Judgment 12/2009 **Ogier v Jeffreys – Royal Court (Civil Action File 1269) – 12 March 2009**

Civil Procedure – application to set aside a conveyance – application that Ozannes, a firm of Advocates, be restrained from acting for the defendant – three Advocates at Ozannes, and one employee, are potential witnesses at the trial of the action – whether risk of disclosure of confidential information – Rules of Professional Conduct issued by the Guernsey Bar Council – need to ensure equality of arms and to ensure public confidence in the administration of justice – ordered that Ozannes cease acting for the defendant

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 1269

The 12th day of March 2009 before Richard John Collas Esquire, alone

GARY DAVID OGIER

Plaintiff

V

MELISSA JEFFREYS

Defendant

Whereas 6th and 24th February 2009 the Deputy Bailiff considered an application by the Plaintiff for an order that Ozannes cease acting for the Defendant and heard thereon Advocates P A Allen and C J Fletcher counsel for the Plaintiff and Advocate G S K Dawes counsel for the Defendant the Deputy Bailiff this day handed down judgment in the terms attached hereto and granted the said application and DIRECTED that that Ozannes shall cease acting for the Defendant in this matter.

S M D ROSS
H M Deputy Greffier

Approved Judgment
12 March 2009

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between **GARY DAVID OGIER** **Plaintiff**

-V-

MELISSA JEFFREYS **Defendant**

Date of hearing: 6th & 24th February 2009

Judgment handed down: 12th March 2009

Before: Richard John Collas Esq., Deputy-Bailiff

Advocates for Plaintiff **P A Allen and C J Fletcher**
Advocate for Defendant: **G S K Dawes**

Cases & legislation referred to:

1. *Cockram v Loyalty Brokers Limited* (Royal Court 25 June 1992
2. *Ozannes v Beetle Holdings Limited* (Court of Appeal 10 April 2003)
3. *Ozannes v Dinning* (Court of Appeal 16th December 2004)
4. *Bolkiah (Prince Jefri), v KPMG [1999] 2 AC 222*
5. *Re L (Minors) (Care Proceedings: Solicitors) [2001] 1WLR 100*
6. *Takilla Limited v Olsen [2004] JRC 108*
7. *Geveran Trading Co Limited v Skjevesland [2003] 1WLR 912*
8. Rule 79 of the Guernsey Advocates Rules of Professional Conduct.
9. Rule 11.06 of the English Solicitors Code of Conduct 2007
10. *R v Sussex Justices, Ex p McCarthy [1924] 1 KB 256*
11. *De Haes and Gijsels v Belgium (1997) 25 EHRR 1, 56-57, para 53*
12. *Bulut v Austria (1996) 24 EHRR 84, 103-104, para 47*
13. *Havelet Holdings Ltd v Ozannes 25.GLJ.1*.

1. Advocates Allen and Fletcher, on behalf of the Plaintiff, have applied for an Order that Ozannes cease acting for the Defendant on the ground that there are four members of Ozannes, including one employee of the firm, who will be, or are likely to be, witnesses at the forthcoming trial.

Factual Background to the Plaintiff's Claim

2. The Plaintiff is the father of the Defendant to whom he sold his dwelling house by conveyance completed before the Royal Court on 1st November 2005, in which he reserved a life enjoyment of the property with responsibility to maintain, repair and upkeep it. The consideration for the conveyance was the sum of one pound (£1.00).

3. The background to the conveyance is that the Plaintiff alleges he became clinically depressed and alcohol dependent following the death of his son in a road traffic accident in 1999. He then became dependent upon his partner to manage his affairs, including his financial affairs, until he and his partner separated in or around December 2004. As a result of the separation he became even more depressed and alcohol dependent and his daughter, the Defendant, then assumed full control of his financial affairs. He alleges that he placed trust and confidence in her and that he passed to her all his correspondence, unopened.

4. The Plaintiff seeks to have the conveyance set aside on a number of grounds. First, that he was induced to sell the property to the Defendant who had fraudulently represented to him that because he owed £5,000 to the States of Guernsey in respect of Income Tax which he was unable to pay, the States would seize the property in settlement of the debt.

5. Secondly, he alleges that he lacked the capacity to enter into the conveyance by reason of his depression, confusion, short term memory loss and alcoholism and, in particular, that he was under the influence of alcohol when he appeared in the Royal Court to consent to the conveyance and the Defendant knew that to be the case.

6. Thirdly, he alleges that he entered into the conveyance as a result of undue influence exerted on him by the Defendant.

7. Fourthly, he alleges that the contract was unconscionable.

8. Fifthly, he claims that the contract should be set aside due to *"absence de cause"* and/or mistake on the grounds that his belief that the States would seize the property to recover the arrears of Income Tax was false and/or without a basis in fact because the arrears had been written off by the Income Tax Department on 12th October 2005.

9. By way of a remedy, the Plaintiff claims rescission of the conveyance and/or damages in an amount representing the value of the property less the £1 purchase consideration paid and less the value of his retained interest.

10. The Defendant, in her pleaded defences, denies the allegations. She alleges that the Plaintiff was alcohol dependent even before the death of his son and puts him to proof as to his psychiatric and medical condition thereafter. She admits helping him with many aspects of his daily life after his partner left him but claims that he remained fully informed about his affairs and continued to open and read his correspondence.

11. She claims that he was fully informed about the sale of the property and was the prime mover in the matters he now complains about. Prior to the conveyance her Advocate arranged for her father to take advice from Advocate Torode who was then a partner in

Trinity Chambers but has since joined Ozannes. The Plaintiff and Advocate Torode met on one occasion when the Defendant accompanied her father to his offices but she was not present in their meeting.

12. The Defendant alleges that her father was sober when he consented to the conveyance and was aware of his actions on that day. She denies making the alleged representation that the States would commence debt recovery proceedings in respect of Income Tax. She alleges that he wanted to sell the property to her in order to protect it from being sold by him, or at the instance of his former partner, and to prevent him from obtaining the proceeds of sale and dissipating the same. She denies any undue influence was brought to bear upon her father and denies any unconscionable conduct on her part. In short, she alleges the conveyance was good and valid and she denies that there are any grounds that would entitle the Plaintiff to have it set aside.

13. It is not for me to decide where the truth of the matter lies but I take note of the fact that there are significant factual issues that are in dispute relating to all the essential elements of the case.

Factual Background to this Application

14. The facts that give rise to this Application have been set out by the Plaintiff in three documents and supplemented during the course of the hearing. The three documents are: an affidavit sworn by Advocate Fletcher on 10th October 2008; the Plaintiff's Skeleton Argument dated 4th December 2008; and a document entitled "Submissions on behalf of the Plaintiff", dated 20th February 2009.

15. The Plaintiff's Advocate has identified four members of Ozannes who will be required to give evidence at the trial in this matter or are potential witnesses, three of whom are Advocates and are partners in Ozannes and the fourth is an employee of that firm. Ozannes are acting for the Defendant.

16. One of the potential witnesses is Advocate Torode who attended with the Plaintiff and has since joined the firm of Ozannes. The others are Ms Julie Perfitt who met with both the Plaintiff and the Defendant when they attended at Ozannes on 27 September 2005 to give instructions for the conveyance; Advocate Prentice who also attended for part of that meeting, he was the Advocate who acted for the Defendant in the conveyance and who presented the parties to the Conveyancing Court on 1 November 2005; and Advocate Bainbridge. Advocate Bainbridge's role in the matter is less clear to me at this stage. Advocate Fletcher's Skeleton Argument suggests he may have been present at the meeting although a file note prepared by Ms Perfitt (a copy of which was handed to me by Advocate Fletcher during the hearing) suggests that he first became involved after the 27 September meeting when Ms Perfitt spoke to him about obtaining separate representation for the Plaintiff. The file note does not say whether Advocate Prentice also spoke to Advocate Bainbridge at that time. The file note records that:

> *"[Advocate Bainbridge] doesn't think that it is advisable that the same office deal with both persons due to Mr Ogier's illness. I am therefore waiting for a call back from Mark Torode of Trinity Chambers to ask if he would be kind enough to see Mr Ogier to make sure that he totally knows what he is doing.*

> *Mr Ogier has no money whatsoever indeed he owes money and therefore [Advocate Bainbridge] said that perhaps Mark might be willing to do it for no recompense and we would return the favour at some stage."*

17. Another document shown to me during the hearing was an email from Advocate Torode to Ms Perfitt dated 11 October 2005 at 13:16. It reads:

> *"Dear Julie*
>
> *I thought it best to confirm to you in writing that I met with Mr Ogier on 3rd October 2005.*
>
> *I confirm that notwithstanding his obvious problems, Mr Ogier is fully aware of what is intended and the repercussions for him. He is very keen to protect the property for his daughter in the future.*
>
> *The only advice that I could not give Mr Ogier was in relation to the nature of the right of enjoyment that would be granted – I understand that this has yet to be decided.*
>
> *Kind regards*
>
> *Mark"*

18. I have not seen a proof of evidence from Advocate Torode so I do not know what he will say but it appears to me that his involvement was limited to the meeting at his offices on 3rd October. The Plaintiff has this to say about that meeting in paragraph 17 of the Cause:

> *"The Defendant accompanied the Plaintiff to the offices of this advocate. Neither the Plaintiff nor the advocate had a copy of the draft conveyance. The Plaintiff was not advised as to the nature of the right of enjoyment of the property that would be granted to the Plaintiff. The Plaintiff was advised that he would remain liable for maintaining the Property, but not to the extent of "grosses réparations". He was given no written advice concerning the Defendant's proposals. The Plaintiff attended the meeting on his own and, as a result of his medical and physical condition at the time, he was unable to fully understand the advice given to him and after the attendance could not recall the advice or information that was given".*

19. If it was intended that Advocate Torode would represent the Plaintiff's interests in the conveyance, I do not understand why he was never fully instructed and was never shown the proposed terms of the life enjoyment. It may be that the Plaintiff indicated during the course of their meeting that he did not want him to act further. It might be considered to be unsatisfactory if the only reason the Plaintiff was not fully represented was because of a lack of funds; he was selling his property for £1 but it might be thought that he could have sold it to his daughter for a price that was sufficient to cover his legal expenses. However, these issues cannot be explored at this stage. If they are relevant they can be dealt with at the trial of the action. The relevant fact at this stage is that the relationship between the Plaintiff and Advocate Torode is

to be treated as that of an Advocate and his client. I understand that Advocate Fletcher accepts that in order to prove certain of the allegations he has pleaded, the Plaintiff will have to call Advocate Torode as a witness.

Risk of Disclosure of Confidential Information

20. The discussions between the Plaintiff and Advocate Torode at their meeting and the details of any advice Advocate Torode may have given are protected by obligations of confidentiality unless and until those obligations are waived by the Plaintiff. In most situations where the Royal Court has ordered that an Advocate shall cease acting on behalf of a party in litigation it has done so in order to prevent any risk of disclosure of confidential information to that party. Such occasions include *Cockram v Loyalty Brokers Limited* (Royal Court 25th June 1992), *Ozannes v Beetle Holdings Limited* (Court of Appeal 10th April 2003) and *Ozannes v Dinning* (Court of Appeal 16th December 2004). In such situations, the Court is guided by the principles set out in *Bolkiah (Prince Jefri), v KPMG [1999] 2 AC 222*.

21. The present case is different because the Plaintiff will waive confidentiality when he calls Advocate Torode to give evidence of what happened when they met.

22. I was initially concerned by the statement in paragraph 15(1) of Advocate Dawes' affidavit sworn on 11th November 2008 that *"Advocate Torode does not have confidential or significant information in relation to the substantive matter"*. It seemed to me that if Ozannes did not appreciate that the details of the attendance with the Plaintiff and the advice given to the Plaintiff were confidential, information might have already been disclosed by Advocate Torode, possibly inadvertently if not intentionally.

23. Where a person does not appreciate, or has forgotten, that he has been entrusted with confidential information there is always a risk of inadvertent disclosure. Such risk was considered by the then Deputy Bailiff in *Cockram v Loyalty Brokers Limited*. It presents a problem that is different from the risks considered in for example, *Ozannes v Beetle Holdings Limited* where Advocate Wessels, and all other members of Ozannes (the firm also involved in that case) were fully aware that he possessed confidential information regarding the cases in which he had been instructed prior to joining the firm of Ozannes.

24. However, my concerns have been allayed by Advocate Dawes' explanation that what he meant to say was that any confidentiality would be waived when Advocate Torode gave his evidence. He also gave an assurance that Advocate Torode has not discussed the case with anyone at Ozannes and he is willing to give an undertaking that he will not do so in advance of the trial

25. I should also mention that in her submissions, Advocate Fletcher argued that the other Ozanne witnesses, especially Ms Perfitt, were at risk of disclosing confidential information they might have learned from the Plaintiff when he attended at their offices in the company of the Defendant on 27th September 2005. However, the

Defendant was also present at that meeting so she is already aware of everything the Plaintiff said. Consequently, there are no confidences to protect. There is no suggestion of any other communications passing between the Plaintiff and Ozannes which were, or were intended to be, confidential in the sense that they were not said in the presence of the Defendant or were not to be communicated to her.

26. During the course of the hearings before me, Advocate Fletcher acknowledged that this is not a case where the Court should act in order to prevent the disclosure of confidential information. She was right to do so, on the basis of the undertaking that has been offered on the part of Advocate Torode.

Other Grounds for the Exercise of the Court's Jurisdiction

27. The basis of the jurisdiction that the Court is being asked to exercise is the inherent jurisdiction of the Court to control its own process and the conduct of its officers and to prevent the abuse of its procedure (*In Re L (Minors) (Care Proceedings: Solicitors) [2001] 1WLR 100*, *Takilla Limited v Olsen [2004] JRC 108* and *Geveran Trading Co Limited v Skjevesland [2003] 1WLR 912*.

28. I have been asked to consider provisions of the Rules of Professional Conduct of the Guernsey Advocate. That calls into question the status of the Rules. They were passed by resolution of the Guernsey Bar Council, approved by Her Majesty's Procureur and sanctioned by the Bailiff to come into effect on 1st January 1995 but they have not been formally approved or adopted by the Royal Court.

29. Counsel agreed with the statement of Arden LJ in *Geveran* that the content and enforcement of the English Bar Code of Conduct was not a matter for the Court. I accept that, similarly, the enforcement of the Advocates' Rules of Professional Conduct is not a matter for me but I respectfully adopt what Paige, Q.C., Commissioner, said in *Takilla Limited* at paragraph 22:

> *"The codes of conduct of the professional bodies can be a convenient point of reference in so far as they crystallize 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".*

30. Advocate Dawes has encouraged me to treat the Rules of Professional Conduct as if they are conclusive and he has submitted that he should be allowed to continue acting because the Rules do not require him to withdraw from the case. It seems to me that must be wrong. I agree with Paige, Q.C. that they are a convenient point of reference but I do not believe that it can properly be said that the Rules should have the final say in the matter.

31. Rule 79 of the Guernsey Advocates Rules of Professional Conduct provide as follows:

> *"**Rule 79***

> ***An Advocate must not accept instructions to act as an Advocate for a client if it is clear that he or she or a member of the firm will be called as a witness on behalf of the client, unless the evidence is purely formal.***
>
> *Commentary*
>
> 1. *An Advocate must exercise judgement as to whether to cease acting where he or she has already accepted instructions as an Advocate and then becomes aware that he or she or a member of the firm will be called as a witness on behalf of the client.*
>
> 2. *The circumstances in which an Advocate should continue to act as an Advocate, or at all, must be extremely rare where it is likely that he or she will be called to give evidence other than that which is purely formal.*
>
> 3. *It may be possible for an Advocate to continue to act as an Advocate if a member of the firm will be called to give evidence as to events witnessed whilst advising or assisting a client. In exercising judgment, the Advocate should consider the nature of evidence to be given, its importance to the case overall and the difficulties faced by the client if the Advocate were to cease to act. The decision should be taken in the interests of justice as a whole and not solely in the interests of the client."*

32. Rule 79 is only applicable if a member of the Advocate's firm is to be called as a witness on behalf of his client. That is different from Rule 11.06 of the English Solicitors Code of Conduct 2007 which applies no matter who calls the witness. It provides:

> "*you must not appear as an Advocate at a trial or act in a litigation if it is clear that you, or anyone within your firm, will be called as a witness, unless you are satisfied that this will not prejudice your independence as an Advocate, or litigator, or the interests of your client or the interests of justice"*.

33. I do not know why the Guernsey Rule differs from the English Rule; in many respects the Rules are very similar. Neither counsel was able to explain why there is a difference. It may have been intentional or it may be that the English Rules have been amended since the adoption of the Guernsey Rules. However, I believe the difference is immaterial in the present case because the Rules are not binding upon me. I must look at, and take account of, the interests of justice.

34. I have already observed that the Plaintiff will have to call Advocate Torode to give evidence on his behalf. Advocates Prentice and Bainbridge and Ms Perfitt are also potential witnesses. I had understood Advocate Allen (who appeared on behalf of the Plaintiff instead of Advocate Fletcher who was unavailable on the first of the two days of the hearing) to say that the Plaintiff will be calling all three of them, although I now believe the position to be that it is intended to call the latter three only if they are not to be called by the Defendant. Advocate Dawes said in argument that the Defendant would not call any of the three witnesses if they are not called by the Plaintiff. I therefore conclude that if they are to give evidence, it will be on behalf of the Plaintiff,

not on behalf of their own client. If so, there would be no breach of Rule 79. Even if they were being called on behalf of their own client, paragraph 3 of the Commentary would apply and I would have to decide what is *"in the interests of justice"*.

35. Advocate Dawes has argued that any evidence to be given by Advocate Torode and the three other Ozanne witnesses will be purely formal. He even went as far as to say that there may be no need for him to cross-examine any of the witnesses. I have not had the benefit of a proof of evidence from any of these potential witnesses but it seems to me to be unlikely that the evidence of all of them will be purely formal. They will be asked, *inter alia*, about what they understood were the reasons for the conveyance; the physical state and the state of mind of the Plaintiff on each of the occasions when they saw him, including the morning of the conveyance; what they observed of the relationship between him and his daughter; and why Advocate Torode was asked to become involved. Such evidence will be relevant to many, or most, of the contested and sensitive issues which are at the heart of the substantive claim in this case.

36. I must not speculate as to what their evidence will be but I consider it is unlikely that any of three Ozanne witnesses who were acting for the Defendant will say that on the morning of the conveyance they knew, or had real concerns, that the Plaintiff lacked the capacity or the understanding to consent to the transaction and that they allowed it to proceed, and to present the parties to the Jurats in the Conveyancing Court, knowing that something was so amiss that it would call into question the genuineness of the transaction and the quality of the title that would be passing to their client under the conveyance. It is unlikely because it would probably be a breach of the duties they owed to the Court as well as the duties owed to their client, the purchaser. So there is a possibility that Advocate Dawes will not need to cross-examine them but I cannot say that for certain at this stage.

37. I conclude, for the purposes of this decision, that because their evidence will relate to some of the key issues to be determined by the Court it will, or at least may, go beyond the purely formal and may be subject to cross examination.

38. In paragraph 39 of his judgment in <u>*Geveran*</u>, Arden L J said:

> *"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"*. (Emphasis added)

39. After referring to special considerations that may apply to prosecuting counsel in criminal cases and to counsel involved in care proceedings, he said there are other exceptional circumstances and in paragraph 42 he said:

> *"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 Hewitt CJ memorably said in <u>R v Sussex Justices, Ex p</u>*

> *McCarthy [1924] 1 KB 256, it is important that justice should not only be done, but seen to be done".*

40. He went on to say in paragraph 43 that:

> *"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 technical 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".*

41. If I was concerned only with the three Ozanne witnesses other than Advocate Torode, it is unlikely that I would grant the application. The Defendant instructed Ozannes to act on her behalf in the conveyance and in my view it is not unreasonable that she should ask that same firm to continue to act for her in defending her title to the property now that it has been called into question. There is no suggestion that Ozannes acted improperly in connection with the conveyance. Advocate Allen argued that they must have had concerns as to the Plaintiff's capacity when she saw him at the meeting on 27th September 2005, or Ozannes would not have involved Advocate Torode. I do not accept that that is an inference which can necessarily and properly be drawn. It might be Ozannes' normal practice to ensure that in every similar case where an elderly parent proposes to give away his property for little or no consideration he should be independently advised by an outside firm. I do not know whether that is their policy, but it is possible and hence I cannot, at this stage, come to the conclusion that Ozannes must have heard or seen something suspicious.

42. The difficult aspect of this decision is the role of Advocate Torode. The decision is not made any easier by not having a proof of evidence from him and hence not knowing what he will say other than what he put in the email I have quoted. I am not criticising Advocates Fletcher or Allen for not producing a proof of evidence; they objected to the involvement of Ozannes at the start of this case which was the proper time to do so and it is not unreasonable that they do not have a proof of evidence at such an early stage in the case.

43. When Advocate Torode met with the Plaintiff he was not associated with Ozannes but he has subsequently joined them. Should Ozannes be retrained from representing the Defendant so that there will be no possibility of Advocate Torode being cross-examined by a partner in his new firm?

44. The facts in *Geveran* were that the during an adjournment of the hearing of a bankruptcy petition the debtor's wife discovered that counsel for the petitioner was someone with whom she had been acquainted socially during the period relevant to the proceedings. She applied to the registrar for a retrial on the grounds that counsel should not have accepted instructions or that there might be an appearance of bias. The application was dismissed by the registrar and by a judge on appeal. On appeal to the Court of Appeal, it was held that in exceptional circumstances the Court could prevent an advocate from acting, even if he had no relevant confidential information, if satisfied that there was a real risk that his continued participation would require the Order made at the trial to be set aside on appeal.

45. In that case, the Court of Appeal heard submissions from Mr Hollander on behalf of the Bar Council as to the circumstances in which an Advocate ought to disclose to the Court at the outset of the hearing that he was acquainted socially with the litigant against whom he is instructed to appear or a close member of that litigant's family. The circumstances in the present case are different but the principles identified by Mr Hollander are helpful. At paragraph 24 of his judgment, Arden L J summarised the risks that Mr Hollander identified:

> *"(i) a use of confidential information; (ii) professional embarrassment of counsel; (iii) infringement of the Convention right of equality of arms; (iv) concerns as to public confidence in the administration of justice."*

46. The risk of using confidential information in this case can be addressed, as I have said, through the giving of an undertaking. I raised with Advocate Dawes the question of professional embarrassment and he said he would not feel any embarrassment in cross-examining members of his firm and said that although Advocate Torode is his partner, he does not know him well and there are many Advocates in other firms with whom he is much better acquainted. He added that the risk of professional embarrassment, if there is any risk, is inevitable in a small Bar in a small jurisdiction where practitioners are known to each other.

47. I accept his statement that he would not feel any professional embarrassment.

48. As regards equality of arms, Arden LJ said *"the principle is that every party must have a reasonable opportunity of presenting his case to the court under conditions which do not place him at a disadvantage vis-à-vis his opponent: De Haes and Gijsels v Belgium (1997) 25 EHRR 1, 56-57, para 53. In this regard, appearances are important as well as sensitivity to the fair administration of justice: Bulut v Austria (1996) 24 EHRR 84, 103-104, para 47"*.

49. It is the need to ensure that there is equality of arms, and the appearance thereof, that concerns me most in this case and that need overlaps with the fourth principle identified by Mr Hollander namely the need to ensure public confidence in the administration of justice and to ensure that justice is seen to be done.

50. One issue that may arise when an Advocate proposes to cross-examine his own partner is that, by reason of their relationship, the cross-examiner may have knowledge of the witness and his working methods that might assist him in conducting the cross-examination. (A similar issue was considered by Carey D-B in *Havelet Holdings Ltd v Ozannes 25.GLJ.1*.) Advocate Dawes says that is not the case here but in my opinion that is not the end of the matter. It is impossible to predict what issues will be raised in the cross-examination and how significant it will be in determining the outcome of the case but, in my view, there is a real risk that the cross-examination may be appear to be influenced even if it is not in fact influenced to the advantage of the Defendant by knowledge that Advocate Dawes might reasonably be presumed to have of his partner Advocate Torode. Hence, there is a real risk that the Plaintiff and any informed, independent observer may consider that the Plaintiff has been prejudiced by Ozannes acting in the case. That could lead to the Court's decision being overturned on appeal.

51. Another concern is that by virtue of section 22 of the Partnership (Guernsey) Law 1995, a partner in a partnership owes a duty of the utmost good faith towards every other member of the partnership. So, Advocate Dawes and Advocate Torode owe duties to each other. They will no doubt endeavour to conduct themselves in such a manner as to ensure that their partnership duties do not conflict with the duties they will owe to the Court as counsel and witness respectively and also the duties they owe to their clients. However, there is a potential for conflict and, once again, it is the perception in the eyes of the Plaintiff and in the eyes of the informed observer that concerns me. It could result in Advocate Dawes being inhibited in his cross-examination of Advocate Torode, or of the perception that he is inhibited. If that were to happen, it would likely be to the advantage of the Plaintiff and to the detriment of the Defendant. It is therefore probably different from the risk I identified in the preceding paragraph and although it might be disadvantageous to the Defendant, she does not object to Advocate Dawes acting for her. (I believe she would have grounds for objection as there is a real risk that the conduct of her case could be adversely affected.)

52. For the reasons I have given, I am concerned that if Ozannes continue to act for the Defendant there is a real risk of the Court's judgment in the matter being set aside on appeal. In those circumstances, I am satisfied that there are grounds for ordering Ozannes not to act for the Defendant.

53. Whether to make such an Order is a matter for my discretion. The factors to consider in the exercise of that discretion are indicated in the cases to which I have been referred.

54. I might decline to exercise the discretion if the Plaintiff had raised the issue late in the day and close to trial but that is not so; he complained about Ozannes acting at the very outset of the action. Another consideration is whether the Defendant could find another Advocate, Guernsey is a small jurisdiction and the Bar is comparatively small. However Advocate Dawes has not suggested that she could not find alternative representation and I have no reason to believe that she could not do so.

Conclusion

55. I am satisfied that it is appropriate for me, in the exercise of my discretion, to make the Order requested and to direct that Ozannes shall cease acting for the Defendant in this matter.

