

Judgment 62/2004

**Ferbrache et al (Ozannes) v Dinning –
Court of Appeal (Civil Appeal 352)
16 December, 2004**

Appeal from order restraining Advocates from acting (See Judgment 37/2004) – position of advocate acting both for the plaintiffs in an action against the present respondent, and for a former partner of the respondent in matrimonial proceedings – restraint order set aside on conditions – firm permitted to continue to act for the plaintiffs but the advocate in question to take no part, directly or indirectly in the substantive action.

IN THE COURT OF APPEAL OF GUERNSEY

The 16th day of December, 2004 before Richard Charles Southwell, Esq., Q.C., Presiding, Peter David Smith, Esq., Q.C., and Christopher Simon Courtenay Stephenson Clarke, Esq., Q.C.

PETER TERENCE RICHARD FERBRACHE

et al

(OZANNES)

(Appellants)

v.

GILLIAN SARAH DINNING

(Respondent)

In the appeal by the Appellants from the Order of the Royal Court on 2nd September, 2004;

THE COURT, having heard Advocates G. S. K. Dawes for the Appellants and R. J. Collas for the Respondent, thereon, this day GAVE JUDGMENT in the terms attached hereto and: -

1. HELD that Advocate Ferbrache was precluded from acting for IFSI Investments Limited (“IFSI”) but that Ozannes could continue to act for IFSI PROVIDED THAT Ozannes and Advocate Ferbrache gave the Undertakings set out in the Schedule attached to the Judgment, which Undertakings were thereupon given by Advocate Dawes on behalf of Ozannes and of Advocate Ferbrache; and

2. AWARDED to the Respondent her recoverable costs in respect of the proceedings before the Royal Court and two-thirds of her recoverable costs before the Court of Appeal.

K. H. TOUGH
Registrar of the Court of Appeal

**IN THE COURT OF APPEAL
(CIVIL DIVISION)**

ON APPEAL FROM THE ROYAL COURT SITTING AS AN ORDINARY COURT

BETWEEN

PETER TERENCE RICHARD FERBRACHE

Et autres t/a

OZANNES

Appellants

V

GILLIAN SARAH DINNING

Respondent

JUDGMENT

CLARKE, J.A.

1. This is an appeal from a judgement of Lieutenant Bailiff Day (“the Lieutenant Bailiff”), handed down on 2nd September 2004, whereby he restrained Ozannes, the Appellants, from acting in certain proceedings against, amongst others, Advocate Dinning of Carey Olsen.

The history

2. In order to understand the issues it is necessary to say something about the background. Manor Park Guaranteed Investment Funds Limited (“*Manor Park Investment*”) is an investment company and operates an umbrella fund (“*the Manor Park Fund*”). Manor Park (Guernsey) Limited (“*Manor Park Management*”) is the manager of the Manor Park Fund. I refer to Manor Park Investment and Manor Park Management collectively as “*the Manor Park companies*”. Mr Alan Williams (“*Mr Williams*”) is a director of the Manor Park companies, the investment manager of Manor Park Management, and is said to be the ultimate beneficial owner of Manor Park Investment and the principal controller of the Manor Park companies.

3. On 1st June 2001 the Manor Park companies entered into an agreement (the “*Distributor Agreement*”) with a company that is now named International Fund Services (Guernsey) Limited (“*IFSG*”) whereby IFSG would provide certain services, including the promotion of the Manor

Park Fund, within the Channel Islands. On the same day IFSG entered into an Administration Agreement (“*the Administration Agreement*”) with Manor Park Management for the purposes of providing administration services to the Manor Park Fund.

4. On **25th July 2003** the Manor Park companies issued injunction proceedings against IFSI Investments Limited (“*IFSI*”), IFSG and others alleging misuse of confidential information. That application was dealt with by undertakings, which were later, extended. On **24th October 2003** proceedings (“*the initial proceedings*”) were brought by the Manor Park companies against IFSI, IFSG and others alleging misuse of confidential information, breach of the Distributor and Administration Agreements, and breaches of fiduciary duty. A trial date of 10th November 2003 was fixed. On **7th November 2003** those proceedings were compromised by a settlement agreement (“*the Settlement Agreement*”) upon the basis that the Distributor and Administration Agreements were to be determined, the undertakings discharged, and each side should bear its own costs. By a consent order of **10th November 2003** all proceedings were withdrawn. Carey Olsen Trust Company, a company in which the partners of Carey Olsen are shareholders, thereafter provided the administration services previously provided by IFSG. Carey Olsen had been acting for the Manor Park Companies and Mr Williams, and continued to do so until early 2004.

5. On **12th February 2004** IFSI served proceedings (the “*substantive litigation*”) against (i) Manor Park Management, (ii) Manor Park Investment, (iii) Mr Alan Williams, and (iv) Advocate Gillian Dinning (“*Advocate Dinning*”) on Advocate Dinning and two of the other defendants. Advocate Dinning was a partner in Carey Olsen who had been advising Manor Park in relation to the initial proceedings. In the substantive litigation IFSI made claims against the defendants of conspiracy, defamation and unlawful interference with IFSI’s business interests, and sought various remedies, including damages in the sum of E32,000,000. It is necessary to say something about the claims, but, in so doing, I should not be taken as expressing any view whatever as to whether or not any of those that remain are either well founded or baseless.

6. IFSI’s business includes the provision of a guaranteed fund service to institutional clients. One of the clients to which it seeks to market its services is Norwich Union International Limited (“*NUIL*”), a company based in Dublin for whom they developed a new open ended fund (“*the NUIL fund*”), which could be sold as one of NUIL’s products. IFSI claimed, firstly, that the Manor Park companies had, in pursuance of a conspiracy between them and a consultant, in breach of the Settlement Agreement, revealed some or all of its terms, and falsely informed independent financial advisers (a) that the severance of contractual relations between the Manor Park Companies and IFSG arose because IFSG had broken the Administration and Distributor Agreements and (b) that the Settlement Agreement was obtained in the absence of good faith and

fraudulently. The second conspiracy claim was that between December 24th 2003 and January 26th 2004 Manor Park Investment and Manor Park Management became aware of agreements between IFSI and NUIL, and that, thereafter, two or more of the defendants conspired to injure IFSI, and did so by making a number of false representations to NUIL about IFSI and its directors, suggesting, for instance, that IFSI had created a secret profit for themselves within the structure of the NUIL Fund, had broken obligations to the Court in the initial proceedings, had breached the terms of agreements with the Manor Park Defendants and obtained the Settlement Agreement on the basis of false representations. The acts allegedly done in fulfilling the conspiracies pleaded were said to constitute an unlawful interference with the business of IFSI and, as the pleading put it:

“Yet further, the Defendants have defamed the Plaintiff”.

The figure of E32,000,000 represented the estimated gross fees payable over the 10 year life of the NUIL fund. IFSI’s case was that NUIL had been deterred from continuing with the launch of the NUIL fund, and would cancel it, if the two Manor Park companies did not undertake not to interfere with or otherwise disrupt the NUIL fund.

7. There have been three applications by Advocate Dinning in the course of the substantive litigation namely (a) an application to strike out the proceedings against her; (b) an application that her strike out application be heard in camera; and (c) the application to restrain Ozannes from acting against her that is the subject of this appeal. By his judgement of **22nd April 2004** the Lieutenant Bailiff rejected the in camera application. By his judgement of **11th June 2004** he struck out, as against Advocate Dinning the first conspiracy allegation, the claim in defamation, and the claims for injunctive and declaratory relief.

8. In addition Manor Park Investment applied to strike out the claim against them, and on **1st October 2004** the Lieutenant Bailiff made an order that unless IFSI applied to amend its pleadings in relation to the first conspiracy by 15th October 2004 its claim in that regard should be struck out; but otherwise dismissed the application.

The facts giving rise to the dispute

9. Ozannes act for IFSI. The partner principally responsible for the conduct of IFSI’s action is Advocate Peter Ferbrache (“*Advocate Ferbrache*”). Advocate Ferbrache also acts for Advocate John Greenfield, who is, himself, a partner in Carey Olsen, in relation to his matrimonial proceedings. Advocate Dinning contends that Advocate Greenfield will have disclosed, and will, in the future, be bound to disclose, to Advocate Ferbrache confidential information relating to the

financial affairs of Carey Olsen (“*the firm*”), and Carey Olsen Trust Company (“*the trust company*”). Her affidavit of 19th February 2004 recorded that Advocate Greenfield had informed her that he had disclosed to Advocate Ferbrache in connection with his matrimonial proceedings confidential information about the firm and the trust company from which Advocate Ferbrache would know the size and value of her interest in the firm and the trust company, her earnings and the amount paid by her when she acquired an interest in those entities. The nature of the information disclosed was, she said, such that Advocate Ferbrache would be able to assess accurately the income, shareholding and liabilities of each of the Carey Olsen partners in relation to the firm and the trust company. Before the Lieutenant Bailiff no affidavit was filed in reply. In addition she contends that Advocate Greenfield will be under a duty, whilst the matrimonial proceedings are on foot, to continue to make disclosure of such information.

10. On **2nd September 2004** the Lieutenant Bailiff, acceded to Advocate Dinning’s application and restrained Ozannes from advising or acting for IFSI in the proceedings against her. The question is whether he was right to do so.

11. On **14th October 2004** IFSI applied to make extensive amendments to its pleadings in order to allege a single conspiracy made on or before 16th January 2004 between all four defendants, in pursuance of which, so it is said, a series of denigrations of IFSI were made by, or on behalf of, the Defendants, amounting to defamation or malicious falsehood, the particulars of which (unlike the single sentence in the original pleading) are set out in considerable detail. The matters pleaded are said to amount to an unlawful interference with IFSI’s business and, insofar as they involved reference being made to the Settlement Agreement, a breach of its terms. The loss claimed is a loss of net profit on the NUIL Fund, now not to be launched, which is said to amount to about £20 million and the loss of a chance of launching similar funds valued at about £40 million. This application, together with a related application to stay the effect of the restraining order has been adjourned by the Lieutenant Bailiff until after the hearing of this appeal.

12. Advocate Dinning has at no time been a client of Ozannes or of Advocate Ferbrache. But, on the facts deposed to by her, Advocate Ferbrache is in possession of information relating to Advocate Greenfield, which, also, reveals details of her financial position.

13. The issues to which these facts gave rise can conveniently be addressed by reference to the original submissions of the parties. For Ozannes it was said (a) that there is, in those circumstances, no duty of confidence owed by them to Advocate Dinning, (b) that the information in question is not, in any event, confidential, and (c) that, even if it was, it would not be relevant to the substantive litigation. For Advocate Dinning it was said (a) that the information is obviously confidential, (b) that it is relevant to the substantive litigation, and (c) that, for that reason,

Advocate Ferbrache is bound to reveal it to IFSI; but for him to do so would be a misuse of private information. On that account Ozannes should be prohibited from acting. At the hearing before the Lieutenant Bailiff it was made plain that Advocate Ferbrache intended to continue to act for IFSI in the substantive litigation. Advocate Roland told the Lieutenant Bailiff that no attempt was being made to set up a Chinese Wall within Ozannes to prevent the transmission or misuse of information, and no undertakings were proffered or arrangements suggested on the part of Ozannes to protect Advocate Dinning or Advocate Greenfield against the risk of disclosure or misuse of private information.

The judgement of the Lieutenant Bailiff

14. The learned Lieutenant Bailiff identified three questions. The first was whether, if Advocate Ferbrache was in possession of information concerning the financial affairs of Advocate Dinning, he had a duty, enforceable by her, not to disclose that information, despite the fact that he has no professional relationship with her, a question that the Lieutenant Bailiff described as novel in relation to this jurisdiction. The second was whether Advocate Ferbrache was in fact in possession of such information. The third was whether such information was relevant to the substantive litigation. Those three questions he answered in the affirmative.

15. As to the first question, the Lieutenant Bailiff relied upon dicta in the speeches in the House of Lords in the case of **Campbell v MGN [2004] UKHL 22**, in which the House was divided as to the result but not as to the general principles, and in particular the speeches of Lord Nicholls of Birkenhead and Lord Hoffman, and the citation therein of passages in the speech of Lord Goff of Chieveley in **Attorney General v Guardian Newspapers Ltd (No 2) [1990] 1 A.C. 109** and of Lord Woolf in **A v B plc EWCA Civ 337**. As to the second question, he said that he was entitled to assume that an Advocate involved in matrimonial proceedings would make full and proper disclosure of his assets and liabilities, and concluded that the imparting of such information would give the recipient at least some idea of the financial interests of Advocate Dinning, which would, as Advocate Ferbrache must or ought to have known, be private and confidential to her. As to the third question, he held that the information could have no relevance as to whether Advocate Dinning was under any liability, or as to the quantum of that liability, if she was. But such information might have an impact on the general conduct of the litigation and any negotiation between the parties, both because it could be of advantage to IFSI to know the financial strength or weakness of Advocate Dinning, and of disadvantage to her not to know whether any and, if so, what information on that subject had been revealed to IFSI. Further he accepted Advocate Collas' submission that the impact of the litigation might be revealed. This was, I think, a reference to Advocate Collas' submission (recorded at page 27 of the Transcript) that the sum claimed might be material to the future of the firm, such that Advocate Greenfield

might have to disclose the firm's views on the impact of the claim on the firm because of the relevance of that to the value of his interest in the practice.

16. In paragraph 23 of his judgement the Lieutenant Bailiff described the impact of possession of this information as “*an intangible factor*”. In paragraph 31 of his judgement he said that, whilst there was no immediately obvious way in which any private information Advocate Ferbrache had with regard to Advocate Dinning's financial affairs could be relevant to the substantive litigation, the fact that it might have an impact to a greater or a lesser extent on the position of the parties during the course of the litigation could not be discounted, and that the wiser policy was to eliminate that possibility, which he regarded as more than fanciful, now. On balance therefore he granted the injunction. In expressing himself as he did the Lieutenant Bailiff must have had in mind the passage from the speech of Lord Millett in **Prince Jefri Bolkiah v KPMG [1999] 1 All ER 518** where he said (528 e to g):

“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”

The argument before the Court of Appeal

17. In the course of the hearing before this Court, in part as a result of concerns raised by the Court itself, the focus of the argument shifted. Advocate Dawes, on behalf of Ozannes, accepted that Advocate Ferbrache was in receipt of confidential or private information from Advocate Greenfield, as indicated in Advocate Dinning's affidavit, which related to her financial position. But, he submitted, that information was not relevant to the substantive litigation. It could have no bearing on any question of liability or quantum. Insofar as it related to the assets that might be available, at the time of execution of any judgement, that information would, in one way or another, become public, or at any rate legitimately available to IFSI, anyway. Insofar as confidential information in the possession of Advocate Ferbrache had any bearing on possible settlement of the claim, it was far too limited in scope to afford a sufficient justification for preventing Ozannes from acting. To a substantial extent Advocate Dinning's financial position, so far as the firm and the trust company is concerned, could be estimated without recourse to confidential information. More precise detail derived from confidential information would not significantly advance matters, and might be positively misleading, not least because it would still not reveal Advocate Dinning's overall position, taking into account any borrowings that she may have incurred in order to fund her share in the firm and her shareholding in the trust company, much less the extent of her assets and liabilities derived from other sources, including, in particular, any insurance to the benefit of which she might be entitled. He placed particular stress

on the irrelevance of the information to the merits of the claim and the fact, as he submitted, that upholding the judgement of the Lieutenant Bailiff would have very serious repercussions on the ability of litigants to have access to the lawyers of their choice in a jurisdiction as small as Guernsey.

18 I am quite prepared to accept, as was the Lieutenant Bailiff, that any confidential or private information that Advocate Ferbrache has in respect of the financial position of Advocate Greenfield and Advocate Dinning has no bearing on the merits of the claim; and, also, that, if the claim matures into a judgement, ISFI will be able, by one means or another, to obtain information about the then state of Advocate Dinning's finances, including the extent to which she is entitled to any insurance cover, either by the use of the procedures for execution available to a judgement creditor or, perhaps more probably, by inquiry of Advocate Dinning. So, like the Lieutenant Bailiff, I would not grant injunctive relief on the basis that information bearing on Advocate Dinning's interest in the firm or the trust company relates to the merits, which it does not, or to the position after judgement.

19. But Advocate Ferbrache is already in receipt of information, which is private to both Advocate Greenfield and Advocate Dinning, that has a bearing on any settlement of the substantive litigation, and the fulfilment of his retainer is likely to require that he be in receipt of further information of that character hereafter.

20 In respect of any settlement of the substantive litigation the most important matters for IFSI to know or assess include (i) the prospects of success, (ii) the view that the opposing parties take as to those prospects, and (iii) the assets available to those parties to settle the claim. As to the latter there are, in the present case, a number of possible permutations so far as Advocate Dinning is concerned. The worst case from the point of view of IFSI would be for them to succeed on liability by proving that the conduct of Advocate Dinning was not only a wrong done to them, but, also, such that she must be regarded as acting outside the scope, or apparent scope, of the partnership business, in circumstances that cause her partners and the firm's insurers to be neither prepared nor compellable to contribute to the payment of IFSI's claim against her. If that were the position IFSI would, for the purposes of enforcement, have to have resort to her assets, which could include, but would not be limited to, the value of her share in the firm and the trust company, but which would probably not include a claim on the firm's insurers. Whether this result arose would depend on a number of variables including (a) the nature of the conduct proved; (b) the precise terms of the insurance and (c) the relevant test to be applied in determining when a partner is not entitled to contribution from his co-partners. If that were to be the result, the likely extent of her assets, apart from any claim on the firm or the firm's insurance, would be important.

21. The accounts of professional firms and trust companies are not matters of public record or knowledge in Guernsey. I do not doubt that it would be possible to make something between a guess and an estimate as to the likely level of Advocate Dinning's earnings from, and the value of her interest in, the firm and, although I think this considerably more difficult, the trust company. But these types of estimate can be significantly wrong, and it would be of value to IFSI to have as accurate information as possible, even if it did not take into account any borrowings to finance those interests, and was, thus, incomplete. The evidence shows that information of this character is already in the possession of Advocate Ferbrache. Ozannes accept that Advocate Ferbrache knows what a partner at the level of Advocate Dinning will have subscribed, what such a partner takes out, and how Ozannes value her interest both in the firm and the trust company. We were informed this morning that Advocate Dinning retired from the firm yesterday. That fact will, of course, reduce, but it will not eliminate, the relevance of her financial interest in the firm and the trust company.

22. The best position from IFSI's point of view would be to succeed on liability in circumstances where the firm was liable, or at any rate prepared, to contribute towards Advocate Dinning's liability, and she was covered for the claim by the firm's insurers. In that case it would be material to know the extent of the cover available and the amount of any deductible. Advocate Ferbrache's evidence, given by affidavit to this Court, but not to the Lieutenant Bailiff, shows that he is not yet in receipt of information about the view taken by the firm on the claim against Advocate Dinning. Nor is he aware of the insurance position, but by the conclusion of the argument it was accepted that, if he continues to act, he will need to know about it. This is because, in the course of acting for Advocate Greenfield in his matrimonial proceedings and advising him, Advocate Ferbrache will have to consider the extent of his client's assets and liabilities, as a first step before deciding what share of them Advocate Greenfield should sensibly offer to his former wife. The existence of a liability to contribute to a claim for E30,000,000 or, a fortiori, £60,000,000, could be an important factor in assessing Advocate Greenfield's net financial position or, at any rate, the extent to which the sharing of any assets should await the outcome of the substantive litigation. In order to determine whether it is, it would be necessary to know what view the partners take as to their liability to contribute, and as to the extent of insurance cover, having regard to the limit of the firm's insurance, any existing claims and any deductible. It would also be material to know what assessment they have made, or have been given, of the validity or otherwise of the claim against Advocate Dinning. Advocate Ferbrache has not yet been made aware of any such assessment. If, of course, the partners are fully covered by insurance, Advocate Greenfield will have no worries on that score, and IFSI could expect any judgement to be recovered against Advocate Dinning in full. But that, itself, would be a fact

which it would be highly material for IFSI to know. If the partners are not fully covered by insurance that too will be material for IFSI to know.

23. So the case is one where Advocate Greenfield has provided, and will be likely to continue to provide, information about his financial position which will have a significant bearing on the position of his former partner, Advocate Dinning, in respect of the substantive litigation. This information is private. To the extent that it has been or will be communicated by Advocate Greenfield it will have been communicated in the course of a confidential relationship between Advocate Greenfield and Advocate Ferbrache, who will, of course, know that Advocate Greenfield himself owes a duty of confidence to his present and former partners. And it will be information which it would be material for IFSI to know.

24. These circumstances seem to me to place Advocate Ferbrache in an impossible position if he continues to act both for IFSI and for Advocate Greenfield. His personal probity is not, and never has been, in question. I have no doubt that he would not do anything that he thought was a breach of his duty to a client. But if, in order to fulfil his duty towards Advocate Greenfield, he receives confidential information, which it is relevant for IFSI to learn, then, if the decision of the Court of Appeal in England in **Hilton v Barker Booth & Eastwood [2002] LLR PN 500** is correct, whilst he may not be in breach of duty in not revealing that information, he will not be able to act for both, at any rate when Advocate Greenfield objects, as he does. An alternative view is that he will be under two mutually inconsistent duties both to reveal and to keep secret the information in question, in which case the same consequence would follow. I express no opinion upon which view is right, not least because the argument in the appeal to the House of Lord in **Hilton** began this week.

25. If Advocate Ferbrache continues to act for IFSI, Advocate Greenfield would, therefore, have a basis for seeking injunctive relief since he is Advocate Ferbrache's client. But Advocate Dinning is not. The question arises whether she can, herself, make such a claim.

26. The Lieutenant Bailiff derived assistance in answering that question from the English cases to which I have referred. In the course of their speeches in **Campbell** Lord Nicholls and Lord Hoffman charted, and carried forward, the development of the law protecting the misuse of private information. Lord Nicholls said this:

“11. The common law or, more precisely, courts of equity have long afforded protection to the wrongful use of private information by means of the cause of action which became known as breach of confidence. A breach of confidence was restrained as a form of unconscionable conduct, akin to breach of trust. Today this nomenclature is misleading. The breach of confidence label harks back to the time when the cause of action was based on improper use of information disclosed by one person to another in

confidence. To attract protection the information had to be of a confidential nature. But the gist of the cause of action was that information of this character had been disclosed by one person to another in circumstances ‘importing an obligation of confidence’ even though no contract of non-disclosure existed: see the classic exposition by Megarry J in Coco v A N Clark (Engineers) Ltd [1969] RPC 41, 47-48. The confidence referred to in the phrase ‘breach of confidence’ was the confidence arising out of a confidential relationship.

12 *This cause of action has now firmly shaken off the limiting constraint of the need for an initial confidential relationship. In doing so it has changed its nature. In this country this development was recognised clearly in the judgment of Lord Goff of Chieveley in Attorney-General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109, 281. Now the law imposes a ‘duty of confidence’ whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential. Even this formulation is awkward. The continuing use of the phrase ‘duty of confidence’ and the description of the information as ‘confidential’ is not altogether comfortable. Information about an individual’s private life would not, in ordinary usage, be called ‘confidential’. The more natural description today is that such information is private. The essence of the tort is better encapsulated now as a misuse of private information.”*

27. In the same case Lord Hoffman said:-

“44. *But although the action for breach of confidence could be used to protect privacy in the sense of preserving the confidentiality of personal information, it was not founded on the notion that such information was in itself entitled to protection. Breach of confidence was an equitable remedy and equity traditionally fastens on the conscience of one party to enforce equitable duties which arise out of his relationship with the other. So the action did not depend upon the personal nature of the information or extent of publication but upon whether a confidential relationship existed between the person who imparted the information and the person who received it. Equity imposed an obligation of confidentiality upon the latter and (by a familiar process of extension) upon anyone who received the information with actual or constructive knowledge of the duty of confidence.*

45 *Thus the cause of action in Prince Albert v Strange was based upon the defendant’s actual or constructive knowledge of the confidential relationship between the Prince Consort and the printer to whom he had entrusted the plates of his etchings. It was not essential that the information should concern the Prince’s family life or be in any other way personal. Any confidential information would have done. Nor was it essential that the defendant should have intended widespread publication. Communication to a single unauthorised person would have been enough. Many of the cases on breach of confidence are concerned with the communication of commercially valuable information to trade rivals and not with anything that could be described as a violation of privacy.*

46 *In recent years, however, there have been two developments of the law of confidence, typical of the capacity of the common law to adapt itself to the needs of contemporary life. One has been an acknowledgement of the artificiality of distinguishing between confidential information obtained through the violation of a confidential relationship and similar information obtained in some other way. The second has been the acceptance, under the influence of human rights instruments such as article 8 of the European Convention, of the privacy of personal information as something worthy of protection in its own right.*

47 *The first development is generally associated with the speech of Lord Goff of Chieveley in Attorney-General v Guardian Newspapers Ltd (No 2) [1990] 1 AC 109, 281,*

where he gave, as illustrations of cases in which it would be illogical to insist upon violation of a confidential relationship, the “obviously confidential document...wafted by an electric fan out of a window into a crowded street” and “the private diary... dropped in a public place.” He therefore formulated the principle as being that

“a duty of confidence arises when confidential information comes to the knowledge of a person....in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others.”

This statement of principle, which omits the requirement of a prior confidential relationship, was accepted as representing current English law by the European Court of Human Rights in Earl Spencer v United Kingdom (1998) 25 EHRR CD 105 and was applied by the Court of Appeal in A v B plc [2003] QB 195, 207. It is now firmly established.”

In A v B, (at p. 207B) Lord Woolf stated the principle enunciated by Lord Goff as being – “a duty of confidence will arise whenever the party subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be protected.....”

28. I have no doubt that the Lieutenant Bailiff was right to regard these statements of principle as an authoritative guide to what should be the law of Guernsey in relation to the protection of private or confidential information. In the present case the information in question is, as I have said, information that has or will have been imparted in the course of a confidential relationship; it is itself confidential in character and imparted by a party, Advocate Greenfield, who, himself, owes duties of confidence to his present and former partners including Advocate Dinning. Advocate Ferbrache knows or has notice of these facts. In those circumstances it seems to me just that he should be precluded from disclosing the information to ISLI or from using it for their benefit or to her detriment. It would seem to me to be wholly unjust that she, the person most immediately affected, should be unable to seek to restrain any possible misuse of information private to her and Advocate Greenfield alike. To deny her relief on the ground that she was not a client of Ozannes would be to reimpose “*the limiting constraint of the need for an initial confidential relationship*” that **Campbell** confirmed had been removed.

29 There remains, however, the question as to whether the circumstances were such as to justify the Lieutenant Bailiff in making an order restraining Ozannes from acting for IFSI. In **Perrot et al v Beetle Holdings Ltd et al**, Court of Appeal 10th April 2003, this Court considered the relevant legal principles applicable in a case when a former client seeks to restrain a firm, (as it happens Ozannes), from acting. Southwell, J.A., summarised the relevant principles based on the decision of the House of Lords in **Prince Jefri v KPMG** as follows:

- (1) where an injunction is sought against a professional by a former client, the court has jurisdiction to intervene, not on the basis of any conflict of interest, or to avoid any perception of possible impropriety, but solely if intervention is necessary to protect the former client against the use or disclosure of information confidential to the former client, based on the continuing duty owed by the professional to his former client to preserve the confidentiality of such information and not to misuse such information;
- (2) such continuing duty is unqualified and is a duty to keep the information confidential, not merely to take all reasonable steps to do so, and not to misuse it;
- (3) if there is no risk of disclosure or misuse of information confidential to the former client, there is no basis for granting relief; but the court should intervene unless it is satisfied that there is no real risk of disclosure or misuse, particularly when the information is both confidential and subject to legal professional privilege; the risk must be a real one, but does not need to be substantial;
- (4) once the former client has established that the defendant firm has confidential information and is acting or 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 falls on the defendant firm to show that even so there is no risk that the information will come into the possession of those acting for the other party;
- (5) the former client cannot be protected completely from inadvertent disclosure but he should be protected against any avoidable risk of such disclosure;
- (6) “Chinese Walls” or other special measures may suffice to eliminate any real risk;
- (7) The courts should restrain the firm from acting unless satisfied by the firm, on the basis of clear and convincing evidence, that all effective measures have been taken to ensure that no disclosure will occur; which is a heavy burden for the firm to discharge.

30 The present case is not one in which a former client seeks to restrain the firm from acting. It is the former partner of an existing client who seeks to do so. But, in the light of the community of interest between Advocates Dinning and Greenfield in the confidentiality of the information, the knowledge of Advocate Ferbrache of the duty of confidence owed by Advocate Greenfield to

his present and former partners, including Advocate Dinning, and the fact that Advocate Greenfield objects to Advocate Ferbrache continuing to act for IFSI, the Court should, in my judgement, adopt a similar approach.

31. Ozannes did not attempt to show before the Lieutenant Bailiff that there was no real risk of disclosure or misuse of the private information in question. Before this Court, however, Ozannes have proffered undertakings with a view to showing that there is no real risk. Those undertakings are directed towards providing for three different situations:

- (a) Ozannes are to continue to act for IFSI , with Advocate Ferbrache acting on their behalf ;
- (b) Ozannes are to continue to act, with Advocate Ferbrache being allowed to act but only as the trial advocate for IFSI; the general conduct of the action and, in particular any negotiations for settlement being dealt with by others;
- (c) Ozannes are to continue to act, with Advocate Ferbrache not acting for IFSI at all.

The basic undertakings offered are those set out in paragraphs (a) to (d) of the Schedule to this judgement with, in cases (b) and (c) above, additional undertakings that Advocate Ferbrache will act as trial advocate only, or will not act for IFSI at all.

32. Since none of these undertakings were proffered at the hearing before the Lieutenant Bailiff we must examine them without the assistance of his judgement. For my part, having carefully considered them , I do not regard it as acceptable that, even with those undertakings, Ozannes should continue to act for IFSI in circumstances where Advocate Ferbrache acts on their behalf, even as trial advocate only. It seems to me inevitable that, sooner or later, it will be necessary for him, in his capacity as advisor to Advocate Greenfield, to be apprised of the views of the firm, or anybody else advising them, as to the merits of the claim against Advocate Dinning. One of the undertakings offered is that Advocate Ferbrache will not disclose to anyone in Ozannes any information acquired by him through acting for Advocate Greenfield relating to the merits of the substantive litigation. But, once he learns of the views of the firm, or anyone advising them, on the validity of the claim it would be practically impossible for him to put any such information out of his mind when giving advice to IFSI. I consider that Advocate Dinning and Advocate Greenfield, and indeed the other partners of the firm, are entitled to prevent a situation where advice on the merits of the claim against Advocate Dinning is, or could be, given to the claimants by someone who is, or could become, aware of the view taken by the firm. In

essence, if Advocate Ferbrache continues to act for IFSI and Advocate Greenfield he will be, to some extent, acting on both sides..

33 But it would not be right to prevent Ozannes from acting for IFSI at all if the position of Advocate Dinning can be adequately protected. In my judgement she would be adequately protected if Ozannes were to give undertakings (a) to (d) in the Schedule to this judgement, and in addition were to undertake, as undertaking (e), that Advocate Ferbrache would take no further part, whether directly or indirectly, in the substantive proceedings. Accordingly for my part, upon such undertakings, but not otherwise, I would allow the appeal, and set aside the order of the Lieutenant Bailiff.

34. In **Perrot** this Court made it plain that the realities of working as an Advocate in this community should be considered in cases such as these, and that tests which may be appropriate in London should not be applied without changes appropriate to the different circumstances in Guernsey. I do not, however, accept that the order that I propose, which will enable Ozannes, but not Advocate Ferbrache, to continue to act for IFSI, will produce an unacceptable or unworkable result in this jurisdiction or unjustifiably deprive Guernsey litigants of the Advocate of their choice. The facts of this case are exceptional in that a litigant with a massive claim against a partner in a Guernsey firm in relation to acts done by her when acting or purporting to act on behalf of the firm wishes to be represented by the Advocate who is currently acting for another partner of the firm, in circumstances where, in the course of his retainer, that Advocate is likely to learn details of the first partner's assets, the extent of the firm's cover, and its view of the merits of the claim. Each case must be determined by reference to its own circumstances, but it may well be that the absence of one or more of those factors would produce a different result. Thus the result might be different if the claim did not relate to acts done by Advocate Dinning as a partner, or if its size and nature was such that there could be no real doubt that it would be covered by the firm's insurance, or if the extent of the assets and liabilities of Advocate Greenfield was not central to the matter in respect of which Advocate Ferbrache acts for him, or if IFSI did not seek to be represented by the same individual as currently represents Advocate Greenfield. It is entirely understandable that many people should seek to avail themselves of the services of an advocate such as Advocate Ferbrache, and a misfortune for IFSI that, in the present case, they will not, as matters now stand, be able to do so in relation to the substantive litigation. But, for the reasons that I have stated, Advocate Ferbrache has, in my view, a prior commitment which precludes him from acting for them.

SMITH, J.A. I agree.

SOUTHWELL, J.A. I agree

SCHEDULE

- (a) Advocates Peter Ferbrache and Adrian Brown undertake jointly and severally to keep confidential to themselves and not to disclose to any partner employee or agent of Ozannes or any other person, excepting only their confidential secretaries, or for the proper conduct of the matrimonial proceedings or any settlement or mediation thereof, or under compulsion of law, information acquired by them through acting for Advocate Greenfield in his matrimonial affairs relating directly or indirectly to:
- (i) the financial affairs of (a) the Carey Olsen partnership or the Carey Olsen related companies; or (b) of Advocate John Greenfield and Advocate Gillian Dinning, such affairs to include, for the avoidance of doubt, Advocate Greenfield's and Advocate Dinning's respective interests, rights and obligations vis-à-vis the Carey Olsen partnership or Carey Olsen related companies;
 - (ii) the merits of the litigation between IFS Investments Limited, Manor Park (Guernsey) Limited, Manor Park Guaranteed Investment Funds Limited, Alan Williams and Advocate Gillian Dinning and/or any other party joined to that litigation subsequently, if any ("the litigation")
- (b) Ozannes undertakes to the Court
- (i) not to do, whether by its partners, employees or agents, anything to prevent compliance by Advocates Ferbrache and Brown with their undertakings;
 - (ii) to ensure by its partners, employees (saving and excepting the confidential secretaries of Advocates Ferbrache and Brown) and agents that there is no discussion with or in the presence of Advocates Ferbrache or Brown of the matters which are the subject of their above undertakings;
- (c) Ozannes, whether by its partners, employees or agents, and Advocates Ferbrache and Brown undertake to ensure that all paper files relating to the matrimonial and financial affairs of Advocate Greenfield are stored either in Advocate Ferbrache's room or on the floor where his office is situate (there being no other lawyer's office on his floor) alternatively in the office of Advocate Brown, but only whilst he is working on the same;

- (d) Ozannes, whether by its partners, employees or agents, undertakes to restrict access to the electronic file or files concerning Advocate Greenfield to Advocates Ferbrache and Brown and their respective confidential secretaries.

- (e) Ozannes and Advocate Ferbrache undertake that Advocate Ferbrache will take no further part, whether directly or indirectly, in the litigation.