Judgment 32/2003

Perrot et al v Beetle Holdings et al
Court of Appeal
(Civil Appeal 325)
10th April, 2003

Advocate – duty of confidentiality - move of busy litigator to another firm acting for opposing parties – injunction application by former clients – relevant principles – whether there is a real risk of disclosure or misuse – undertakings to be given by the Advocate and by his new firm. [See also Judgment 12/2003]

IN THE COURT OF APPEAL OF GUERNSEY

Civil Division

The 10th day of April, 2003 before Richard Charles Southwell, Q.C., presiding, Sir John Nutting Bt., Q.C. and David Arthur John Vaughan, C.B.E., Q.C.

ROGER ALAN PERROT AND OTHERS
Practicing together as OZANNES

Appellants

v

BEETLE HOLDINGS LIMITED

First Respondent

ISLANDS' INSURANCE COMPANY LIMITED

Second Respondent

VANESSA JEAN GARNHAM

Third Respondent

JOHN ALFRED WATERMAN

Fourth Respondent

ALISON MARIA GUILMOTO

Fifth Respondent

EILEEN MAY LANYON

Sixth Respondent

MIKHAIL ZHIVILO

Seventh Respondent

YURI ZHIVILO

Eighth Respondent

BASE METAL TRADING LIMITED

Ninth Respondent

In the matter of the appeal by the Appellants from the judgment of the Royal Court on the 13th day of February, 2003;

THE COURT, having heard Advocates G. S. K. Dawes, A. J. Ayres and Miss J. A. S. White for the Appellants, the First and Third to Seventh

Respondents, and the Eighth and Ninth Respondents, respectively, the action involving the Second Respondent having been settled since the decision under appeal;

GAVE JUDGMENT in the attached terms and

1. ALLOWED the appeal;

2. DISCHARGED the Order of the Royal Court made on 13th February, 2003 upon the Appellants' undertakings to the Court as detailed in paragraph 17 of the Judgment; and

3. DIRECTED that the parties shall each bear their own costs.

K. H. TOUGH
Registrar of the Court of Appeal

Final Text

THURSDAY 10TH APRIL, 2003

IN THE COURT OF APPEAL OF GUERNSEY

Before

Richard Charles Southwell Q.C.; presiding

Sir John Nutting Bt. Q.C.

David Arthur John Vaughan C.B.E., Q.C.

PERROT et al V BEETLE HOLDINGS LIMITED et al

(Civil Appeal No. 325)

Judgment delivered by Southwell JA.

1. Until September 2002 Mr Jeremy Wessels was a partner in the firm of Babbé Le Pelley Tostevin ("Babbés"). Mr Wessels was a busy Advocate with more than 10 years experience at the Guernsey Bar, and as the Bailiff said in his judgment Mr Wessels "has during his time with Babbés established himself as a competent litigator and he has had the conduct of many substantial matters that have come before the Court."

2. On about 5 August 2002 Mr Wessels informed Babbés that he would be leaving them and moving to the firm of Ozannes, the partners of which are the defendants in these proceedings and the appellants before this court represented by Advocate Gordon Dawes. Mr Wessels moved to Ozannes on 1 October 2002 and became a partner on 1 January 2003.

3. At the time when Mr Wessels left Babbés and joined Ozannes, Ozannes were acting as advocates for several parties in actions in which Babbés were acting for the opposing parties. Mr Wessels had been involved as an advocate and partner in Babbés on behalf of those parties in representing their interests in the litigation in which Ozannes represented the parties on the other side.

4. In November 2002 Babbés on behalf of seven of their clients brought seven proceedings against Ozannes seeking injunctions restraining Ozannes from continuing to act for the other parties in the litigation, and restraining the disclosure of confidential information. A similar application was brought by Carey Langlois on behalf of the other parties involved in one of the actions who were represented by Carey Langlois and not by Babbés. (The firm of Carey Langlois has itself now merged with another firm under

the new name of Carey Olsen.) The Bailiff directed that the applications for injunctions be heard together. They were heard by the Bailiff on 30 December 2002. Judgment was handed down on 13 February 2003. The Bailiff's decision was to grant the injunctions sought, so as to prevent Ozannes from continuing to act in the seven actions. There was delay by Ozannes in serving notice of appeal; this was done on 5 March 2003. I directed as a single Judge that times be abridged so as to enable the appeal to be heard at this sitting of the Court of Appeal.

5. I gratefully take the statement of facts as to each of the seven actions as summarised in the Bailiff's judgment with some minor changes:

(1) **Beetle Holdings Limited** This company has employed Babbés to pursue a claim against Christies Limited for which Advocate Peter Ferbrache of Ozannes acts, in a landlord and tenant action for damages and other relief in connection with an alleged breach of the terms of a lease. The Advocate dealing with the matter at Babbés was Mr Wessels. Mr Bourne the managing director of Beetle claims that he took Mr Wessels into his confidence particularly with regard to possible areas for compromise and he also deposes that there is one matter that has been disclosed to Mr Wessels which could result in further litigation later. It is true that these clients found that Mr Wessels was rather too busy to deal with the matter and apparently Mr Ayres took it over in June 2002. However, the fact remains that Mr Wessels is in possession of confidential information relating to how these clients see the outcome of the litigation with Christies Limited.

(2) **Islands' Insurance Company Limited** This case has settled since the decision below, and is no longer material.

(3) **Mrs. Vanessa Jean Garnham** This lady is suing a gynaecologist and the Board of Health for damages for personal injuries sustained during a caesarean section. This lady gave her initial instructions in 1999 to Mr Wessels, but thereafter has had less contact with Mr Wessels than some of the other plaintiffs. In 2000 the matter was handed over to a New Zealand lawyer employed by the practice who later left. In 2001 the client was unhappy with Mr Wessels for reasons that I would accept are almost certainly due to pressure of work rather than disinterest or incompetence on his part. Miss Bailey took over the matter at the client's request, but it seems that Mr Wessels did stay in reserve to oversee the case and to take it to Court if it went that far. This client clearly was dissatisfied with the way Mr Wessels dealt with her. He does appear to have been in overall charge of the matter and the client deposes that she feels that her position is unsatisfactory particularly as she happens to have lost confidence in Mr Wessels for reasons which as I have indicated.

(4) **Mr. John Alfred Waterman** This gentleman is suing the States of Guernsey for an accident at work. The States of Guernsey have been prosecuted and fined for failure to provide a safe system of work. Originally the New Zealand lawyer dealt with the matter, but on the 23rd October 2001, there was a meeting between Mr Waterman and Mr Wessels and there were a number of subsequent telephone conversations. Mr Waterman claims that Mr Wessels knows the detailed factual background to his case, the names of witnesses and the evidence that they are able or not able to give and that he also has had access to medical notes and reports.

(5) **Mrs. Alison Maria Guilmoto** This is a claim brought by a widow against the Board of Administration following her husband's death. It is a sad and unusual case of a fisherman who was drowned when his van fell off the harbour slipway. Mrs Guilmoto deposes that she has discussed all her personal details with Mr Wessels and continues: "He also knows what resources I have to pursue this litigation and the extent to which I am prepared to go to see justice done. He knows the basis upon which I would be prepared to settle these proceedings. He has advised me on the strengths and weaknesses of the case, …".

(6) **Mrs. Eileen Lanyon** This lady has a personal injuries claim being dealt with by Babbés as the result of a road traffic accident in June 1997. Mr Wessels seems to have taken over the matter although the New Zealand lawyer and later a Mrs Jay apparently dealt with it on a daily basis. We have in support of Mrs Lanyon's case an affidavit in which she claimed that she had discussed her claim with him on 6th February 2001. She does not make any claim that Mr Wessels is privy to confidential information which if it leaked out to her opponent's advocate would prejudice her. For this suggestion we have to look to Advocate S J Bailey's affidavit. According to Miss Bailey, Mr Wessels would have become aware of the strengths and weaknesses of her claim and issues of tactics, strategy and evidence. Mrs Lanyon's affidavit came in late before the Royal Court and this point was not canvassed at the hearing before that Court.

(7) **Mikhail Zhivilo** Mr Dawes acts for a Mr Shamurin who has been involved in heavy litigation against three defendants, Mr Mikhail Zhivilo for whom Advocate Wessels has acted while at Babbés, a company called Base Metal Trading Limited and Mr Zhivilo's brother Yuri. The latter two Defendants are represented by Advocate Tee of Carey Langlois, who on their behalf has put in the separate application for similar injunctive relief against Ozannes. Sadly, as is sometimes the case with litigation involving residents of the former socialist countries the claim is peppered with allegations of lawlessness and even violence. Although Miss Tee has entered the fray on behalf of Base Metal and Yuri Zhivilo, basically the issue is the same, namely that Mr Wessels knows all about Mr Mikhail Zhivilo's defence and this confidential information is at risk if Ozannes continue to represent Mr Shamurin. The only difference is that if he misused the information he has this could prejudice Yuri Zhivilo and Base Metal as well.

6. Certain matters are common ground between the parties:

(1) Mr Wessels has in his mind knowledge of confidential matters relating to the six remaining clients of Babbés and the cases which they are making through Babbés in those actions.

(2) Mr Wessels is fully prepared to give an appropriate undertaking to the Court that he will not disclose any such confidential information, and the partners of Ozannes are prepared to give appropriate undertakings as well.

(3) Mr Wessels will not deliberately act in breach of his duty of confidence or such an undertaking if accepted. Indeed Babbés have stated that "no one doubts Advocate Wessels' integrity or his high professional standing … there is no suggestion that [he] would intentionally breach his obligations of confidentiality …."

(4) The central issue between the parties is as to whether there is a real and appreciable risk that Mr Wessels will inadvertently act in breach of his duty of confidence.

7. I start with consideration of the relevant legal principles. In English law these are to be found in the decision of the House of Lords in *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 1 All ER 517, and in particular in the speech of Lord Millett, and the other English cases where judgment has been given subsequently, and can be summarised in this way:

(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 the 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.

8. The facts in *Prince Jefri* were far from the present case. Further, the House of Lords were considering the circumstances in the vastly larger commercial and professional world of London. It is our task to apply these principles to the different circumstances in Guernsey, and in particular at the Guernsey Bar.

9. These circumstances were considered by Carey Deputy Bailiff in *Loyalty Brokers Ltd v Cockram* (25 June 1992, unreported). In that case again there was movement of an advocate from one firm to another. Carey DB drew attention to the similarity between English firms of solicitors and Guernsey advocates firms. He also pointed to the small size of the Guernsey Bar, and to the fact that situations such as the present ones involving former clients would of necessity arise regularly. He indicated that of necessity in a small community a lay person may have to instruct a firm of advocates who have some knowledge of the opponents in the litigation, and that in Guernsey possibly greater flexibility would be called for than in a larger jurisdiction. Nevertheless on the facts of that case he ordered the injunction sought.

10. There was cited to us another recent decision of the English Court of Appeal, *Koch Shipping Ltd v Richard Butler* (a firm) [2002] EWCA Civ 1280 (22 July 2002) in which the *Prince Jefri* principles were applied in a case in which, like the present, there was only one potential discloser. *Koch Shipping* was simply another instance of the application of the *Prince Jefri* principles to particular facts, and for that reason is not reported. I will refer to it later for a particular purpose.

11. The Bailiff in the present case decided that Ozannes had not discharged the heavy burden upon them. He took the view that there was a real risk of inadvertent disclosure by Mr Wessels, which he put in this way:

"There is no serious suggestion that Mr Wessels will be other than a gregarious member of the Ozannes litigation team. Neither does it appear to me (and of course I speak from some experience having seen Mr Wessels and his colleagues regularly performing in Court) that he is the kind of member of that team whose expertise will not be tapped by others. This is where the danger lies. How many times does a colleague ask whether one has experienced a particular situation arising in a case? A bell is rung. Recalled facts come out in a random order and where one has a situation that we have here of Mr Wessels having intimate knowledge of the cases of these former clients the risk of his unwittingly disclosing to somebody in the Ozannes practice confidential information about their affairs is in my view real and not fanciful."

12. It is against this background that I turn to consider the case which Ozannes make in an attempt to discharge their burden. The main submissions on which Ozannes rely are these:

(1) Mr Wessels has given an undertaking in the following terms:

"I hereby undertake to [Babbés] and all material [Babbés] clients that I will not breach my obligations of confidentiality to those clients nor will I discuss any of the material cases with anyone at Ozannes, whether now or in the future."

(2) Ozannes are prepared to give either as a firm or by the partners individually similar undertakings not to discuss the material cases with Mr Wessels.

(3) Mr Wessels occupies an office separated vertically and horizontally from those handling the material cases in Ozannes, and will continue to do so.

(4) Mr Wessels employs and will continue to employ a different fax machine, copier and secretarial support from those employed by the persons handling the material cases and with similar physical separation.

(5) Ozannes and Mr Wessels are willing to consider any other reasonable requirement which Babbés or the Court may have.

(6) Given Mr Wessels' age, experience and standing at the Guernsey Bar, there is no appreciable risk that he might divulge confidential information relating to Babbés clients or the material cases.

(7) Given the small size of the Guernsey Bar, and the inevitable movements between firms, it would be unrealistic to expect on every occasion firms to which Advocates move to have to give up acting for all clients involved in cases in which the opposing parties are represented by the firms from which the Advocates have moved, this being the inevitable result if the position of someone of Mr Wessels' standing is not accepted in the present case.

(8) The individual circumstances relating to Mr Wessels' involvement in each of the material cases need to be taken into account, because (inter alia) these show both that Mr Wessels would be well aware of what he needs to keep confidential, and that in any event his knowledge of and involvement in the cases was less than Babbés have tried to indicate.

(9) The ground relied on by the Bailiff for deciding that there is a real risk of inadvertent disclosure (see paragraph 11 above) is not a valid or adequate ground for such decision.

13. The essential response to these submissions by Advocate Ayres for Babbés' clients and Advocate White for Carey Langlois' clients is that the Bailiff took into account all the relevant matters in exercising his discretion to grant the injunctions, and no ground has been shown which would entitle this Court to overturn his decision.

14. In my judgment this is not in truth a matter of the Royal Court's discretion. Given that it is accepted that the information in question is confidential, the fundamental question is, whether Ozannes have discharged the evidential burden of demonstrating that, in the light of the undertakings to be given to the Court by Mr. Wessels and Ozannes, there is no real risk of inadvertent disclosure or misuse of confidential information. In a small community such as Guernsey, and in a small close-knit legal community such as the Guernsey Bar, there is in my judgment no real risk that an Advocate of Mr Wessels' age, and experience and standing in the profession, would jeopardise his reputation and his future as an Advocate by disclosing or misusing the sort of confidential information here under consideration whether inadvertently or otherwise. Reputations at the Guernsey Bar take time to establish, but could be lost irretrievably by one act of folly. To an advocate such as Mr Wessels this must be abundantly clear. Mr Wessels and his new colleagues in Ozannes are entitled, in my judgment, to come to the Court and to say that, unless they can be trusted completely to comply with their undertakings to preserve the confidentiality of the information known to Mr Wessels in the circumstances described in paragraph 12 above, then no Guernsey Advocate and no Guernsey firm to which a Guernsey Advocate has moved can ever be trusted in this way. I would be most reluctant to accept any such proposition.

15. It was submitted by Mr. Dawes for Ozannes that there can be, and in some of the six cases, here there is a lower level of confidentiality which does not merit protection. I do not accept the proposition that there can be or are different levels of confidentiality in relation to the facts of each of the six cases.

16. The elements in Ozannes' case as summarised in paragraph 12 have convinced me that they have discharged the burden of showing that there is no real risk of disclosure or misuse, subject to one point to which I will return. As regards the ground relied on by the Bailiff (paragraph 11 above) I am not able to accept that the fact that Mr Wessels will be gregarious or the kind of member of Ozannes litigation department whose expertise will be tapped by other members means that there is a risk of Mr Wessels unwittingly disclosing any of the confidential information. Any undertakings given to the Court would be uppermost in the mind of Mr. Wessels, his new partners and their employees, and the consequences of any breach would be catastrophic to them all. I add this. It is important in a small community such as Guernsey 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 are not applied without changes appropriate to the different circumstances.

17. The one point I mentioned is that I consider that Mr Wessels' undertaking should be to the Court and that it requires some amendment, and that Ozannes should also give a suitable undertaking to the Court. Drafts of such undertakings (prepared with some regard to the undertakings accepted in *Koch Shipping*) were supplied to the parties, and they have had an opportunity to address the Court on any changes they wished to be made. In my judgment the undertakings to the Court should be in the following terms in each of the six remaining actions:

(1) **Mr Wessels**

"Mr Wessels undertakes to the Court

(a) to keep confidential to himself and not to disclose to any partner employee or agent of Ozannes or any other person any confidential or privileged information acquired by him relating directly or indirectly to the affairs of or the action in the Royal Court referred to in the Cause in the present action other than under compulsion of law or for the sole purpose of personally obtaining from a firm other than Ozannes legal advice as to his own position or the relevant case handler at Babbé Le Pelley Tostevin;

(b) not to discuss or permit to be discussed directly or indirectly in his presence the affairs of or the action in the Royal Court referred to in the Cause in the present action or associated proceedings in other jurisdictions with or by any partner employee or agent of Ozannes or any other person or to access on any document retrieval system any document relating to such action other than under compulsion of law or for the sole purpose of personally obtaining from a firm other than Ozannes legal advice as to his own position."

(2) **Ozannes**

"Ozannes undertake to the Court

(a) not to do, whether by its partners, employees or agents, anything to prevent compliance by Mr Wessels with his undertakings;

(b) to ensure by its partners, employees and agents that there is no discussion whether directly or indirectly with or in the presence of Mr Wessels of the affairs of or the action in the Royal Court referred to in the Cause in the present action or associated proceedings in other jurisdictions."

18. On the footing that these undertakings will form part of the order of this Court, I would allow the appeal and discharge the order of the Royal Court dated 13 February 2003.

NUTTING, JA: I agree.

VAUGHAN, JA: I agree.

