



**The Registrar of La Chambre De Discipline v An
Advocate**
Royal Court
6th December 2016

**JUDGMENT
49/2016**

Appeal by the Registrar of La Chambre de Discipline against a decision of the Chambre

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between: THE REGISTRAR OF LA CHAMBRE DE DISCIPLINE (“the Registrar”)
and
AN ADVOCATE (“the Respondent”)

Hearing date: 31 October 2016

Judgment handed down: 6 December 2016

Before: Sir Richard Collas, Bailiff

Advocate for the Registrar: Advocate J Roland
Advocate for the Respondent: Advocate K M Le Cras

Cases, legislation and references referred to:

Rules of Professional Conduct – Rule 46
The Guernsey Bar (Bailiwick of Guernsey) Law, 2007
Royal Bank of Scotland plc v Etridge (No 2) HL(E) [2002] 2 AC 773
Pickersgill v Riley [2004] UKPC 14
Clark Boyce v Mouat [1994] 1 A.C. 428
Hilton v Barker Booth & Eastwood (HL(E)) [2005] 1 WLR 567
Boulting v Association of Cinematograph, Television and Allied Technicians [1963] 2 Q. B. 606
Bristol and West Building Society v Mothew (C.A.) [1998] 1
Bolkiah v KPMG (HL(E)) [1999] 2 A.C. 222

INTRODUCTION

1. This is an appeal by the Registrar of La Chambre de Discipline against a decision of the Chambre dismissing two complaints which arose from the application of Rule 46 of the Rules of Professional Conduct (the “Rules”). The appeal raises issues of general interest to Advocates in circumstances where a lender requires independent advice to be given to third parties who are providing a guarantee or other security for the obligations undertaken by another person such as a spouse or other family member; the purpose of the independent advice being to provide the lender with the comfort that the third parties are acting of their own free will and are giving an informed consent to the transaction.

2. The Appeal, and the hearing before the Chambre, were both heard in private, but I have directed that the judgment be published for the benefit of members of the Bar and others. I have written the judgment without identifying any of the persons concerned as the eventual disposal has not yet been decided. Under the provisions of The Guernsey Bar (Bailiwick of Guernsey) Law, 2007, as amended, (the “Bar Law”) if the Appeal were allowed, the powers available to the Royal Court are the powers of the Chambre under section 27 of the Bar Law which include administering a private reprimand to the Advocate concerned. Consequently, it may not be appropriate that any of the Respondent, the Complainants or the other parties involved be publically identified.
3. In this judgment, I refer to the Advocate concerned as “the Respondent”; to the two complainants as “Complainant A”, “Complainant B”, together, the “Complainants”; and to their husbands as the “Guarantors”. The Guarantors were the directors and shareholders in a company that I describe as the “Borrower” which entered into contractual documentation, including a loan agreement, with the “Lender” and a related company, the “Group”.
4. Rules 46 and 49 and the Commentaries thereon provide:

“Rule 46

Subject to Rule 49 an Advocate or firm of Advocates should not accept instructions to act for two or more clients where there is a conflict or a significant risk of a conflict between the interests of those clients.

Commentary

Where an Advocate already acts for one client and is asked to act for another client whose interests conflict or appear likely to conflict with those of the first client, the Advocate should generally refuse to act for the second client.”

“Rule 49

An advocate may act for both seller and buyer on a transfer of land, or for both lessor and lessee, or for both lender and borrower, provided the Advocate obtains the informed consent of both parties to his or her acting.

Commentary

“Informed consent” means consent given in the knowledge that there is a potential conflict between the parties and that, as a result, the Advocate might be disabled from acting if a conflict arises, or from disclosing to each party the full knowledge which he or she possesses about the transaction, or might be disabled from giving advice to one party which conflicted with the interests of the other, and if all parties are content to proceed on that basis, the Advocate can properly act for both: see Clark Boyce v Mouat (1993) 4 All ER (Privy Council).”

PROCEDURAL HISTORY

5. The events giving rise to the complaints date back more than six years to October 2010. A letter of complaint was received from each of the two Complainants in October 2013. The two letters were in similar terms, and were referred to together by the Chambre in the singular as “the Complaint” and I will do the same in this judgment. The Complaint was potentially out of time because section 21 of the Bar Law requires any complaint to be made not more than six months after the last of the events giving rise to the complaint. The President of the Chambre has power to permit a later complaint if “*satisfied that exceptional circumstances exist which justify the making of the complaint outside of that period*”. In this matter, the President gave permission for the Complaint to be entertained on the grounds that the

Complainants could not reasonably have discovered grounds for complaint until shortly before the Complaint was made.

6. The Complaint was referred to the Registrar of the Chambre (“Registrar”) on 15 January 2014 under section 21 of the Bar Law. Unfortunately there were unavoidable delays in completing the Registrar’s investigations due to the untimely death of the then Registrar, Advocate Richard Ogier. The matter was later taken up by his successor, Advocate Allez, on 28 April 2015. He determined that there was a prima facie case and referred the Complaint to the Chambre under section 22 (6) of the Bar Law. The Chambre was formed by a panel comprising Advocate Strappini, Mrs S Mason and A Moore. They heard the Complaint on 31 March 2016 and delivered a reasoned decision in writing on 3 May 2016. The Chambre was unable to reach a unanimous decision but, by a majority, it dismissed the Complaint on the grounds that, on the facts of the case, Rule 46 was not applicable for reasons I set out below.
7. A Notice of Appeal was lodged on behalf of the Registrar dated 27 May 2016.
8. The matter first came before me on 7 June 2016 for an initial, in camera, ex parte directions hearing. The Registrar was present along with Advocate Jessica Roland who presented the Appeal on his behalf (she was not the Advocate who had appeared at the hearing before the Chambre). The Respondent had received the Notice of Appeal but had not been given notice of that initial hearing. At my request, Her Majesty’s Procureur attended in order to give assistance to the Court in the absence of any guidance in the Bar Law and in the absence of any rules of Court prescribing how an appeal under section 28 of the Bar Law should be conducted.
9. One question was who should receive notice of the Appeal? A right of appeal is vested in the Registrar and the respondent to the complaint (i.e. the Advocate who was the subject of the hearing before the Chambre) by virtue of sub-section 28 (1) of the Bar Law. Other persons will have received from the Chambre a copy of its reasoned decision at the conclusion of the hearing before the Chambre; they are the complainant, the Registrar, the respondent to the complaint and Her Majesty’s Procureur (sub- section 27 (3)). The notice of appeal has to be served on Her Majesty’s Greffier (sub-section 28(2)) but not on anyone else, despite so many people being aware of the decision.
10. Before the hearing on 7 June, the Registrar had sent a copy of the Notice of Appeal to the Respondent, the President of the Chambre and the Complainants. On my directions, Her Majesty’s Procureur had also received a copy to enable him to attend the hearing. At that hearing, I was informed that, in exercise of their discretion, the members of the Chambre had permitted the Complainants to attend the whole of the hearing before the Chambre. They had received a copy of the written decision in accordance with the Bar Law and they were aware of the Appeal. No one objected to them being advised of it so I directed that a copy of the Notice of Appeal should be sent to each of the Complainants, it being fair and just to do so.
11. I also directed that if the Complainants wished to be present at any future hearing they were to make an application in that regard. The attendance of the complainant at a hearing before the Chambre and at the hearing of any subsequent appeal may not always be appropriate; Her Majesty’s Procureur observed that there might be circumstances where, when such hearings are held in private, a complainant should not attend other than for the purposes of giving evidence.
12. Also on 7 June, I directed that skeleton arguments be filed by the Registrar and the Respondent. The Respondent, who was not in attendance at the hearing on 7 June, was represented in the appeal by a Guernsey Advocate who was not the Advocate who had appeared on his behalf at the Chambre hearing where he was represented by a Jersey

Advocate. I directed that the Jersey Advocate would not have a right of audience before the Royal Court but said he could be present as part of the legal team if the Respondent so requested. I directed the Registrar's Advocate to contact the Respondent and the Respondent's Advocate to agree further directions.

13. A second directions hearing was held on 16 August 2016, again in private. Present were Advocates representing each of the Registrar and the Respondent together with Her Majesty's Procureur and the Registrar. I heard submissions as to whether the Appeal hearing should be in private or in public. The Bar Law is silent on the issue although sub-sections 25(1) and (2) provide that hearings before the Chambre shall be in private unless the respondent requests a public hearing and the Chambre decide that in all the circumstances it would be in the interests of justice to sit in public. The Appellant's Advocate advised me that the President of the Jersey Law Society had informed her that similar appeals are held in private in that island unless it is in the public interest to hear them in public. Her Majesty's Procureur cautioned against conducting the appeal hearing in public when there was no apparent reason to do so. I had regard to the fact that a possible outcome, if the Appeal were to be allowed, could be a private reprimand to the Respondent. In all the circumstances I directed that the hearing would be in private but the judgment would be published in anonymised form.
14. The Complainants had written to say they were unable to be present on 16 August but wished to attend or participate in the substantive appeal hearing. I directed that they had no right to make representations to the Court but, in the absence of any objection from either of the parties, they would be permitted to attend on condition they did not repeat anything they heard at the appeal whilst it was being conducted in private.
15. Unless and until the procedure is clarified either by an amendment to the Bar Law or by Rules of Court, I would expect that on any future appeals, the Court will consider all the facts and circumstances of each appeal before deciding whether it should be heard in public or in private and if the latter, who is entitled to be present. As I have said, the Bar Law contains a presumption that a hearing before the Chambre is to be held in private unless the Respondent requests otherwise and the Chambre is satisfied that "*in all the circumstances it would be in the interests of justice to*" hear it in public (section 25 (2)) but there is no express presumption in respect of an appeal. In my judgment, it is the interests of justice and the public interest that should determine whether an appeal is to be heard in public or in private. The circumstances of each and every appeal will be different and I do not consider it to be either necessary or helpful to elaborate on the factors that might need to be taken into account.
16. Following the directions hearings, skeleton arguments were lodged in connection with the substantive Appeal by Advocates on behalf of both the Respondent and the Registrar. The hearing was held, in private, on Monday 31 October. In addition to the parties and their legal teams, one of the Complainants was present in Court. She did not seek to make any representations and was not invited to do so.

FACTUAL BACKGROUND

17. The facts were largely not in dispute in the Chambre. At paragraph 12 of its decision, the Chambre set out the facts as agreed or, where disputed, as proved to the satisfaction of the Chambre beyond reasonable doubt, being the standard of proof required under the Bar Law. In the following extract from the Chambre's decision I have anonymised or redacted all the names.

"12. It seems to us that the following matters do not seem to be disputed and in any event we consider them to be proved beyond reasonable doubt:

- 12.1 *In October 2010 the Complainants' husbands, [the Guarantors] ("their Respective Husbands"), agreed to stand as guarantors to the Lender in respect of the liabilities of a company known as [the Borrower], the shares in which were beneficially owned by their Respective Husbands;*
- 12.2 *The Complainants had no direct legal or beneficial interest in the issued share capital of [the Borrower], but they were the owners (jointly with their Respective Husbands) of their respective family homes;*
- 12.3 *It was a condition of [the Lender's] agreement to the proposed transaction that the liabilities of the [Borrower] would be secured by means of Bonds creating charges over the entire interests in the respective family homes [of the Guarantors and the Complainants];*
- 12.4 *In all the circumstances it was very much in the interests of [the Lender] not only that the Complainants executed the Bonds jointly with their Respective Husbands, but also that, before doing so, they received full and independent legal advice as to the meaning and intent thereof;*
- 12.5 *It was also (one might say self-evidently) very much in the Complainants' best interests that they received full and independent legal advice, before entering into the proposed Bonds, as to the meaning and intent thereof;*
- 12.6 *By an email dated 12th October 2010, [the] Advocate who was already acting for [the Lender] in relation to the proposed Bonds, wrote to [Complainant A] (who was not then a client of his firm) in the following terms [having anonymised the Advocates involved, it is necessary to explain that "the Advocate" who was acting for the Lender is in the same firm of Advocates as the Respondent]:*

*"Dear [A]
 ["X", an employee or officer of the Lender] tells me that I should contact you directly regarding the bonds.
 I accordingly attach both forms of bond and the related statements. Can you please confirm that you (sic) [Guarantor B and Complainant B] will attend on Thursday and that you and [Guarantor A] will attend next Tuesday.
 Can you arrange please to settle both accounts tomorrow?
 Please note the provision of each bond in highlighted text that states that
 "Each Obligor has been advised by the Company to take independent legal advice on the obligations on such Obligor's part in respect of this Bond before signing and allowing this Bond to be registered against the Secured Property and has taken such legal advice or having been given the opportunity has declined to do so."
 Under the Loan Agreement it is a precondition that there is produced legal confirmation from an independent party relating to the Guarantors spouses consent in respect of the Bonds. Ideally this should be from both your own lawyer and also Complainant B's lawyer. It will be satisfied with a letter/Email addressed to [the Group] in the following form:
 "I confirm that I have met with [Complainant A][Complainant B] and explained to her the nature of the obligations set out in the form of bond that is proposed to be passed before court and that it will create security over the property known as [...] [...] of which she is joint owner including the sums secured and the remedies available to the grantee on occurrence of an event of default.*

I am satisfied that [Complainant A][Complainant B] will give informed consent to the bond and fully understands the implications of it.”

*Regards
[Advocate]”*

12.7 *The “X” referred to in [the Advocate’s] email is [...], an employee or officer of [the Group], for whom [the Respondent’s firm] were already acting. The reference to [the Group] is to a parent or associated company of [the Lender].*

12.8 *[Complainant A] responded on the same day in the following terms:*

“Dear [Advocate]

Thank you for your email, I have not arranged for legal advice to be taken by [Complainant B] and I yet as I was waiting for [X] to confirm if this could be given by another partner at [the Respondent’s firm]. Neither [Complainant B] nor I have our own lawyer and will have to approach a totally new law firm and provide the required due diligence etc and if [the Respondent’s firm] cannot provide this then I will have to commence this process tomorrow late afternoon as I have clients in until 3.30 pm tomorrow myself and will try to arrange for us to have an appointment asap.

I would like [Complainant B] and I to have advice given at the same time as the circumstances are identical for both of us in relation to our position as guarantors spouses with the advice being identical and obviously this is independent to both the [Group] and [the Borrower’s] transaction legal teams. This will keep our costs down as I can see a bill for £600+ coming for each of us if we have to take legal advice for a service provision that neither of us actually want to have to take as we fully understand the implications of a property bond.

This will undoubtedly put back a Thursday court appearance. Can we schedule myself and [Complainant A’s husband] for next Tuesday as planned and [Complainant B and her husband] for next Thursday with a view to having taken the legal advice this week.

Also, can you please address the invoices to [the Borrower] re [the Complainants] as this is of course a [Borrower] transaction cost. Also, please provide your bank details as they are not on the statement attached.

*Regards
[Complainant A]”*

12.9 *The following day, the 13th, [the Advocate] replied in the following terms:*

“Dear [Complainant A]

Thanks for your Email. The issue is that you should obtain independent legal advice from a suitably qualified person who does not have a conflict. This does not preclude you from seeking that advice from a partner at [the Respondent’s firm] who is not involved in this transaction (for example [the Respondent] who is [...]), but the choice of lawyer must be yours. Regarding CDD requirements, the usual passport and proof of address will be required whoever you instruct.

I have spoken to [X] and we agree that it would be sensible to put the giving of the Bonds back to Tuesday and Thursday next week to allow this process to be completed.

The invoices need to be addressed to [the Lender] as that is the client to whom we provide the service in this matter. We can though revise them to

provide that they are payable by [the Borrower] rather than the individuals as currently shown.

*Regards
[the Advocate]”*

12.10 *On the 14th, [Complainant A] replied:*

“Dear [Advocate]

Can you please arrange for a partner of [the Respondent’s firm] not involved in the transaction to meet with [Complainant B] and myself tomorrow afternoon if possible between 1.0pm and 3.0pm please, I cannot see that it will take long. An email confirmation per your draft text below is sufficient for us.

*Regards
[Complainant A]”*

and [the Advocate] emailed the Respondent in the following terms:

“[Respondent]

This is the matter I mentioned to you before – will you be able to see [the Complainants] tomorrow as she asks. If so please ask [your secretary] to get back to [my secretary], noting the AML requirement.

I do not have AML on either of them. My client took copies of the passport for its own verification reasons but I think that [your secretary] needs to do this independently for CO.

*Regards
[the Advocate]”*

12.11 *the terms of the retainer upon which the Respondent agreed to provide independent legal advice to each of the Complainants are as set out in [the Advocate’s] email to [Complainant A] of 12th October 2010, namely (in paraphrase) that he should “confirm: (1) that he had met with her and explained to her the nature of the obligations set out in the bond and that it would create security over her property including the sums secured and the remedies available to [the Lender] on the occurrence of an event of default; and (2) that he was satisfied that she would give informed consent to the bond and fully understand the implications of it” (“the Retainer”)*

12.12 *The following day, 15th October 2010, a meeting (“the Meeting”) took place at the offices of the Respondent’s firm, between the Complainants and the Respondent.*

12.13 *Differing accounts have been given in evidence as to what was or was not said at the Meeting and as to whether the advice the Complainants received from the Respondent was adequate. We repeat that we as the Chambre de Discipline are not concerned with determining the nature, extent or adequacy of the advice that was given.*

12.14 *Following the Meeting, the Complainants went on to consent to the Bonds. In due course, difficulties arose, as a result of which [the Lender] pursued both the Complainants and their Respective Husbands for recovery of [the Borrower’s] unpaid liabilities.*

12.15 *At no time prior to or during the Meeting did the Respondent seek to satisfy the requirements of Rule 49 by obtaining the “informed consent” of both [the Lender] and the Complainants to his firm acting for all three of them.*

12.16 *The explanation given by the Respondent at the hearing as to why he did not seek to satisfy Rule 49 was that:*

12.16.1 *he did not consider (in the words of Rule 46) that this was a situation “where there (was) a conflict or a significant risk of a conflict between the interests” of the clients; and*

12.16.2 *the interests of [the Lender] and the Complainants were in fact identical in every respect (i.e. they were not in conflict with each other), in that they both required the Complainants to receive the fullest possible advice in the terms of the Retainer – [the Lender] so that no impediments would arise should the Bonds ever need to be enforced; and the Complainants so that they should know exactly what they were being asked to undertake by way of obligation to [the Lender] and that they should have the fullest opportunity to ask questions and to object to anything in the Bonds of which they did not fully approve.”*

18. In order to help to explain the background to this Appeal, I set out in full the two competing submissions as to the interpretation of the rules between which the Chambre had to decide, followed by the majority decision of the Chambre:

“13. It appears that there are two competing applications of the Rules as they apply to the above facts, which are as follows:

First application

14. *As Rule 49 is intended to provide a limited exception to the general prohibition on acting for two clients with conflicting interests contained in Rule 46, it cannot apply at all if that prohibition has not first been activated.*

15. *As [the Lender] and the Complainants had a complete identity of interests at the time of the Meeting (see 12.16.2 above) in respect of the limited nature of the instructions the prohibition in Rule 46 was never activated.*

16. *Thus neither was the requirement for “informed consent” in Rule 49.*

17. *It follows that the Complaint fails and should be dismissed.*

Second application

18. *As Rule 49 is intended to provide a limited exception to the general prohibition on acting for two clients with conflicting interests contained in Rule 46, it cannot apply at all if that prohibition has not first been activated.*

19. *[The Lender] and the Complainants in fact never had a complete identify of interest, because the interests of [the Lender] were that the Complainants should receive independent legal advice of such a kind that, if the Bonds ever came to be enforced against the Complainants, they would never be able to avail themselves of a defence based on any alleged lack of independence in the legal advice they had received, prior to executing them, as to the meaning and intent of the Bonds.*

20. *It follows that Rule 46 applied fully to the situation and that, if the exception in Rule 49 were to apply (if it ever could – see paragraph 21), it was the professional duty of the Respondent to ensure that both [the Lender] and the Complainants gave their informed consent to his firm advising all three parties.*

21. *It is nevertheless hard to imagine circumstances in which Rule 49 could ever be invoked to justify a single firm advising all three parties in the positions of [the Lender] and the Complainants, it having at all material times been a fundamental stipulation on the part of [the Lender] that independent legal advice must be received by the Complainants.*

Our decision

22. *Having carefully considered and deliberated on the above, La Chambre on this occasion has failed to reach a unanimous decision.*

23. *Section 25 (8) of The Guernsey Bar (Bailiwick of Guernsey) Law 2007 provided that: “Any question shall be determined by a simple majority of the members of La Chambre”.*

24. *Our decision, by a simple majority, is that the Complaint should be dismissed on the basis of the First Application of the rules as described at 14 to 17 above.”*

19. At paragraph 25 the Chambre set out concerns it had as to the inadequacy of the Rules and further comments on the conduct of the Respondent which are not material to the Appeal and therefore will not be repeated by me in this judgment.

20. In a “Memorandum of Grounds of Appeal”, the Registrar contended that the Chambre had erred in fact and/or law in relation to the terms of the retainer and the establishment of the retainer between the Complainants and the Respondent. The Chambre had been wrong to decide that the terms of the retainer between the Complainants and the Respondent were set out in the email of 12 October 2010 sent by the Lender’s Advocate advising the Complainants to take independent advice. The email did not envisage they would instruct an Advocate in the Respondent’s firm. If the terms of the retainer were as set out in that email, the terms of the retainer were determined by the Lender and that gave rise to an actual or significant risk of a conflict. Further that, in deciding that the terms of the retainer were derived from the Lender’s instructions, the Chambre erred in failing to consider the provisions of Rule 21 and the Rules generally. The commentary to Rule 21 explains that, at the outset, an Advocate must agree clearly with the client the scope of the retainer and, if it is limited, “*it is good practice for the limits of the retainer to be precisely defined and communicated in writing to the client.*”

21. The Registrar also contended that the Chambre was wrong to conclude that there was a complete identity of interest between the Lender and the Complainants. Further that, in focusing solely on whether there was an actual conflict, the Chambre failed to consider the matter prospectively to see whether there was a significant risk that a conflict of interest may arise in the future.

22. In his Notice of Appeal, the Registrar summarised two issues, which he said potentially arise on the appeal:

“(1) The appeal raises an important point of principle and/or practice, namely the parameters of Rule 46 and what is meant by ‘a conflict or a significant risk of a conflict between the interests of those clients’. In particular, whether it is incumbent on the professional in deciding whether to act, to look not just at the immediate position but also prospectively at the issues likely to arise. If it is possible that the interests of two clients will conflict in the future, does that engage Rule 46, such that if a fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both, is he in breach of the obligations of undivided loyalty and does he put himself in the position where his duty to one principal may conflict with duty to the other.

(2) *If, it is incumbent on the professional to consider prospective issues of conflict that may arise, then the first issue in this appeal is whether the Chambre erred in its analysis as to the scope of the retainer and/or in concluding that the interests of the Complainant and [the Lender] were ‘completely’ aligned such that there was no conflict or significant risk of conflict of interest between [the Lender] and the Complainants.*

(3) *The second issue that arises for consideration is set out at paragraph 25 of the Decision, namely whether the Rules are inadequate to cater for a situation such as the one which arose in this case, and if so, should the Rules be amended to specifically ensure that advice to a borrower or a guarantor (at the request of the lender) can never be given by the same firm advising the lender.”*

23. In her oral submissions, Advocate Roland explained the requirement for the Complainants to receive independent advice by reference to the House of Lords’ decision in Royal Bank of Scotland plc v Etridge (No 2) HL(E) [2002] 2 AC 773. The details of what is required of the independent solicitor in England and, by analogy, the independent advocate in Guernsey is set out in the speeches of Lord Nicholls of Birkenhead at paragraphs 61 to 68 and Lord Scott of Foscote at paragraphs 168 to 170. The responsibilities will be dependent upon the instructions, express or implied, that the guarantor will give to the solicitor/advocate; they should include explaining the nature of the documents, the amount of the guarantor’s liability and the legal and practical implications of the transaction. From the point of view of the conflict of duties, there is no material difference between the ability to act for both the principal debtor and the guarantor and acting for the lender and a guarantor. An added feature in the present case was the fact that the Lender was not a bank and the documentation was not the standard documentation of a lending bank. Consequently there was a requirement to explain to the Complainants the potential conflict arising from the separate duties owed by the Respondent’s firm to the Lender and the Complainants and to obtain an informed consent from the Complainants to giving the independent advice required and to providing the letter of confirmation required by the Lender.
24. It was therefore impossible, the Registrar contended, for the retainer between the Respondent and each of the Complainants to have been concluded on 12 October in the email exchange between the Lender’s Advocate and Complainant A. As far as Complainant B is concerned, she never saw those emails at the relevant time.
25. In response, the Respondent submitted that the Chambre did not decide that the retainer was concluded on the 12 October but that the terms of the retainer, when concluded later, were as set out in the email of 12 October. The Respondent saw the exchange of emails, based his view of any conflict on what they said and saw nothing to give rise to a significant risk of conflict. There was nothing to suggest that the terms of the retainer needed to be other than as set out in the email of 12 October and it was on that basis that the Respondent saw the Complainants and advised them.
26. There is no need for me to say much about the retainer in this judgment and it would be inappropriate for me to go into detail when I have not heard evidence. It is possible that the Royal Court will have to determine any issues concerning the retainer in separate proceedings involving the Respondent’s firm and I would not wish to prejudice those separate proceedings. I will continue to refer to “the retainer” in the singular although it may have been that there were, or should have been, two retainers as the ‘retainer’ was, or should have been, two separate contracts established between the Respondent and each of the Complainants. When analysed in terms of an offer and an acceptance on behalf of each of

them, it seems unlikely that the two contracts both came into existence on the 12 October when neither the Respondent nor Complainant B were parties to the emails.

27. The precise date on which the retainer was concluded is not material for present purposes. It is sufficient that the Respondent accepted that the terms of the retainer were as set out in the 12 October email. Indeed that is what the Chambre said in paragraph 12.11 of their decision: *“the terms of the retainer upon which the Respondent agreed to provide independent legal advice to each of the Complainants are as set out in [the email from the Lender’s Advocate to Complainant A] of 12th October 2010”*. I don’t read the decision of the Chambre as having decided when the retainer was concluded. It is regrettable that the Respondent did not issue a letter of engagement to each of the Complainants but that has not been raised as an issue for me to determine. It is questionable as to whether Rule 21 was correctly observed by the Respondent but that is not in issue in this appeal and so does not fall to be decided by me.
28. The issues before me in this Appeal concern Rule 46: whether it was or should have been engaged; and, if so, whether it was adequately addressed by the Respondent. The determination of those issues is unaffected by the date on which the retainer came into existence; it matters not whether that was prior to the Respondent’s meeting with the Complainants or, at the latest, during the meeting on 15 October.
29. When responding to the Complaint, the Respondent’s initial response was to acknowledge that Rule 49 applied and therefore by implication, the Registrar submitted, he acknowledged that Rule 46 was engaged. The Respondent had written, in a letter dated 13 December 2013:

“It is common practice in Guernsey for law firms to act for lenders and borrowers (as well as for lenders and those receiving independent legal advice in this sort of situation) where both parties agree and where appropriate procedures are put in place to preserve confidentiality and protect against conflicts of interest arising. Such a practice, I would suggest, is a recognised exception to Rule 46 of the Rules of Professional Conduct (“RPC”) which precludes one firm acting for multiple clients in an actual or potential conflict situation. Nowhere is it suggested that the parties involved did not agree that [the Respondent’s firm] should act for both parties or that the aforesaid appropriate procedures had not been implemented. What appears to be suggested, again by the Complainants’ “independent lawyer”, is that because the Complainants were not borrowers, they therefore fell outside of the exception to Rule 46 of the RPC and that Rule 49 should not therefore apply. I fail to see, however, how the position of the Complainants in this sort of situation is not entirely analogous to that of a borrower for the purposes of interpreting Rule 49. I believe that Rule 49 is intended to apply to exactly this sort of situation and that we were entitled to act for both parties as we did, provided that we had their informed consent (as defined in the commentary to Rule 49) to do so.”

30. At the hearing before the Chambre, the Respondent denied that Rule 46 applied. He maintained that having regard to the respective instructions received from the Lender and the Complainants, the scope of the advice and the role actually performed by the Respondent, the Respondent was under no obligation to advise beyond explaining the nature and effect of securing the bonds. The Lender and Complainants shared the same interest in ensuring the Complainants were advised of the nature and effect of the bonds and securing them on the respective properties and that they understood the same. Consequently, there was no conflict of interest and no significant risk of such. Accordingly, Rule 46 was not engaged and as a result, there was no need to address Rule 49.
31. The submission was accepted by the majority of the members of the Chambre de Discipline in finding that when the Respondent met with the Complainants in order to give the advice

required, there was a complete identity of interest between them in light of the limited nature of the instructions. In other words they found, by a majority of two to one, both that there was no conflict and that there was no significant risk of a conflict between the interests of each of the Complainants and the Lender at the time of that meeting in giving the required advice. That position was maintained by Advocate Le Cras on behalf of the Respondent at the hearing of the appeal.

32. By reference to the Privy Council decisions in Pickersgill v Riley [2004] UKPC 14 and Clark Boyce v Mouat [1994] 1 A.C. 428, Advocate Le Cras submitted that the breadth of the duty of the Respondent was limited to the extent of the retainer and that he was not obliged to advise upon the wisdom of the transaction. Consequently, the terms of the retainer as set out in the 12 October email were sufficient to enable the Respondent to provide the independent advice the Complainants required in accordance with the judgment in Etridge. If a conflict of interest, or real risk of a conflict had arisen when he met with the Complainants, the Respondent would have ceased to act for the Complainants and would not have issued the confirmatory letter requested by the Lender. She emphasised that the evidence heard by the Chambre showed that the Respondent gave the advice required under the terms of the retainer and that, during their meeting with him, neither of the Complainants asked any questions of him.
33. At paragraphs 3-007 and 3-008 of ‘Conflicts of Interest’, fourth Edition by Charles Hollander QC and Simon Salzedo QC, FCA the meaning of “significant risk of conflict” is discussed in the context of the Code of Conduct issued by the Solicitors Regulation Authority. The learned authors state:

“The SRA rule speaks of “significant risk of conflict”. This is not a term of art and it is probably difficult to give the term a precise meaning. Presumably it means “viewing the matter prospectively”, does it appear that there is a significant risk that if the matter proceeds there will be a clash of fiduciary obligations (such as to give rise to what Millett L. J. describes as “potentially conflicting interests”)?”

34. They quoted a formulation from the Court of Appeal decision in Boulting v Association of Cinematograph, Television and Allied Technicians [1963] 2 Q. B. 606 at 638 that the conflict rule:

“must be applied realistically to a state of affairs which discloses a real conflict of duty and interest and not to some theoretical or rhetorical conflict”.

35. In the present matter, viewing the risk of conflict prospectively as he did, there was nothing to cause the Respondent to fear there would be a real conflict of duty if he were to act for the Complainants in giving the limited advice required to enable him to write to the Lender’s Advocate in the terms sought in the retainer. On that basis, Advocate Le Cras invited me to dismiss the appeal.

DISCUSSION

36. Towards the end of her submissions, Advocate Le Cras answered a question that Advocate Roland had posed earlier. She had asked why it was that the Lender’s Advocate could not have given advice to the Complainants if the Respondent’s firm had no conflict of interest and there was no significant risk of conflict. Advocate Le Cras’ answer was that the Lender’s Advocate could not have advised by reason of being in possession of information that prevented him from acting for the Complainants.

37. The answer is illuminating even though Advocate Le Cras did not say what it was that the Lender’s Advocate knew. The Respondent’s case is that he was able to act for the

Complainants because he had not been involved in advising the Lender in connection with the transaction and therefore did not have in his personal possession the knowledge that the Lender's Advocate had that prevented him from acting. Thus the Respondent was free to act in circumstances where the Lender and Complainants had a common interest namely that they all required the Respondent to explain the nature and effect of consenting to the bonds. Both aspects require consideration in this judgment: the conflict of interest; and the parties' respective interests.

38. Having acknowledged that the Lender's Advocate had a conflict of interest, the Respondent's case can only succeed if his personal position is to be viewed separately from that of his firm. However, the wording of Rule 46 permits no distinction as it refers both to "*an Advocate*" and a "*firm of Advocates*". The Rule is engaged when the firm has a conflict, even if an individual Advocate can say that he has no conflict. That, in my judgment, could be the end of the matter but having heard submissions, I will look at what is meant by a "*conflict or significant risk of conflict between the interests*" of the clients.

39. I begin by considering how a conflict of interest may arise (although this analysis is not intended to be an exhaustive statement of all the situations where a conflict may arise). It is accepted that the duties owed by the Respondent and his firm were the same as the duties owed by a solicitor to his client as described by the House of Lords in Hilton v Barker Booth & Eastwood (HL(E)) [2005] 1 WLR 567:

"A solicitor's duty to his client is primarily contractual and its scope depends on the express and implied terms of his retainer" (para 28 of the judgment per Lord Walker of Gestingthorpe).

"The relationship between a solicitor and his client is one in which the client reposes trust and confidence in the solicitor. It is a fiduciary relationship. But not every breach of duty by a fiduciary is a breach of fiduciary duty." (para 29).

40. In this jurisdiction, Rule 10 of the Rules confirms the existence of a fiduciary relationship between an Advocate and his client:

"An Advocate must be able to give impartial and frank advice to the client, free from any external or adverse pressures or interests which would destroy or weaken the Advocate's professional independence or the fiduciary relationship with the client"

41. Obligations of loyalty and fidelity are core duties of a fiduciary (per, for example, Millett L.J. in Bristol and West Building Society v Mothewe (C.A.) [1998] 1 at 18G). Those obligations give rise to the duty not to serve two principals with potentially conflicting interests, a duty which is sometimes referred to as "the double employment rule". Millett L.J. cited with approval the decision of the Privy Council in Clark Boyce v Mouat [1994] 1 A.C. 428:

"A fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of the obligation of undivided loyalty; he puts himself in a position where his duty to one principal may conflict with his duty to the other" (with extra emphasis on the word "may").

42. The obligation of confidentiality is well understood and was considered in detail by the House of Lords in *inter alia* Bolkiah v KPMG (HL(E)) [1999] 2 A.C. 222 albeit in a different context. The duty of confidentiality is expressed in Rule 22 of the Rules:

"Except as required by law, an Advocate must keep his or her client's business and affairs confidential."

The obligation of confidentiality is dealt with in further detail in Rules 51 to 54. Rule 51 provides that:

“Except as required by law, an Advocate is under a duty to keep confidential to his or her firm the affairs of clients and to ensure that the staff do the same.”

43. By agreeing to act for the Complainants, the Respondent put himself, and his firm, at risk of breaching the obligations of loyalty and of confidentiality. The Respondent’s firm was serving more than one master by acting for the Lender and each of the two Complainants. The Lender’s Advocate had protected the confidentiality of information he possessed by not communicating it to the Respondent; he had erected a Chinese wall to protect the Lender. The Respondent was required to explain the nature and effect of the proposed transaction to the Complainants. The Respondent had to be free to give frank and impartial advice to the Complainants as to the nature and effect of the transaction and they needed to be confident that what they might discuss with him, including any confidential information they might disclose, would not be disclosed to the Lender.
44. The solution that enables a solicitor, or in this island, an Advocate to act for two clients with potentially conflicting interests is to obtain the informed consent of them both and to erect whatever “Chinese walls” may be needed to protect the confidentiality of each client. Such is permitted by Rule 49 but the Respondent’s case did not rely on that exception to Rule 46 because he submitted that there was no conflict and no significant risk of a conflict. It follows from what I have said that I consider he was wrong.
45. In my judgment, the Chambre misdirected itself in coming to the conclusion that there was a “*complete identity of interests*” between the Complainants and the Lender. The fact that the Lender’s Advocate found it necessary to erect a Chinese wall is one indication that there was a conflict. Even without that factor, I am not persuaded that there was complete community of interest. Rule 46 speaks of both an actual conflict and a significant risk of conflict which, adopting the decision in Boulting:

“must be applied realistically to a state of affairs which discloses a real conflict of duty and interest and not to some theoretical or rhetorical conflict”.

46. Before entering into the proposed transaction with the Borrower, the Lender and the Group wanted to protect themselves against the risks of the transaction failing by taking from the Guarantors a guarantee supported by a charge over their family homes. They were seeking the greatest possible protection for themselves. On the other side, the Complainants’ desire would have been to protect their family homes as much as they possibly could. There was an inherent conflict between their respective desires and a balance had to be struck between them. The principal purpose of obtaining independent advice was to ensure that the Complainants were acting of their own free will, not under coercion from their husbands and to ensure they had sufficient understanding of the nature and effect of the proposed transaction to reach their own independent decisions as to the wisdom of giving security.
47. The Chambre was correct to look at the terms of the retainer in order to understand what was required of the Respondent. The Complainants were “*to take independent legal advice on the obligations on the Obligor’s part in respect of this Bond*”. It is implicit that the scope of the advice they needed was as explained by their Lordships in Royal Bank of Scotland plc v Etridge (No 2). Having stated that the content of the advice will depend on the circumstances of the case Lord Nicholls of Birkenhead said, at paragraph 62:

“Typically the advice a solicitor can be expected to give should cover the following matters as the core minimum. (1) He will need to explain the nature of the documents and the practical consequences these will have for the wife if she signs them. She could lose her home if her husband’s business does not prosper. Her home may be her only substantial asset, as well as the family’s home. She could be made bankrupt. (2) He will need to point out the seriousness of the risks involved. The wife should be told the purpose of the proposed new facility, the amount and principal terms of the new facility, and that the bank might increase the amount of the facility or change its terms, or grant a new facility, without reference to her. She should be told the amount of her liability under her guarantee. The solicitor should discuss the wife’s financial means, including her understanding of the value of the property being charged. The solicitor should discuss whether the wife or her husband has any other assets out of which repayment could be made if the husband’s business should fail. These matters are relevant to the seriousness of the risks involved. (3) The solicitor will need to state clearly that the wife has a choice. The decision is hers and hers alone. Explanation of the choice facing the wife will call for some discussion of the present financial position, including the amount of the husband’s present indebtedness, and the amount of his current overdraft facility. (4) The solicitor should check whether the wife wishes to proceed. She should be asked whether she is content that the solicitor should write to the bank confirming he has explained to her the nature of the documents and the practical implications they may have for her, or whether, for instance, she would prefer him to negotiate with the bank on the terms of the transaction. Matters for negotiation could include the sequence in which the various securities will be called upon or a specific or lower limit to her liabilities”.

48. When agreeing to act for the Complainants, the Respondent would not have known what the Complainants might ask him but he would have known that the advice might have to include the matters identified by Lord Nicholls. The Chambre was told that in fact the Complainants asked no questions when they met the Respondent but he did not know in advance that they would not do so. It was only after the event that he knew, for example, that they did not want him to negotiate with the Lender on the terms of the transaction. Whilst it might be said that negotiating with the Lender went beyond the scope of the retainer, the Respondent should have known that he might be asked to do so. Unlike the normal situation where the independent Advocate or solicitor gives advice in connection with the giving of security for the benefit of a bank in accordance with its standard documentation where any negotiations are likely to be limited to matters such as the limit of the spouse’s liability, the documentation in the present matter had been drafted for this transaction and therefore the potential scope for negotiation was greater than normal. The fact that the documents had been drafted by the Respondent’s firm should have been in the mind of the Respondent.
49. It might be said that there was no significant likelihood of the Respondent being asked to renegotiate the terms. Other aspects of the advice were very likely to give rise to a conflict of interest. The Respondent knew he was retained to provide independent confirmation that each of the Complainants fully understood the implications of consenting to the Bonds. Such advice would have to include other issues outlined by Lord Nicholls including discussing with each Complainant her understanding of her financial means, her understanding of the value of the family home and whether her husband had any other assets out of which the guarantee liability could be satisfied if the business failed. Such discussion would inevitably include confidential matters that the Complainant would not want to have communicated to the Lender without her consent. Thus there was a significant risk of conflict of interest. The Respondent would have to erect his own Chinese wall to protect the confidentiality of the Complainants’ information in his possession, just as the Lender’s Advocate had done the same on behalf of the Lender.

50. I should explain that I am only stating what should have been in the mind of the Respondent when considering whether to act for the Complainants. I make no comment on the advice he did or did not give to each of them when he saw them. The quality or content of the advice given was not an issue for the Chambre and nor is it a matter for this appeal. It may or may not fall to be considered in other proceedings and nothing said in this judgment must influence the outcome of other proceedings. I am solely concerned with whether there was a conflict or significant risk of a conflict between the interests of the Lender and the Complainants when agreeing to act for the Complainants and for the reasons I have given, I am satisfied there was.

CONCLUSION

51. The Lender's Advocate was in possession of information that prevented him from advising the Complainants and that is the reason he told the Complainants to take advice from someone else. The Lender's Advocate was a member of the same firm as the Respondent and so the Respondent's firm had an actual conflict of interest. For that reason, Rule 46 was engaged.

52. Even if there had been no actual conflict of interest, the Respondent should have considered the risk of a conflict arising; the assessment of risk involves an assessment of what may occur in the future and therefore has to be carried out prospectively. Where there is no actual conflict already existing, an advocate has to view the likelihood of a conflict arising in the future in the light of what he knows or should know. If there is a significant risk of conflict, not some theoretical or rhetorical conflict, Rule 46 is engaged. In practice this should not normally present great difficulties because if there is any uncertainty, the advocate may look to Rule 49 and seek the informed consent of his clients to enable him to act.

53. The scope of the independent advice required to be given to the Complainants in accordance with the judgment in Etridge was such that the Respondent was placing himself and his firm at significant risk of being unable to advise his clients without breaching fiduciary duties owed to the firm's clients, such as the obligations of loyalty and confidentiality. There was a significant risk of a conflict between the interests of the firm's clients.

54. Rule 46 was engaged. The Respondent could have acted for the Complainants if he had obtained their informed consent under 49, but the case he presented to the Chambre did not rely upon Rule 49 as he chose to deny that Rule 46 was engaged.

55. I allow the appeal.

56. There will now have to be a further hearing to determine what sanction, if any, is to be imposed on the Respondent. I invite the parties' further submissions in writing, including any directions that may be required to decide how to proceed, whether Jurats will be needed and whether the further hearing should be in public or in private.