerned, in the light of my ruling in respect of the injunction the requests in respect of identification of confidential information are unnecessary. I indicated at the hearing the extent to which the other requests should in my view be answered, and I understood Mr Warwick not to demur.

55. I grant the application for an extension of time for service of the Defence.

56. In all circumstances it seems appropriate for me to allow counsel now to confer and if possible draw up appropriate orders in accordance with this judgment.