OUTER HOUSE, COURT OF SESSION

[2019] CSOH 21

P968/18

OPINION OF LORD BRAILSFORD

In the petition

KAE ALEXANDRA TINTO or MURRAY

Petitioner

for interdict

Petitioner: McBrearty QC, Innes; SKO Family Law
Respondent: Duncan QC, Byrne; Turcan Connell

7 March 2019

[1] The petitioner seeks to interdict a firm of solicitors ("TC") from acting in divorce proceedings she has raised against her husband, Sir David Murray ("SDM").

Background

[2] The background to this petition can be stated briefly. The petitioner and SDM were married in 2011. Prior to their marriage they entered into a pre-nuptial agreement regulating financial affairs in the event of the marriage terminating in divorce. TC are a Scottish firm of solicitors specialising in private client work. They were formed in 1997 and since that time had acted on behalf of SDM in connection with his private affairs. They acted for SDM in the negotiation and preparation of the pre-nuptial agreement. The petitioner was represented in the negotiation and preparation of the pre-nuptial agreement by a

solicitor, Noel Ferry then Head of Family Law in another firm of solicitors, Maclay Murray & Spens. In 2013 Mr Ferry joined TC initially as a senior associate and from April 2015 as a partner working in that firm's Glasgow office in the field of family law. Since joining TC Mr Ferry has not acted for nor had any dealings with the petitioner. Since her marriage to SDM the petitioner has on a number of occasions instructed and obtained advice from another partner of TC, Mr Peter Littlefield. Mr Littlefield is a partner dealing primarily with trust and tax matters for private clients. It was in this area of expertise that the petitioner sought the advice of Mr Littlefield. On 22 March 2018 the petitioner and SDM separated. The petitioner instigated divorce proceedings in this court against SDM by summons signeted on 22 May 2018. The petitioner was represented in the divorce proceedings by a firm of solicitors specialising in family law, SKO. Defences were lodged on behalf of SDM on 19 June. He was represented by TC. In the divorce proceedings the petitioner seeks to set aside the pre-nuptial agreement and, further, makes financial claims both in relation to capital and aliment. That action proceeded uneventfully throughout the summer of 2018. By interlocutor of 12 July a proof date was fixed for 5 February 2019 and seven subsequent days. At a scheduled by order case management hearing on 11 September the petitioner raised the issue of potential disclosure of information confidential to her by TC. On 14 September the petitioner sought to introduce by way of Minute the contention that it was inappropriate for TC to continue to act in the divorce. The Minute, as a step in the divorce proceedings, was directed at SDM albeit that it was formally intimated to TC for any interest they may have. I declined to allow the Minute to be received on grounds of competency. Subsequently the present petition was presented on 18 September.

[3] The petition raises issue of the appropriateness of TC continuing to act in the divorce proceedings when they are contended to possess information confidential to the petitioner.

The information claimed to be confidential falls into two broad categories. First, information in the nature of "retained knowledge", that is information for which there are no documents but which depends on the memory of a person. In the circumstances of the present matter the petitioner contends that Mr Ferry has retained knowledge in relation to the petitioner's affairs arising from his involvement on her behalf, albeit when employed by a different firm of solicitors, in the preparation and negotiation of the pre-nuptial agreement. The second category is information of a confidential nature said to be contained in two files compiled by Mr Littlefield when giving private client advice to the petitioner during the tenure of her marriage. It is to be noted that although the hard copies of these files were passed by TC to SKO in implement of a mandate in June 2018, TC retain within their IT system electronic copies of the files.

[4] Procedurally, as a result of concerns expressed by the petitioner, an arrangement was made, with the approval of the court, to allow counsel instructed on behalf of TC and a named partner of that firm to consider the two files said to contain information confidential to the petitioner. The partner permitted to have access to the files had no previous involvement in the affairs of the petitioner or SDM. He had not, and going forward will not, take any professional role in the divorce proceedings. I should also note that the partner and assistant in TC conducting the divorce proceedings on behalf of SDM took no part, and were indeed excluded, from any consideration and involvement in the present petition. The hard copies of the two files said to contain the confidential information were produced in a sealed envelope to the court prior to a hearing on the petition and answers lodged thereto which took place on 2 November when I considered the issue of confidentiality. With the permission of both parties the envelope was opened at the commencement of the hearing on 2 November and thereafter has been considered by myself. Orders under section 11 of the

Contempt of Court Act 1981 preventing publication of the proceedings on 2 November were pronounced, unopposed, by interlocutor of the court dated 30 October 2018. In addition, again on an unopposed basis, an interlocutor was pronounced on the same date in which those parts of the proceedings in which information said to be confidential were discussed were held in closed court. The reason for these, admittedly rather unusual, steps being taken was to preserve the integrity or confidentiality of any information pending a final decision on the issues of confidentiality and representation of SDM.

[5] As will subsequently be elaborated upon at the conclusion of the hearing on 2 November an opportunity was given to TC to allow them, if so advised, to provide further information. To enable that to occur the hearing was adjourned and a further hearing arranged for 30 November 2018.

[6] The petitioner's position was that the issue of whether TC should be allowed to continue to represent SDM had two distinct components. The first, characterised as dominant, consideration was the issue of confidentiality. The second was a more general consideration in which, seeking to invoke the inherent power of the court to supervise its officers, it was contended that the administration of justice, including the appearance of justice, required to ensure the integrity of justice in circumstances where a firm of solicitors, or members of that firm, had knowledge of a confidential nature belonging to a former client and where the solicitors acted for a person now involved in either litigation or who was in dispute with the former client.

Law

[7] In relation to the legal framework underlying both heads of the petitioner's argument there was broad agreement between the parties as to the relevant principles. In

respect of the application of the court's inherent power and the integrity of the judicial process it was a matter of agreement that the Inner House decision in *Ecclesiastical Insurance Office Plc* v *Lady Whitehouse-Grant-Christ*[1] was, insofar as applicable, binding on this court. The facts in that case were marginally different than these in the present case. In 2000 the defence made a claim for indemnity under a policy of insurance with the pursuers. The pursuers sought to avoid the policy on grounds of material non-disclosure and served a summary in an action seeking reduction of the policy in October 2000. A solicitor was consulted by the defender at or about that time. His dealings with the defender lasted about six weeks. Thereafter the defender instructed other solicitors. Defences were lodged but in October 2002 the action was sisted, and remained so until March 2012 when the sist was recalled and the defender lodged a counter-action. A debate took place in February 2015 and the counterclaim was dismissed. The defender reclaimed and in March 2016 an Extra Division recalled the decree of dismissal and allowed a proof-before-answer. In September 2016 the defender brought to the court's attention that the pursuers had instructed new solicitors and that the solicitor who had acted for them for a period of six weeks in 2001 was a consultant to that firm. The defender submitted that both the firm and senior counsel instructed should withdraw from acting for the pursuers, following which interdict should be pronounced against them on the ground of conflict of interest. The court decided that having regard to the solicitors in 2001's limited involvement there was no real risk that relevant confidential information might come into the hand of a person with an adverse interest. In considering the solicitors where a fair-minded person would conclude that an officer of court should be prevented from acting in order to protect the integrity of

[1] 2017 SC 684

the judicial process the applicable test, enunciated by Lord Bracadale[2] was to the effect that a solicitor should be prevented from acting if a fair minded person would conclude that that course was necessary in the interests of the integrity of the judicial process and the due administration of justice, including the appearance of justice. No issue was taken with this characterisation of the test by counsel for TC.

[8] In relation to the issue of confidential information both parties were again agreed that the leading authority was a decision of the House of Lords, *Prince Jefri Bolkiah* v *KPMG* (a firm)[3]. The tests which were said required to be surmounted before a solicitor could be restrained from acting for a party in a litigation are set down authoritatively in the speech of Lord Millet[4] in the following terms:

> "Accordingly, it is incumbent upon a plaintiff who seeks to restrain his former solicitor from acting in a matter for another client to establish (i) that the solicitor is in possession of information which is confidential to him and to the disclosure of which he has not consented and (ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own. Although the burden of proof is on the plaintiff, it is not a heavy one. The former may readily be inferred; the latter will often be obvious."

Again there was no dispute as to the applicability of the tests adumbrated by Lord Millet in the foregoing passage. It was also agreed that these tests had been considered, in a variety of factual circumstances in a number of cases which followed from *Bolkiah (supra)*. My attention was drawn to *Georgian American Alloys Inc* v *White & Case LLP*[5]; *Marks and Spencer plc* v *Freshfields Bruckhaus Deringer*[6]; *Koch Shipping Inc* v *Richards Butler*[7].

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[2] at paragraph 11
[3] [1999] 2 AC 222
[4] at page 235 D/E
[5] [2014] 1 CLC 86
[6] [2005] PNLR 4
[7] [2003] PNLR 11

Petitioner's argument at first hearing

[9] The petitioner argued that in relation to confidential information the tests in *Bolkiah (supra)* were met in the circumstances of the present application. It was contended that within the file recovered from TC there was information confidential to the petitioner. The petitioner had not waived her right to confidentiality. The material was not in the public domain. The material, which was of a financial nature, enabled a fair reader of the file to have a reasonable understanding of the petitioner's financial affairs. The information was directly relevant to her claims in the divorce action. Beyond that the information if it became known by SDM would or at least might assist him in any consideration of matters which might arise in the course of any discussions anent settlement of the matters at issue. These considerations applied in relation both to the issues arising out of the pre-nuptial agreement and in the wider context of the divorce action in general.

[10] Developing this argument counsel for the petitioner identified two separate sources where TC held information contended to be confidential to the petitioner and material to the divorce proceedings. The first source was information held by Mr Ferry as a result of his having been the petitioner's advisor in relation to the pre-nuptial agreement. The second was the two files relating to work done by Mr Littlefield on behalf of the petitioner during the course of the marriage.

[11] In relation to Mr Littlefield's files the submission was that they "plainly contained" material which was confidential to the petitioner. It was contended that

> "even a cursory read of the file demonstrates that it contains information relating to the petitioner's personal finances, interest in a family trust, property dealings and personal arrangements relating to succession."

That submission was developed by reference to particular passages in the files.[8] My attention was drawn to entries at pages 5, 9, 16-25, 216, 219 and 323. Counsel for the petitioner characterised the information contained in the passages to which he adverted as relating to the petitioner's personal financial circumstances. The entries encompassed material covering the petitioner's understanding of SDM's assets at a given date, the nature and extent of her entitlement as a beneficiary in certain trust funds, the value of the trust funds, potential future values of development land held by a trust in which she was a beneficiary and her personal assets at given dates. Counsel for the petitioner accepted a characterisation of the information suggested by me as giving a reader of the file a reasonably clear view of the petitioner's financial position.

[12] All the information contained in the files and identified by counsel as confidential was said to constitute material which may be relevant in the divorce proceedings and, further and importantly, knowledge of which was potentially prejudicial to the petitioner's interests. In relation to this submission, again on questioning by myself, counsel submitted that the matter of potential prejudice in the context of the divorce proceedings required to be determined as at the date the present petition was being determined. On that basis the situation which required to be considered was of extant divorce proceedings where a proof had been allowed. The proof had not been split, for example by way of preliminary proof in relation to the status of the pre-nuptial agreement. It was not appropriate for this court in this petition to consider every possible procedural possibility that might develop in the course of the proof. It was also inappropriate to proceed on the basis that none of the information in the files would ultimately prove to be confidential because of an obligation upon the petitioner to disclose all matrimonial property or, further, non-matrimonial assets

[8] The two files were numbered sequentially

which might be relevant as a potential source of funds. To do so would require speculation in relation to the possible course the divorce action would take, which would be illegitimate and inappropriate at this stage. It would also leave out of account more intangible aspects of confidentiality, such as the impact disclosure of confidential information might have on any extra judicial settlement negotiations which might occur. In that regard my attention was drawn to the fact that there was information before the court vesting it with knowledge that there had already been correspondence anent settlement negotiations between TC and the petitioner's agents.[9] I was lastly reminded that on the authority of *Bolkiah (supra)* although the burden of proving that TC were in possession of information confidential to the petitioner and, further, that such information is or may be adverse to the interest of the former client, that burden on the petitioner was not a high one.[10]

[13] In relation to the risk of disclosure counsel for the petitioner recognised that each case turned on its own particular facts and that, depending on the circumstances of the given case, it might be possible to devise security measures sufficient to protect the confidentiality of information owned by a person in the position of the petitioner and thereby negate the risk of disclosure. Those security measures were referred to as an "information barrier". The generality of the submission was that the steps in that regard taken by TC were inadequate and insufficient to protect the petitioner's legitimate rights in relation to the confidentiality of information held by TC. It was, further, observed and submitted that in the context of a legal firm information does not simply move as a result of information discussed directly between partners or those who had direct access to the confidential information. Information has the potential to move between other qualified legal staff but, in addition, between trainees, secretaries and support staff. Information can

[9] Affidavit of Gillian Crandles dated 9 October 2018 at paragraph 11
[10] *Bolkiah (supra)* per Lord Millet at page 235 D/E

be inadvertently passed even by persons not having had sight of documents but who may have been party to conversations where such matters are discussed. Information can be disclosed even when there is no intention of deliberately breaching confidentiality.

[14] In regard to these submissions, and what was said to be a heavy burden imposed upon TC if they were to satisfy the court that there was no risk of disclosure, my attention was drawn to a number of features of TC's case. First, TC appeared to rely heavily on a culture of confidentiality and care for clients confidential data said to operate throughout the firm. There was no challenge to the proposition that such a culture was encouraged within TC but it was submitted that this alone would be insufficient to eliminate the risks which had been identified. Second, even within such a culture, within a firm there was always a risk of inadvertent disclosure. In that regard my attention was drawn to three pages in Mr Littlefield's files[11] where correspondence pertaining to a client other than the petitioner had been inadvertently and incorrectly filed. Third, it was observed that in the affidavits lodged by TC there was disclosure of some information which is confidential to the petitioner and to which she had not consented to disclosure. Reference was made to paragraph 7 of Mr Littlefield's first affidavit[12] in which he details a particular instance of the petitioner having sought his advice and the reasons why she did so at that time. Similarly there were passages in the first affidavit submitted by Mr Ferry[13] where confidential information had been disclosed. It was not suggested that the material disclosed in any of the instances cited contained matters which were germane to the divorce proceedings, nor was it suggested that there was any deliberate breach of confidentiality by Messrs Littlefield or Ferry. It was however submitted that these were examples of inadvertent disclosure of

[11] At pages 133-135
[12] Dated 9 October 2018
[13] Dated 9 October 2018

confidential information and their occurrence did "not provide comfort as to the culture of confidentiality in TC".

[15] Perhaps more forcefully a fourth concern was developed. This was that no evidence had been provided by TC to establish who had accessed the relevant confidential information. It was noted that Ms Crandles deponed that TC

> "have largely moved to a paperless environment and our systems would be able to demonstrate that no one from my team has accessed any documentation or information pertaining to the petitioner."[14]

The submission was developed to observe that modern IT systems would be able to demonstrate precisely who had accessed which documents and when. No documentary evidence to demonstrate as a matter of fact who had accessed relevant confidential information was provided. Furthermore there was no affidavit from any member of IT staff at TC precisely explaining the nature of their system, how it could be accessed and that checks had been conducted to show who had had access to the relevant files and when. Mr Littlefield deponed that his "understanding is that when a file is locked down only those who have access will know it is there".[15] It was submitted to be important that he did not explain the operation of "locked down" merely expressed his understanding that it restricted access to files. Again the lack of a full and cogent explanation as to the operation of the system in relation to electronic files was said to constitute a significant omission in TC's case. No witness provided any technical explanation as to how "lock down" was achieved. No explanation was provided as to how TC's system operates so as to achieve "lock down" or as to who puts a file into "lock down", how they do so or how that file can be changed after that event. There was no explanation as to who controlled the security aspects of "locked down" files and what protocols were in place to control how individuals

[14] Affidavit dated 9 October 2018 at paragraph 6
[15] Affidavit dated 9 October 2018 at paragraph 8

came to have permission to view a locked down file and how and in what circumstances such permission could be removed.

[16] Against that background it was submitted that whilst it was accepted that the extremely elaborate precautionary measures taken in cases such as *Bolkiah (supra)* and *Georgian American Alloys (supra)* would not be necessary in every case, and indeed would not be necessary in the context of the present divorce proceedings, there was insufficient evidence in the present case to enable the court to reach a view that sufficient precautionary measures had been put in place to enable it to form the view that TC had discharged the onus upon them in this regard.

Respondent's arguments at first hearing

[17] Counsel for TC accepted that the authorities referred to by the petitioners were relevant and applicable to consideration of the issue under consideration. He did however emphasise that each case turned on its own facts. He pointed out that all the cases relied upon by the petitioners involved matters where confidential information encompassed large volumes of material and was known by large numbers of persons. This was to be contrasted with the present case where both the numbers of persons who had direct access to any material which might be regarded as confidential were small and, in the context of TC, the potential pool of persons who might, in any circumstances, gain any access by any means to the material was, at least in the context of the authorities relied upon by the petitioner, very small.

[18] In relation to the underlying facts counsel for TC, in common with the approach taken by the petitioners, drew a distinction between the position of Mr Ferry and the matters contained in Mr Littlefield's file. The proposition in relation to Mr Ferry, in line with that

made by the petitioners, was that he had no documentary information. Such information as he possessed all fell into the category of "retained information". He was, as an enrolled solicitor, an officer of court. He had proffered an undertaking to the court in his second affidavit. The terms of that undertaking were sufficient to eliminate any risk which might exist.[16] The undertaking is in the following terms:

> "I undertake to the court (a) that I recognise and will continue to abide by my professional obligations to the petitioner; (b) that, except were required or mandated by law or professional duty, I have not and will not discuss anything with anyone from Turcan Connell relative to the divorce action and relative to the pre-nuptial agreement in particular."

[19] In relation to the issue of confidentiality and the material in Mr Littlefield's file counsel's general proposition was to query whether the material was truly to be regarded as confidential. In that regard he submitted that the material was of a general nature. Some of the material would in any event be within the knowledge of SDM. Some of the knowledge, for example information pertaining to the development potential of heritable property owned by the trust in which the petitioner was a beneficiary, would be public knowledge there having been planning applications in relation to the proposed development of land. In any event in the context of a divorce action the petitioner would be obliged to disclose in the context of ascertainment of matrimonial property most of the material contained in Mr Littlefield's file.

[20] Even if some of the material were regarded as confidential it was further submitted that in the context of the factual circumstances of the present case sufficient protections had been put in place by TC to obviate any risk of disclosure of the information. Reliance was placed upon the affidavits produced by members of TC and a number of staff in that firm. Importantly the relevant partners, Mr Ferry, Mr Littlefield, Mr Duguid, who has been the

[16] Undertaking contained in affidavit dated 1 November 2018

client care partner for SDM since July 2015 and Ms Crandles have all sworn affidavits in which they give undertakings in relation to the protection of information within their knowledge pertaining to the petitioner. The undertakings are all in the terms of those already noted in relation to the undertaking given by Mr Ferry. These undertakings given by officers of court are, it was submitted, sufficient to eliminate the risk and concerns enunciated by the petitioner.

Procedure prior to continued hearing on 30 November 2018

[21] Prior to the hearing on 30 November TC lodged twenty-one further affidavits in supplement to those produced for the original hearing. In addition counsel for both parties produced additional notes of argument dealing with issues arising out of the new affidavits.

[22] Twenty of the twenty-one affidavits produced were from employees of TC solicitors, trainee solicitors and ancillary staff. On the basis of TC's investigations since the original hearing these twenty deponents were persons who had accessed the petitioner's electronic file held by TC. I was informed by senior counsel for TC that his clients had obtained affidavits from all persons who had accessed the petitioner's electronic file with three exceptions. The exceptions were an employee who was absent from work on long-term sick leave and about whom a decision had been taken that having regard to her health it would be inappropriate to disturb the person. The other two persons were former employees. Neither was a solicitor or trainee solicitor. The electronic record showed that they did not have extensive contact with the petitioner's file. Again a decision had been taken that there was neither need nor merit in seeking to trace and contact these persons in order to obtain an affidavit. So far as the twenty affidavits from persons who had accessed the petitioner's file were concerned the format of the affidavits was very similar. They all explained their

function in TC at the time when they accessed the petitioner's file. They explained why they accessed the file. The majority of them stated they had no recollection of accessing the file and no recollection of the contents of the file. Many of the deponents also spoke about the culture of confidentiality which existed within TC.

[23] I require to deal more fully with one of the deponents, Mrs Littlefield a senior associate with TC specialising in tax and trusts. I will return to Mrs Littlefield's involvement during my narration of the arguments advanced by counsel.

[24] I also require to deal more extensively with the evidence of the twenty-first deponent, Allan Davie.[17] Mr Davie is the IT director at TC, responsible for all IT systems, IT infrastructure, security and IT strategy within the firm. In his affidavit he provided an overview of the electronic file management system in operation at TC. His evidence was that the technology utilised by the firm was "designed with a number of key security features, which have been configured in line with best practice advice at the time the system was being implemented in 2016." He continued that "[T]here is a permanent and indelible record of access to all documents and all work space."[18] He then went on to explain what was meant by the phrase "lock down" in the context of an IT system such as that operated by the respondents. The explanation was

> "lock down refers to the process of restricting access to a matter work space to a limited number of staff, using the built in security tools of the iManage system. If staff are not permitted access to a matter, they will not even be able to see the description of that matter in the system. The process for 'locking down' or unlocking access is for the Turcan Connell Partner to make a request that the IT team amends the access to the matter. Only the IT team can change the security access to matter works basis within the system."[19]

[17] Affidavit dated 23 November 2018 number 20 of process
[18] Affidavit number 20 of process at paragraph 3
[19] Affidavit number 20 of process at paragraph 4

Mr Davie indicated that so far as the petitioner's file was concerned it was locked down at 15.37 hours on 21 September 2018 on the instruction of Mr Peter Littlefield. The instruction was that after that time access to the file was restricted to Mr Littlefield and Nicola Quinn, his assistant. Mr Davie appended to his affidavit a number of print offs from TC's IT system. As I understood it the print off identified 17 items from the "correspondence" section of the petitioner's electronic file as held by TC. The print off showed who had accessed these 17 items of correspondence, when they did so and for how long.

Petitioner's submissions at continued hearing

[25] Senior counsel for the petitioner submitted that notwithstanding the significant volume of additional information produced by TC there were still what he categorised as "significant deficiencies in the material" relied upon by TC. The submission was developed to say that TC had still not discharged the burden of demonstrating through clear and convincing evidence that effective measures have been taken to ensure that there was no risk of relevant confidential information coming to the notice of SDM or of those now acting on his behalf.

[26] Counsel for the petitioner made the general point that the new material produced by TC demonstrated that a total of 19 persons had accessed the petitioner's electronic file. He submitted that the information demonstrated that "a very significant number of partners and staff have had access to the file". The thrust of this submission was, as I understood it, to demonstrate the level of risk of inadvertent disclosure of information. On this line of argument the most significant criticism, however involved the access to the petitioner's file by Mrs Littlefield. The information obtained from Mr Davie's consideration of the electronic file demonstrates that on two occasions Mrs Littlefield accessed the file for reasons "other

than in order to carryout fee earning administrative or secretarial work". This part of the petitioner's submission was put in the context of the chronology of the litigation between the petitioner and SDM. The petitioner and SDM separated on 22 March 2016. A summons in an action of divorce at the instance of the petitioner against SDM was signeted on 22 May 2018. At the beginning of June 2018 Mr Littlefield met with the petitioner and advised that he could no longer act for her in relation to her trust and personal affairs. She was also advised that TC were acting for SDM in the divorce proceedings and that, accordingly, TC could no longer act for her in relation to the divorce. On 4 June 2018 SKO sent a mandate to TC requiring them to provide SKO with the petitioner's files. That mandate was complied with. On 18 June 2018 a partner in SKO emailed Mr Littlefield primarily in relation to matters arising out of implementation of the mandate. The email did however further ask for confirmation of what steps TC had

> "taken to ensure that any electronic information that you hold on behalf of [the petitioner] cannot be accessed by anybody within the firm who (i) may act for [the petitioner's husband] in the context of the divorce action, and/or (ii) may be a witness in the divorce action to follow."

On 11 September at a By Order hearing in the divorce action the issue of a challenge to TC's continued representation of SDM was raised. The present petition was presented on 18 September 2018. As previously noted the petitioner's electronic file held by the respondents was locked down on 21 September 2018. Senior counsel for the petitioner observed that against this background on 17 April 2018, which was after the separation of the petitioner and SDM, Mrs Littlefield accessed a file note relative to a telephone conversation that Mr Littlefield had with the petitioner on 14 March 2018. That file note is on page 5 of the hard copy version of the petitioner's file provided to the court. It is a page which was founded upon by senior counsel for the petitioner in his original submissions

designed to demonstrate the existence of relevant confidential information on the file. The information on that page relates to the petitioner's financial affairs. On 17 April 2018 Mrs Littlefield accessed the file note for 2 minutes 20 seconds. The submission was that there was no professional reason for Mrs Littlefield to access the file. The contention of counsel was that the time during which Mrs Littlefield had access, 2 minutes 2 seconds, was sufficient for a reader to obtain information from the document. The submission continued that the information available disclosed that Mrs Littlefield accessed the petitioner's electronic file again on 17 July 2018, being a time both after TC had ceased to act for the petitioner and after the summons in the divorce proceedings had been served. It was also after the time that the issue of confidentiality and restriction of access to the petitioners electronic file had first been raised in the email from SKO to Mr Littlefield dated 18 June 2018. On the second occasion Mrs Littlefield accessed a file note of Mr Littlefield dealing with a conversation he had with the petitioner on 13 May 2018. The document accessed by Mrs Littlefield on that occasion is to be found on page 4 of the hard copy of the petitioner's file. Whilst not containing financial information it was submitted it contained "highly sensitive confidential information". The period of access was 2 minutes 32 seconds. Counsel noted that in her affidavit[20] the explanation for accessing the petitioner's electronic file on those occasions given by Mrs Littlefield was that she had, in the company of her husband Mr Littlefield, met the petitioner in the company of SDM at a social occasion. In the context of a social meeting she deponed in her affidavit that

> "She [the petitioner] struck me at the time as being the sort of person that I would like to include in future invites and it was my intention to keep in touch with her. I do try when meeting clients to understand what is going on in their lives and believe that such knowledge does enhance the relationship. Obviously all matters relating to clients are confidential but clients do appreciate it when they get a sense that they are genuinely appreciated."

[20] Dated 22 November 2018 number 27 of process

She went on to state further

> "I have been asked why I have accessed file notes on the file. I would have done so simply for the very purpose of being up-to-date. I don't know now but it may be that I had in mind inviting [the petitioner] to a Turcan Connell event."[21]

Senior counsel for the petitioner submitted that the explanation proffered by Mrs Littlefield was inadequate. The petitioner was not, and had never been, Mrs Littlefield's client. Mrs Littlefield had never acted for the petitioner nor offered her any professional advice. It was the submission of senior counsel that no proper justification for Mrs Littlefield's access to the files had been tendered and that her ability to do so on the dates that she did "simply demonstrates the extent to which, within the respondent's office, there is scope for information moving within a firm".

[27] The petitioner's submission was developed to show that any information barrier which existed within TC in the context of the petitioner's file was of an "ad hoc" nature and therefore subject to the general criticism of ad hoc security arrangements made in *Bolkiah (supra)* and *Georgian American Alloys (supra).*

[28] In support of the proposition that, in the context of the present case, ad hoc security arrangements were likely to be inadequate three principle factors were advanced. The first was that the petitioner's file was only "locked down" on 21 September 2018. This was three days after the present petition had been served upon TC. It was, further, four months after the summons in the divorce case was signeted and at least three and a half months after TC had ceased to act for the petitioner. This was said to clearly demonstrate that the information barrier being relied upon by TC was ad hoc and merely put in place to deal with contingencies as they arose. I was reminded that in *Bolkiah (supra)* Lord Millet observed that information barriers need to be

[21] Paragraph 2 and 3 of affidavit number 27 of process

> "an established part of the organisational structure of the firm, not created ad hoc and dependent upon the acceptance of evidence sworn for the purpose by members of staff engaged on the relevant work".[22]

[29] The second ground was that a necessary implication of the date of lock down was that up to that date there was unrestricted access to the petitioner's file. A corollary of that was that TC required to rely upon

> "a large number of affidavits in which qualified and support staff set out their best recollection as to why they accessed the file, whether they recall anything about it and whether they would have discussed the contents with anyone."

That consideration increased the level of risk of disclosure of information of a confidential nature whether inadvertently or otherwise. Reliance was made in this respect to observations of Field J in *Georgian American Alloys (supra)*.[23] It was also observed by counsel for the petitioner at this point that whilst no criticism was made of TC there were three persons who had accessed the file from which affidavits had not been obtained. This was said to demonstrate the difficultly which would arise when ad hoc security arrangements required to be justified. The ad hoc nature of an arrangement meant, as a matter of probability, that no record of access would be kept and therefore attempts to identify potential disclosure at a later stage would be correspondingly difficult.

[30] The third area of criticism was directed at the work done by TC in an attempt to demonstrate that there had been no disclosure of confidential information. Mr Davie had interrogated the "correspondence" area of TC's electronic file for the petitioner. That exercise had enabled Mr Davie to show who had accessed that part of the file and what documents they had seen. He had not however sought to interrogate those parts of the electronic file relating to "emails", "finance" or "signed documents". That failure necessarily meant that who had accessed those parts of the file and what they may have

[22] At page 239
[23] At page 85

accessed was unknown. In these circumstances it simply could not be said that there had been no disclosure of confidential information. It was submitted that there were was "no apparent reason why the respondent could not have provided the petitioner with the print offs for the remainder of the documents" which would have at least enabled them to satisfy themselves in relation to those parts of the file.

[31] Having regard to all the foregoing considerations the submission was that it was impossible to know what the extent of the risk of disclosure in the past had been. Whilst it was accepted that the file had been locked down since 21 September it was further submitted that the risk of disclosure was not removed. The submission was developed by stating that the petitioner could see no obvious reason why TC required to retain the petitioner's file within its electronic system at all. It was suggested that if TC had taken the step of removing the information from its system and storing it off-site, a step which was taken in relation to files in *Bolkiah (supra)* as a matter of example, that could have gone further towards removing risk of future disclosure. In these circumstances it was submitted that TC had not demonstrated to the extent necessary that the level of risk existing was acceptable. The submission was further renewed that the appearance of justice and the broader ground of the need to preserve the administration of justice justified the granting of interdict as craved.

Respondent's submissions at continued hearing

[32] TC's submissions were that all necessary steps had now been taken to demonstrate that the level of risk of leakage of confidential information was sufficiently low to enable the court to be satisfied that TC could continue to act for the petitioners without there being a risk of disclosure of information confidential to the petitioners or, further, in any respect

threatening the integrity of the administration of justice. The respondents had taken the opportunity afforded to them by the court to provide information such as would enable the court to form the view that there was no significant level of risk of disclosure of information which was the property of the petitioner.

[33] In relation to the specific criticisms advanced by senior counsel for the petitioner in relation to the actings of Mrs Littlefield senior counsel for TC suggested that the actions of Mrs Littlefield were not malign. Whilst he appeared to accept that no obvious reason existed for Mrs Littlefield accessing the file on the occasions she did he did point out that the petitioner had parted company with TC on good terms and had expressed to Mr Littlefield the hope that she could have a professional client solicitor relationship with them again in the future.[24]

[34] In relation to the three members, or former members of staff from whom affidavits have not been obtained senior counsel's submission was simply that having regard to the circumstances and the likely level of knowledge on the part of the individuals concerned the effort to obtain the information was not justified.

[35] Dealing with the affidavit of Mr Davie and its implications senior counsel for TC submitted that these investigations demonstrated that analysis of who had accessed the correspondence section of the electronic file disclosed no grounds for concern of leakage of confidential information. He accepted that other parts of the petitioner's electronic file held by TC had not been investigated by Mr Davie. I was informed that senior counsel had discussed this with Mr Davie in consultation and been advised that the correspondence folder within the file was the most "significant folder" for the issues with which this petition is concerned that being because "that is where the file notes and correspondence is, and

[24] Affidavit of Peter Littlefield number 13 of process

where someone would be expected to go if they wished to learn about the important information on the file". It was also apparently the view of Mr Davie that interrogation of the remaining elements of the file "would take many hours". Notwithstanding these considerations senior counsel caused or required Mr Davie to conduct further investigations. I was advised that the "emails" section of the file contained 156 items. The "documents" section of the file contained 28 items. The "finance" section contained 7 items and the part of the file relating to "signed documents" contained 4 items. Senior counsel instructed Mr Davie to consider 5 items in the email folder and a number of other items. It was maintained that this further investigation provided nothing which would cause concern. A document disclosing the files in these sections was produced by TC, albeit only on the morning of the hearing, that is 30 November 2018.

[36] On the basis of all the foregoing the submission for TC was that the index of risk was at such a low level that there was no impediment to TC continuing to act for SDM.

Conclusions

[37] The law relevant to the determination of this petition was generally agreed is as outlined in paragraphs [7] and [8] hereof and does not appear to me to be in serious doubt.

[38] There are two distinct strands. First, on the authority of *Ecclesiastical Insurance Office Plc (supra),* a decision of an Extra Division of the Inner House which is binding upon me, the court has an inherent power to regulate the conduct of officers of court, such as solicitors. That inherent power can be exercised where a fair minded person would conclude that an officer of court should be prevented from acting in order to protect the integrity of the judicial process and the due administration of justice which includes the appearance of justice.

[39] Second, beyond the general exercise of an inherent power the court requires to intervene when it is established that a real risk that relevant confidential information might come into the hands of a person with an interest adverse to that of the applicant, in this case the petitioner. Authority for that proposition is founded upon the dictum of Lord Millet in *Bolkiah (supra)* in the passage quoted in paragraph [8] of this opinion. I should also note that lest there be any doubt as to the applicability of Lord Millet's dictum uttered in an English case it was expressly approved by the Inner House in *Ecclesiastical Insurance Office Plc (supra).* The test established by Lord Millet was twofold, first to determine that the solicitor is in possession of information which is confidential to the client and to which disclosure has not been consented and, second, that the information may be relevant to the matter in which the interest of the other person is or may be adverse to the applicants. As Lord Millet expressly said although the burden of proof is on the applicant that burden is not a heavy one. In that regard it might also be noted that the test for relevancy enunciated by Lord Millet is only that the information "may be" relevant to the subject in issue.

[40] Implicit in Lord Millet's dictum is the issue of confidentiality. In the course of submissions counsel referred to a number of text books where the concept of confidential information had been discussed. I did not, with respect, find these references of particular assistance. As a matter of plain English "confidential" means that which is intended to be kept secret, and "confidentiality" is the state of keeping something secret or private. I would, further, observe that a solicitor is in my view bound by a duty of confidentiality in relation to all information pertaining to a client which comes into his possession. Indeed the very fact that a person is a client of a solicitor would itself, again in my view, constitute confidential information. This duty can only be narrowed if the information imparted by a

client to a solicitor is in the public domain or the client expressly waives confidentiality in any matter.

[41] I consider it is against these considerations that the material in Mr Littlefield's files must be viewed. The starting point would therefore be that everything in the files would be confidential unless it is plainly within the public domain or the right to confidentiality has been waived by the petitioner. In the context of the present dispute there would of course arise the further question about whether knowledge of the material in the file would be prejudicial to the interests of the petitioner and advantageous to those of SDM.

[42] The characterisation by counsel for the petitioner of those parts of TC's file specifically drawn to my attention was to the effect that it showed or tended to show matters pertaining to the petitioner's finances. Having considered the file I consider that characterisation to be justified and appropriate. I have already referred to the proposition I made which counsel for the petitioner accepted to the effect that a reader of the file would gain a reasonable understanding of the petitioner's finances. Counsel for TC did not seek to challenge that proposition in his submission. In my opinion a reasonable understanding of the opponent's financial circumstances would be of advantage to the other party in a divorce action with financial conclusions. In forming that opinion I take account of the consideration that in such a divorce action the court requires to establish the extent of matrimonial property. That no doubt entails that information, some of which may well encompass material of the type in Mr Littlefield's files, will require to be disclosed. I do not however consider that I am entitled to have regard to the exact nature of matrimonial property at this stage. I agree with counsel for the petitioner that I should determine the present application on the basis of the position as it is at the time of determination of the present petition, that is of a divorce action with a proof set down for a date in February 2019.

In this context I also have regard to the issue of possible settlement negotiations. As was submitted it is within judicial knowledge that the majority of divorce cases with financial conclusions are ultimately settled. Beyond that, as already noted, the court has been provided with knowledge which shows that there have already been some discussions anent settlement in the divorce action between the petitioner and SDM. The exact nature of settlement negotiations is, obviously, unknown to the court. The tactics and considerations of parties in negotiations are equally unknown to the court. It does however appear to me tolerably clear that knowledge of the information contained in Mr Littlefield's file could be useful to SDM in any settlement discussions in the present case.

[43] On the basis of the foregoing analysis I form the view that the information contained in Mr Littlefield's files constitutes information which is confidential to the petitioner disclosure of which would be potentially adverse to her interests. On that basis the first part of the test adumbrated in *Bolkiah (supra)* is satisfied.

[44] There remains the issue of the nature of safeguards instituted by TC and whether they are sufficient to reduce the risks of disclosure of confidential information to an acceptable level. In that regard I make clear that whilst I have considered the authorities put before me I accept the proposition advanced by both parties that each case requires to be determined on its facts. I acknowledge that the present case is one where a limited number of persons are likely to have had access to any information confidential to the petitioner. I equally accept that the scope, even if inadvertent, of disclosure of information is more limited than would be the case where large numbers of persons had access to large quantities of confidential information. It follows from that that I accept that the rigour of the precautionary measures taken in, for example, *Bolkiah (supra)* and *Georgian American Alloys (supra)* would not be required in the present case.

[45] I deal firstly with the issue of "retained information", which, as presented in submission, was confined solely to the knowledge of Mr Ferry. Mr Ferry has sworn on affidavit containing an undertaking the effect of which is that he will disclose no information he has retained in his memory to any person save as such disclosure is mandated or is ordered by a court. I consider the terms of the undertaking to be both satisfactory and sufficient to eliminate any risk of disclosure on the part of Mr Ferry. I would only add that in reaching that view I have taken account of his special status as an officer of court which in my view strengthens still further the force of the undertaking given.

[46] At the conclusion of the first hearing, my view, in relation to the confidential information in Mr Littlefield's files was different to that which I heard in relation to retained information. I considered that the persons who had at that stage sworn affidavits and who had given undertakings had taken steps which were sufficient to protect information directly controlled by those persons. I have no reservations in stating that the undertakings were given by officers of court in good faith acting professionally and responsibly. I did however have serious reservations as to whether these undertakings of themselves were sufficient to reduce the risk complained of to an extent that would satisfy the court that the petitioner's interests were not prejudiced. The criticisms of the extent of the protection offered by counsel for the petitioner, were not, in my view, overstated. The affidavits sworn contained examples of confidential information which had been disclosed. This was, I accept, done inadvertently. I also accept that the material disclosed is immaterial to the issues at stake in the divorce action. Notwithstanding those factors the fact that there was disclosure of confidential information in my view illustrated the dangers presented by inadvertent disclosure. The same observation applies to the fact that material from another

file pertaining to another client was inadvertently placed in Mr Littlefield's file for the petitioner.

[47] My principle concern however was that I did not consider that TC had provided the assurances necessary to satisfy the court that there was no risk of disclosure of information prejudicial to the petitioner outwith the direct control of those who had thus far given undertakings. The lacunae in information related primarily, but not exclusively, to TC's IT systems. I considered the complaints advanced by counsel for the petitioner to be well justified. I would have expected to see an affidavit, or possibly report, from a senior person in TC's IT department explaining how their system operates, how lock down operates and how it would apply in the context of security measures in the present divorce action. Provision of such evidence in my opinion would not have been particularly difficult and could have potentially alleviated the concerns I expressed. I also noted that aside from IT there was little evidence from either non-partner qualified staff who had access to the files or support staff who have had access or may have access in the future. In my view evidence identifying such persons and, further, providing evidence from persons in those categories would also be required before the court could be satisfied that an effective system sufficient to reduce the level of risk to that which would be deemed satisfactory had been achieved.

[48] In the absence of evidence of the nature I have described I could not be satisfied that the level of risk had been reduced to an acceptable level.

[49] On the basis of the conclusions I reached at the conclusion of the first hearing I would have been entitled to pronounce decree of interdict as craved in this petition. That was the submission made to me by counsel for the petitioner at the hearing on 2 November 2018. Notwithstanding that submission I formed the view that there were other legitimate considerations to which I ought to have regard to before pronouncing decree. These were

that petition procedure is inherently more flexible than the procedure stipulated in the rules of court for the conduct of ordinary actions. Further, following the hearing on 2 November I did not make avizandum, merely continued the cause to consider arguments raised on that date. Yet further, and perhaps most importantly, I had regard to the fact that TC had made serious efforts to address the issues of risk of disclosure of confidential information advanced by the petitioner. My criticism was confined to what I regarded as failures, or omissions, to address all legitimate concerns relative to risk of disclosure submitted by the petitioner. I should say that I also had in mind the need to proceed expeditiously. As already stated the substantive action between the petitioner and SDM is due for proof in February 2019, a period of only four months in the future. In the event that interdict was pronounced against TC SDM would require to brief and consult with new solicitors who would require to familiarise themselves with the paperwork and thereafter prepare the case. I considered there was a realistic risk that this process would take longer than the time available and the result would be a discharge of a proof which I did not conceive as being in the interests of either party. Considering the implications of the totality of these factors lead me to conclude that it would be consonant with the interests of justice to afford TC a short period of time to consider whether they were able and minded to address and seek to rectify the lacunae in evidence I had identified. For that reason I continued the matter until a by order hearing on 30 November 2018.

[50] Following the conclusion of the hearing on 30 November, and on the basis of all the information available I consider that a number of conclusions can be drawn. First, that by virtue of acting for the petitioner for a number of years in relation to her private affairs TC retained at the date of the petitioner's separation from SDM (22 March 2018) information pertaining to her financial affairs. Second, that information was up until the time when TC

ceased to act for the petitioner in early June 2018 current and of a nature which would enable a person reading the file relative to the petitioner to form a reasonably accurate view of the petitioner's financial position. Third, whilst the court does not and cannot have any insight into the private considerations of any litigant in a contested litigation, in the context of a divorce action with financial conclusions knowledge of an opponent's up-to-date financial circumstances are, on the balance of probabilities, likely to be advantageous in the litigation. Fourth, that whilst on the evidence of Mr Davie TC operated an IT system which had within it the facility to "lock down" a file, which meant that after lock down only authorised persons could gain access to the file, that system only operated when a partner instructed the IT department to put the system into operation. The system was therefore in effect a security measure capable of restricting access to a file but one which for effectiveness was dependent upon partner intervention. In my view that is in essence an ad hoc system available when a partner deems it necessary to put it into operation. Fifth, in the present case the lock down system was only implemented on the instruction of Mr Littlefield, some three and a half months after he knew that TC no longer acted for the petitioner. Moreover it was only operated three days after the present petition was served upon TC. I interject to observe that senior counsel for TC informed me during the course of submissions that Mr Littlefield now accepted, "with the benefit of hindsight" that lock down should have taken place at an earlier stage. In relation to that point, whilst I do not suggest Mr Littlefield was acting in other than good faith, I note that SKO, who had accepted instructions to act for the petitioner following TC's withdrawal from acting, drew to Mr Littlefield's attention the requirement for security precautions to be implemented in respect of the petitioner's electronic file in an email dated 18 June 2018. I was provided with no explanation as to why lock down took so long to implement and, further, no explanation why the request in SKO's

decision of 18 June was not heeded. Sixth, 18 persons within TC accessed the correspondence section of the petitioner's electronic file. Whilst that number is contained, and all these deponents speak to a culture of client confidentiality within TC and to their awareness of a need to respect the confidentiality of clients, it is in my view clear that this number of persons accessing a file carries with it a risk of inadvertent disclosure of confidential information. Seventh, one person, Mrs Littlefield, accessed the file without apparently having authority to do so. Mrs Littlefield had never acted for the petitioner. She was an associate and on the evidence had not been instructed by a partner who was acting for the petitioner to access the file. Her reason stated for accessing the file, for the "purpose for being up-to-date" so far as a client was concerned was, in my view, unsatisfactory. Whilst the file pertained to a person who was a client of TC, the firm who employed Mrs Littlefield, she herself had no client contact with that person. Moreover her statement that "obviously all matters relating to clients are confidential but clients do appreciate it when they get a sense that they are genuinely appreciated" appears to me to improperly comprehend the nature of the confidentiality of client information. In the context of the affidavit in which that statement was made it seems to carry the suggestion that confidential information may be accessed if there is some consideration pertaining to the general state of knowledge about the client which overrides that person's right to confidentiality. I do not consider that as a matter of law such a view would be justified. In the context of the present petition Mrs Littlefield's access to the file demonstrates that, albeit prior to lock down taking effect, there was scope for someone with no professional reason for accessing the petitioner's file doing so. Given that the second date on which Mrs Littlefield accessed the file (17 July 2018) was after the date when SKO had alerted TC to the need for security in relation to the petitioner's electronic file, then accessing of the file also appears to highlight the risks and

inadequacies associated with ad hoc information barriers. Further, inadequacy of the reason given for accessing the file is, again in my view, at variance with the many statements made on behalf of TC about the culture of confidentiality said to exist within the firm. Eighth, the interrogation of the petitioner's electronic file conducted by Mr Davie is, on his own admission, incomplete. It was only comprehensive in relation to the "correspondence" section of the file. Four other areas of the file were not interrogated at the date Mr Davie swore his affidavit on 23 November 2018. After that, and apparently only following consultation with and on instruction of senior counsel, limited areas of two further parts of the petitioner's electronic file were interrogated. The information contained therein was only made available to the petitioner's solicitors on the morning of the hearing of 30 November at a time when it would seem that in a practical sense no proper consideration or analysis of it could be made. In relation to the correspondence file which was interrogated it was submitted by senior counsel for TC that this represented the most important part of the file and was where confidential information would be most likely to be found. I cannot comment on this assertion in the absence of direct information. I would however simply observe that having regard to the prominence of email communications in modern commerce I would have thought that that part of the file could also have been considered as both a potential source of information and therefore one which might have merited full examination. The explanation proffered by Mr Davie to senior counsel that "it would take many hours" to investigate those areas which were not interrogated is, in my view, of no consequence and indeed having regard to the importance of protecting client confidentiality perhaps a little surprising and concerning. Consideration of the line of authority I have been directed to demonstrates that the importance of protecting a client's confidential information is such that professional advisors, in circumstances where they

subsequently wish to act for someone with an interest adverse or potentially adverse to the former client, have an onerous burden placed upon them. A consideration of the amount of time that such files might take to investigate is in my view an inadequate reason for failure to consider all material held which might contain information confidential to the former client. I would add that in addition to these eight conclusions on the basis of the information before me, the concerns I expressed at the conclusion of the first hearing appear in large part, to continue to exist.

[51] In my opinion where a firm of solicitors wishes to act in a matter for a party with an interest adverse to that of a former client, and where they hold information confidential to the former client, an adequate and effective information barrier must exist to protect the position of the former client. I respectfully agree with the observations of Lord Millet in *Bolkiah (supra*) that ad hoc arrangements made retrospectively, that is after a potential conflict between existing client and past client have emerged, are unlikely to be as robust as permanent arrangements which operate automatically and are already in place and operative when a conflict emerges. The reason for this is plain, ad hoc arrangements can take time to put into place. During any period before an ad hoc security arrangement or information barrier is erected and is operative there is the potential, by means of either deliberate or inadvertent action for confidential information to leak. In the present case the most important information barrier was the "lock down" system of electronic files. For reasons which, as I have already said, no explanation was forthcoming, lock down did not operate for a period of something in the order of three and a half months after there was an obvious risk created by the petitioner ceasing to instruct TC and that firm correspondingly informing her that they could not act on her behalf in divorce proceedings against her husband. I am bound to state that my view is that a conflict, or at least potential conflict,

and therefor the need to have an effective information barrier, should have been obvious to TC from the date of the service of the summons in the action of divorce by the petitioner against her husband, a continuing client of the firm, on 22 May 2018. That said, the relatively short lapse in time between that date and early June is probably of no particular materiality in the context of the present petition. The significant gap in time between the emergence of a conflict and the operation of lock down would of itself cause me significant concerns. I do however take into account the fact that after the respondents ceased to act for the petitioner Mrs Littlefield accessed the relevant file on one further occasion. As I have already observed the lack of adequate explanation for that intervention causes me concern. I consider that that fact increases the risk of disclosure of confidential information which is the petitioners concern in this petition. I am also concerned that there has been incomplete examination of all sections of the petitioner's electronic file. This fact leads me to the conclusion that the court is still, notwithstanding that the respondents were given additional time to provide further information, in a position where it cannot be satisfied as to the precise level of any disclosure of confidential information which has occurred.

[52] Having regard to my conclusions in relation to the precautionary steps that have been taken by TC to obviate the risk of disclosure of information it is not strictly necessary for me to form any concluded views on the petitioner's arguments in relation to the inherent jurisdiction of this court to protect the integrity of the judicial process in circumstances where there is an apprehension of disclosing of confidential information. For completeness it may however be of assistance if I make some observations in relation to this issue. In the present case TC acted for both the petitioner, albeit on a limited and ad hoc basis, and SDM throughout, broadly, the tenure of their marriage. I have found that in the course of acting for the petitioner TC acquired information confidential to her knowledge of which, if

acquired by SDM, could be advantageous to that person and prejudicial to the petitioner's interests in the conduct of the divorce litigation. In my opinion, the court, and for that matter the solicitors' profession, is rightly concerned to ensure that solicitors do not, in circumstances such as these disclose, whether by inadvertence or otherwise, information confidential to a client or former client which might result in prejudice to that client. Whilst no information was placed before me I am aware, as a matter of judicial knowledge, that the Law Society of Scotland have guidelines or rules regulating solicitors' conduct in situations where conflict may arise. It is therefore, in my view, a relatively easy step to conclude that in order to ensure that the "appearance of justice", as it was characterised by Lord Bracadale in *Ecclesiastical Insurance Office Plc (supra)*, is preserved the court will take a rigorous or strict approach to the operation of its inherent power in circumstances such as have arisen in the present case. On the basis of that consideration I conclude that, as is the case here, where the court is not satisfied that sufficient precautionary measures have been taken by solicitors to protect the interests of clients or former clients the inherent jurisdiction described in *Ecclesiastical Insurance Office Plc (supra)* would be an appropriate vehicle for providing protection to the client or former client facing potential prejudice.

[53] When I have regard to all the foregoing considerations I am not satisfied that the respondents have satisfied the onerous test imposed upon them. I consider that the petitioner is in those circumstances justified to the grant of interdict as craved.