IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2008 HCV 00118

BETWEEN	OLINT CORP LIMITED	CLAIMANT
AND	NATIONAL COMMERCIAL BANK JAMAICA LIMITED	DEFENDANT

Maurice Manning and Georgia Gibson-Henlin instructed by Catherine Minto of Nunes Scholefield & Deleon for Claimant.

Dave Garcia and Carlene Larmond for Defendant

Heard: February 1, 15, 29, and March 6, 2008

JONES, J.

[1] On November 7, 2007, NCB (hereinafter called the Defendant) wrote to Olint Corp. Limited (hereinafter called the Claimant) advising of its decision to close its banking accounts. The Claimant filed an action in this court for breach of the Fair Competition and Banking Acts on the part of the Defendant; they also obtained an ex-parte order in the Supreme Court from Pusey J. prohibiting the Defendant from closing its accounts. The ubiquitous former Solicitor-General of Jamaica, Michael Hylton QC, appeared for the Defendant on its application to have aspects of the ex-parte injunction varied; he is now instructed to defend the substantive action on behalf of the Defendant. The Claimant cries foul and claims that by accepting instructions from the Defendant Mr Hylton QC is conflicted; he has crossed the ethical threshold and must withdraw from the matter. Mr Hylton's sense of the dramatic is unmatched here; in the face of an accusation of a disqualifying conflict of interest, he refuses to stand down. After hours of

charges, counter charges, much soul searching and negotiations on both sides, the positions hardened

[2] The Claimant resolved that the small talk must stop and filed an Application for Court Orders objecting to Michael Hylton QC representing the Defendant in this case. The basis of the objection is that a disqualifying conflict of interest exists and that there is a real risk that confidential information disclosed by the Claimant to Michael Hylton QC as Solicitor General, Chairman and Commissioner at the Financial Services Commission (hereinafter called the FSC) may find itself into the hands of the Defendant in this case. Mr Hylton's response became more strident. He charged that the Claimant's application is misconceived and amounts to nothing more than setting a cat amongst the pigeons. Whether or not there is substance to this charge is to be seen.

The Background

[3] The FSC contends that the Claimant is a prescribed financial institution under the Financial Services Act and as a financial entity ought to be licensed and regulated by the FSC. The Claimant disagreed and the relationship between the two deteriorated. In March 2006, the FSC raided the Claimant's offices, issued a Cease and Desist Order and later instituted legal proceedings. On December 24, 2007, the Supreme Court gave a judgment in the FSC's favour. It is on appeal before the Jamaican Court of Appeal.

[4] Michael Hylton QC, the Respondent in this application, was involved in the dispute with the Claimant through various offices. He was Solicitor General between January 2001 and October 2007; a Commissioner at the FSC between 2003 and August 2007, and Chairman of the FSC between October 29, 2007, and January 11, 2008.

[5] Prior to Mr Hylton QC relinquishing the various positions that he held, David Smith the principal in the Claimant Company met with him on two occasions. Mr Smith alleges that during their talks he discussed all matters having to do with the standoff between himself and the FSC as well as the pending closure of his accounts by the Defendant in the substantive matter. Mr. Smith claims that he gave to Mr. Hylton QC confidential documents pertaining to the operations of the Claimant and its affiliates. The Defendant had by that time indicated to Mr Smith by a series of letters that it intended to close the accounts of the Claimant and its affiliates, commencing on November 14, 2007. At the time of the discussions with Mr Smith, Mr Hylton was no longer Solicitor General but was Chairman of the FSC and had actual or apparent authority to meet with Mr. Smith.

[6] Having seen the acknowledgment of service filed by Michael Hylton & Associates in his matter with the Defendant, Mr Smith objected by letter dated January 21, 2008, to Michael Hylton QC acting as Attorney-at-law for the Defendant in this matter. Mr. Hylton QC responded quickly by letter dated January 22, 2008, advising that he did not see the conflict or the mischief. On January 23, 2008, Mr Smith instructed his attorneys to file a Notice of Application for Court Orders seeking the following orders:

i) That Mr. Michael Hylton Q.C. of the firm Michael Hylton & Associates, Attorneys-at-law, be barred from representing or giving any legal advice to the Defendant/Respondent in these proceedings.

ii) Costs of the Application to the Claimant/Applicant.

[7] There is one preliminary point on the issue of jurisdiction and three substantive issues raised in these proceedings. First, the preliminary point.

The Preliminary Issue: Can the court hear an application to disqualify an attorney for conflict of interest in the same proceedings with the existing claim?

[8] The preliminary issue raised was as to whether or not this Application for Court Orders is properly before the court. Counsel for Mr Hylton contends that the Claimant's application is misconceived and is not properly before the Court. He submits that the Claimant cannot obtain the Order (which is injunctive) by an application for court orders in the present claim. He says that the correct course for the Claimant to have taken is to file a claim against Mr Hylton QC seeking an injunction restraining him from acting for the Defendant.

[9] Counsel for Mr Hylton launched a two pronged attack on this issue. The first argument is that an application to remove an attorney from appearing for a party cannot under CPR 2002 be started by way of a Notice of Application in a pre-existing claim. CPR 2002 63.5(1)(a) provides that a party may apply to remove the name of an attorney-at-law from the record as representing another party in five specified circumstances, namely, where the attorney-at- law on the record has: -

i. died;

ii. become bankrupt;

iii. failed to take out a practicing certificate;

iv. been removed from the roll; or

v. cannot be found;

and there is no record of a Notice of Change of Attorneys or Notice that the Litigant is Acting in Person having been filed. On this basis, he submits that that the Claimant cannot properly proceed with this application.

[10]The second prong of the attack by Counsel for Mr Hylton on the procedure adopted by the Claimant's is that given the nature of the relief sought i.e. an injunction, a Notice of Application is not appropriate to give the court jurisdiction. He argues that these proceedings are between the Claimant and the Defendant and Mr Hylton QC is not a party to the claim. Accordingly, Mr Hylton QC is not before the court as a litigant against whom an injunction can properly be made. He argues that the Claimant should properly have brought a claim against Mr Hylton QC seeking an injunction restraining him from representing the Defendant, and that until it does so the court has no jurisdiction to hear this application.

[11]Counsel for Mr Hylton reviewed the case law in the United Kingdom in order to demonstrate that prior to the implementation of the CPR applications of this nature were commenced by way of Originating Summons. He submits that since the implementation of the CPR in the United Kingdom, such matters have always been commenced by way of a Part 8 Claim, which is equivalent to the Fixed Date Claim Form in our jurisdiction.

[12]Unfortunately, these arguments by Counsel for Mr Hylton are rather unconvincing. As a general rule the duty of confidence owed by an attorney-at-law is governed by the same principles of law as any other profession. It arises in both contract and tort, in three situations. First, where there is a breach of confidence, usually against a former client. Second, a breach of a duty of loyalty, where the behaviour of the attorney is not consistent with his fiduciary duty to a former client. Three, a special duty of confidence which arises from the attorney's duty to

the court. This special duty of confidence is enforceable by the exercise of the courts inherent jurisdiction to control officers of the court. This special feature arising from the duty to the court may well affect how the matter is brought to court. In ***Rakusen's case*** (referred to later) Cozens-Hardy M.R made reference to a "special jurisdiction over solicitors" and said "we expect and indeed exact from solicitors who are our officers a higher standard of conduct than we entertain against them who are not our officers".

[13] A recent example of the application of this special jurisdiction can be seen in the approach of the court in ***Davis v Davis*** **[1999] EWCA Civil 890** (decided after the implementation of the CPR1998 in England). This was a case in which the application for the attorney to be disqualified from acting for one of the parties was interlocutory. The Petitioner had a one off consultation with a solicitor, Mr. Tooth, about problems she was having in her marriage. When she issued divorce proceedings seven years later, the solicitor Mr. Tooth appeared for her husband. Mr. Tooth refused to withdraw stating that he had no recollection of the consultation with Mrs. Davies and that there was no conflict of interest. Furthermore, he argued that there was no support for the contention that there was a likelihood of prejudice to Mrs. Davies by Mr. Tooth's continued representation of her husband.

[14]On the respondent's preliminary application that the matter was not properly before the court, Lord Justice Aldous said:

> "Mr Pointer QC opened his submissions to this court with two points of procedure. He submitted that the petitioner should not have issued a summons naming the respondent as defendant. She should have made a separate application to which the respondent's solicitor was the sole defendant...It is possible for the petitioner to start proceedings against the respondent's solicitors and I accept that this is the procedure adopted in many cases. However, there is no rule of law or procedure which prevents a petitioner from bringing before the court the issues that arose in this case. There was a dispute between her and the respondent as to whether the

respondent's solicitors should continue to act for the respondent, and there was no reason why that should not be decided in the proceedings between the parties".

[15] In my judgment this court has an inherent supervisory jurisdiction to hear this matter. Mr Hylton QC as an attorney-at-law is an Officer of the court. Under the Financial Services Commission Act, he has a statutory duty of confidence and secrecy even after his resignation. In addition, he owes duties to the court and is subject to its supervisory jurisdiction in any matter in which the integrity of the administration of justice is at risk either in a separate application or in the same proceeding between the parties.

The Substantive Issues:

[16] There are three substantive issues to be determined. They are as follows:

i) Whether or not confidential information was disclosed to Michael Hylton QC by David Smith and the Claimant for which they have not given consent for its disclosure.

ii) If so, whether the confidential information known to Michael Hylton QC is relevant to the litigation currently before the court between the Claimant and the Defendant and if disclosed to the Defendant would adversely affect the interest of David Smith and the Claimant?

iii) If so, is there a real or appreciable risk that the confidential information disclosed to Michael Hylton QC would be divulged to the Defendant?

iv) Should this court in the exercise of its inherent supervisory jurisdiction over Officers of the Court intervene and exercise its discretion to protect the disclosure of the confidential information?

The Law

[17]The statutory framework is contained in the **Legal Profession (Canons of Professional Ethics) Rules** and the **Financial Services Commission Act**. The **Legal Profession (Canons of Professional Ethics) Rules** made under the **Legal Profession Act** provides at **Canon (IV)** that:

> "An Attorney shall act in the best interests of his client and represent him honestly, competently and zealously within the bounds of the law. He shall preserve the confidence of his client and avoid conflicts of interest ".

[18]Canon (IV) Rule (q)(iv) require that:

> "Attorneys withdraw forthwith from employment or from a matter pending before a Tribunal where his continued employment will involve him in the violation of a Rule of Law or a disciplinary rule".

[19]Canon V Rules (e) and (f) provides that:

> "(e) An Attorney who holds a public office shall not use his public position to influence or attempt to influence a tribunal to act in favour of himself or of his client.
>
> (f) An attorney shall not accept private employment in a matter upon which he previously acted in a judicial capacity or for which he had substantial responsibility while he was in public employment".

[20]Section 15 of the **Financial Services Commission Act** provides under the heading (Obligation to Secrecy):

> "15(1) Every person having an official duty or being employed in the administration of this Act shall-
>
> (i) regard and deal with as secret and confidential documents, information and records obtained in the course of their duties under this Act, relating to the operations of a prescribed financial institution; and

(ii) make and subscribe a declaration to that effect before a Justice of the Peace....

(4) A person to whom information is communicated pursuant to an authority of the Commission in that behalf shall regard and deal with such information as secret and confidential and shall make and subscribe a declaration to that effect before a Justice of the Peace".

[21]The law has always accepted that certain relationships including that of attorney-client gives rise to an obligation of confidentiality. However, there is no general rule that a solicitor who acted for someone either before or after litigation began cannot in any case act for the other side. ***Rakusen v Ellis Munday & Clarke*** **[1912] 1 Ch 831** laid down the rule that the applicable test for conflict of interest is the "real probability of real mischief". In that case, the defendants were the only partners in a firm of solicitors doing business separately and without any knowledge of each other's clients. The Claimant consulted Munday with reference to an action for wrongful dismissal which he desired to commence against a company. He subsequently changed his attorneys and issued a writ. The matter was referred to arbitration. The other partner Clarke knew nothing of the consultations as he was away at the time and accepted instructions under the firm's name to act in the arbitration proceedings for the company involved in the litigation with the Claimant. On an application for an injunction to restrain the firm of solicitors from acting for the company it was held that there is, no general rule that a solicitor who had acted for some person either before or after the litigation began could in no case act for the opposite side. The Court must be satisfied that mischief would result from his so acting. At page 835, Cozens-Hardy MR said:

"... A solicitor can be restrained as a matter of absolute obligation and as a general principle from disclosing any secret which are confidentially reposed in him. In that respect it does not very much differ from the position of any confidential agent who is employed by a principal."

[22]In *Coco v A.N Clarke (Engineers) Limited* [1968] FSR 415 the Claimant designed a moped engine and sought the co-operation of the defendants in its manufacture. After the Claimant disclosed to the defendants all the details of his design and proposals for manufacture the parties fell out and defendants decided to manufacture the engine on their own. When the defendants brought out their own design which closely resembled that of the Claimant he brought a motion for interlocutory injunction to restrain the defendants for misusing information communicated to them in confidence. The defendants denied that confidential information had been communicated to them or that they used it in their engine. Megarry J who delivered the judgment of the court said:

> "In my judgment, three elements are normally required if apart from contract a case of breach of confidence is to succeed. First, the information itself... 'must have the necessary quality of confidence about it'. Secondly, that the information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it"

[23]In examining the first element, Megarry, J observed:

> "...'something which is public property and public knowledge' cannot per se provide any foundation for proceedings for breach of confidence. However confidential the circumstances of communication, there can be no breach of confidence in revealing to others something which is already common knowledge."

[24]Where the elements were proved, Megarry J took the view that where information was received by someone in a commercial environment or given on a professional basis he would regard the receiver of the information as "carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence".

[25]*Grimwade v Meagher* [1995] 1 VR 446 is a striking illustration of the wide power of the courts to control its attorneys in matters not involving attorney client relationships as a part of

its inherent jurisdiction. It is said that the court acts to preserve the due administration of justice and public confidence in the judicial system.

[26]In that case Mr. Grimwade made an application to restrain Meagher QC from acting against him in a civil claim. This civil claim was brought against Grimwade by a number of claimants and Meagher was to appear for the claimants. In an earlier case Mr Meagher had been engaged as senior counsel to prosecute Grimwade in relation to certain criminal offences. He appeared for the prosecution against Grimwade in the committal proceedings, a failed first trial and a drawn out second trial. Grimwade was successful in his appeal to the Full Court which allowed his appeal and refused a new trial. Meagher also appeared as counsel for the prosecution on the appeal.

[27]Grimwade sought an order restraining Meagher from appearing for the claimants in the civil case. Although Grimwade was no longer a client with an interest adverse to that of Meagher's current client, the Court upheld his application to restrain Meagher from acting in the matter so as to "ensure the due administration of justice", "to protect the integrity of the judicial process" and in order to ensure that justice was not only done but manifestly and undoubtedly seen to be done.

[28]It was held that a fair minded reasonably informed member of the public would conclude that the proper administration of justice required that the counsel concerned be prevented from appearing in the action because of real risks of lack of objectivity and of conflict of interest and duty.

[29]Mandie J had this to say:

> "In my view it cannot be doubted that this court likewise has an inherent jurisdiction to ensure the due administration of justice and to protect the integrity of the judicial process and as part of that jurisdiction, in an appropriate case, to prevent a member of counsel appearing for a particular party in order that justice should not only be done but manifestly and undoubtedly be seen to be done. The objective test to be applied in the context of this case is whether a fair-minded reasonably informed member of the public would conclude that the proper administration of justice required that counsel be so prevented from acting, at all times giving due weight to the public interest that a litigant should not be deprived of his or her choice of counsel without good cause"

[30]In ***Prince Jefri Bolkiah v KPMG (A Firm)*** **[1999] 2 A.C 222** the issue for determination was whether, and if so in what circumstances, an accounting firm that provided litigation support services to a former client and as a result had in its possession confidential information belonging to the former client could take on work for another client with an adverse interest. The matter went to the House of Lords where it was established that solicitors or accountants providing litigation services who were in possession of information confidential to a former client which might be relevant to a matter in which they were instructed by a subsequent client, the court should intervene to prevent the information from coming into the hands of anyone with an adverse interest unless it was satisfied that there was no real risk of disclosure. The burden of showing that there was no risk is on the defendant.

[31]Lord Millett, in affirming the basis of the courts jurisdiction to intervene on behalf of a former client said at page 234:

> "This makes the possession of relevant confidential information the test of what is comprehended within the expression 'the same or a connected matter.' On this footing the court's intervention is founded not on the avoidance of any perception of possible impropriety but on the protection of confidential information".

[32]Lord Millet made it clear that after the termination of the solicitor client relationship the only duty which survives is a continuing duty to preserve the confidentiality of information given

while the relationship existed. He then set out what a claimant who seeks to restrain his former solicitor from acting for another client with an adverse interest must prove:

> "...it is incumbent on 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...whether a particular individual is in possession of confidential information is a question of fact which must be proved or inferred from the circumstances of the case".

Evaluation of First Issue: Whether or not confidential information was disclosed to Mr Hylton QC by David Smith and the Claimant for which they have not given consent for its disclosure?

[33] It is common ground between the parties that:

a) Michael Hylton Q.C was Solicitor General of Jamaica in the period January 2001 to October 2007; a Commissioner at the Financial Services Commission from 2003 to August 2007; and Chairman of the Financial Services Commission from October 29, 2007 to January 11, 2008, when the issues between the Clamant and the FSC came to light and also when the dispute between the Claimant and the Defendant about the suggested closing of the Claimant's accounts started.

b) Michael Hylton QC was the Solicitor General, and a Commissioner at the Financial Services Commission when the policy decision was taken by the FSC that the investment activities of the Claimant was within the scope of a prescribed financial institution under the Act, and, ought to be regulated by the Commission

c) Michael Hylton QC was the Solicitor General and Commissioner at the FSC when the policy decision was taken by the FSC to raid the offices of the Claimant and to confiscate, seize and take away documents which were confidential.

[34] Counsel for Mr Hylton QC contended that the Claimant's only specific reference to disclosure of confidential information is contained in paragraph 7 of David Smith's sworn affidavit dated January 24, 2008. The following passage is taken from paragraph 7:

> "Mr Campbell refers to the Claimant purportedly carrying on the business of foreign exchange trading. This is not true and the Claimants Claim Form and Particulars of Claim make this clear as there is no admission of this. However, in discussions with Michael Hylton QC we spoke about foreign currency trading which is done by companies with which I am associated overseas and outside Jamaica"

[35] Counsel for Mr Hylton continues his submissions with the following points:

(a) The Claimant is described in the public media as:

(i) a "foreign exchange trading company",

(ii) a "foreign exchange trading club"; or

(iii) an "investment club trading in foreign exchange".

(b) Mr Campbell's characterization of the Claimant as a "private members club" trading in foreign exchange on behalf of its members is a widely held view and could not be influenced by any information provided by Mr Hylton QC.

(c) Submissions made to the court in the matter of **Olint v FSC** acknowledged that the Claimant was engaged in foreign currency trading. McIntosh (N), J. in

delivering her judgment on December 24, 2007, referred to the comments of Lord Gifford at page 8:

> "However, Lord Gifford for the Appellants [Olint Corp Limited and David Smith] has argued that they have not breached the Securities Act (hereafter referred to as the SA) as their activities do not involve securities and there was therefore no basis for the issuance of the Cease and Desist Order. He emphasized that their activities were concerned with foreign currency trading and foreign currency is not a security as defined in Section 2 of the SA."

(d) Mr Smith in his affidavit filed in this matter denies that he is engaged in the business of foreign exchange trading and as such is not a witness of truth.

(e) Any disclosure by Mr Hylton that the Claimant is a "private members club trading in foreign exchange on behalf of its members", would already be in the public domain and cannot be considered to be confidential.

[36]On the other hand, the Claimant suggest that the confidential information given to Mr Hylton is directly related to the reasons given by the Defendant for closing the Claimant's accounts, allegedly, for lack of information about its business operations. The Claimant also argues that the Defendant has used the outcome of the Olint/FSC case as one of the reasons to close the accounts of the Claimant. The Claimant also alleges that Mr Hylton QC met with David Smith in December 2007, and was given confidential documents relating to the Claimant and its affiliates.

[37]From the affidavit evidence, this court accepts as a starting point that Michael Hylton QC was a part of all the major decisions relating to the Claimant's business activities. As a result, he had access to all confidential information at the FSC relating to the Claimant's business activities. On an examination of section 15 (1) and (4) of the **Financial Services Commission**

Act it can easily be concluded that any information received by Mr. Hylton QC, in his capacity as Chairman or Commissioner of the FSC is confidential information. He is bound by a statutory obligation of confidentiality and secrecy. That information can only be used for the purposes of the business of the FSC.

[38]There is no doubt from the evidence that Mr Hylton willingly participated in meetings with Mr Smith as Chairman of the FSC. I do not accept as Mr. Hylton QC suggests that these were mere courtesy calls. The meetings were, clearly, in relation to the ongoing dispute between the Claimant and the FSC in which the FSC claimed jurisdiction to regulate the Claimant as a "prescribed financial institution". To the extent that the contents of these conversations are not in the public domain, they are confidential. It is common ground that documents were seized by officers of the FSC during a raid on the premises of the Claimant. The contents of those documents were never made public and are clearly confidential under Section 15 of the Financial Services Commission Act. As Chairman and a Commissioner of the FSC Mr. Hylton QC had access to these documents and the contents would, in my view, be confidential by virtue of Section 15(4) of the Financial Services Commission Act.

[39]In my judgment, the contents of the discussions between Mr Hylton QC and David Smith and any documents passed to Mr Hylton QC, or acquired during a raid on the Claimant's premises are secret and confidential by virtue of the Act. This obligation of secrecy, in my view, remains even after Mr Hylton QC has demitted office as Chairman and Commissioner of the FSC.

[40]With regard to the claim that Mr Hylton QC divulged to the Defendant that the Claimant is a "private members club trading in foreign exchange on behalf of its members" I hold that it is in

the public domain and does not have the quality of confidence to be protected. Megarry in **Coco's case** made it clear that "something which is public property and public knowledge cannot per se provide any foundation for proceedings for breach of confidence".

[41]Lastly, the Claimant has provided the Court with information disclosed to Mr. Hylton QC in a secret affidavit to be read only by the court. The Claimant maintains that its contents are not in the public domain. Mr Hylton QC has said that except for details provided, the contents are the same as what is contained in the affidavit of David Smith filed in this application. The court will not assist any applicant if the confidential information is of a trivial character. In other words, the law does not shield information just on the basis that the applicant would rather not disclose it.

[42]Without disclosing the contents of the "secret affidavit" it is sufficient to say that it is not trivia. I hold that the matters contained in the affidavit were communicated in a professional and business setting with a common object in mind. Megarry J in **Coco's case** made it clear that where information is given in this context he would regard the receiver of the information as "carrying a heavy burden if he seeks to repel a contention that he was bound by an obligation of confidence". For these reasons, I hold that that Mr Hylton QC is bound by an obligation of confidence in respect to the matters contained in the "secret affidavit" to the extent that they are not in the public domain.

(a) Whether or not the confidential information known to Michael Hylton QC is relevant to the litigation currently before the court between the Claimant and the Defendant and if disclosed to the Defendant would adversely affect the interest of David Smith and the Claimant?

[43]The Claimant submits that there is a great danger (even though actual knowledge or use of such knowledge cannot be proved) that the confidential information disclosed to Michael

Hylton QC would be passed to the Defendant who is an adverse party in this case. The Claimant contends that this would present the Defendant with an unjust benefit.

[44]The Claimant also contends that it is sufficient to demonstrate that there is a real and not a fanciful risk of disclosure of confidential information though it is unnecessary to show that the risk is substantial. The mere perception or appearance of the risk of disclosure of confidential information is sufficient. The Claimant contends that although it is not possible to prove or disprove that these confidences have been disclosed or utilized by Mr Hylton QC in the preparation of the Defendant's case it is the sensible course to err on the side of being cautious.

[45]The Claimant argues that Mr. Hylton Q.C. is not in a position to give any assurance that issues regarding the Claimant which arose while he was a FSC Commissioner and Chairman will not be relevant to these proceedings, or that confidential information will not be used in preparing the Defendant's case. As the argument goes there is always a possibility that Mr Hylton QC could unconsciously disclose confidential information or that it will subliminally influence the preparation of the case for the Defendant. In these circumstances the attorney at law is expected to withdraw from such matters unless he or the firm can prove to the satisfaction of the court that adequate mechanisms are put in place to avoid the risk.

[46]The Claimant went on to deal with the matter of perception. The argument is that as Mr. Hylton QC is in receipt of confidential information from the Claimant, it creates the perception and appearance of injustice. In addition, the status, authority and influence of Mr Hylton QC as a former Solicitor General and Chairman of the FSC would create the perception of an unfair advantage to the Defendant. On this basis the Claimant has asked that this court restrain Mr

Hylton QC from acting, even in the face of a client that requires his services. Disqualification from acting for the Defendant is the clear solution to the problem.

[47]The issue in **Davies v Davies** (a case brought under the inherent supervisory jurisdiction of the court over its officers) was whether the issues in that case were relevant to the discussions the wife had with the solicitor. The Court of Appeal observed that:

> "The matter which was particularly outstanding at that stage was the financial ancillary relief which was claimed and which was disputed. It has to be said that in the ancillary relief proceedings both parties relied on allegations of what divorce practitioners refer to as "conduct", criticising the behaviour of the other party and submitting that it was a relevant matter to be taken into account when considering the financial assessments which were claimed."

[48] The Court of Appeal took the view that the conduct of the parties would be relevant to the ancillary relief proceedings, and made reference to the first instance judge's remark as to what had been told to Mr Tooth when he met with the wife/petitioner. The judge said that the petitioner explained to Mr Tooth: "the detail of the respondent's conduct and recounted the details of her own experience and conduct during the marriage".

[49]In ruling that Mr Tooth was disqualified from appearing for the respondent the court said:

> "The matter that has weighed with me particularly is that in 1991 this wife entered into a detailed discussion with Mr Tooth about her matrimonial situation, in which no doubt she complained of the respondent, but also no doubt put forward the weaknesses of her own position. Those are the very same matters that are now to be litigated, it would seem, in these proceedings. By way of example, the respondent now says that for the petitioner the marriage was but a device to advantage herself financially at his expense - a matter which must have been active in the minds of both parties in 1991, as indeed it had been on the very day of the marriage".

[50]The Claimant in this case has raised an ambitiously intricate argument supported by numerous assumptions that don't hold up under scrutiny. Applying Occam's razor, the

simplest answer to the Claimant's case is that it has failed to establish the relevance of the confidential information disclosed to or accessible to Mr Hylton QC to the issues in his case against the Defendant. This is what Lord Millet in **Prince Jefri Bolkiah** meant when he said on page 234 that the "possession of relevant confidential information" in the "same or connected matter" is what grounds the jurisdiction for the protection of confidential information. He also made it clear that the Claimant has the burden of proof, which I would suggest is on a balance of probabilities. He said "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".

[51]In summary, the issue in the Claimant's case against the Defendant is whether the Defendant should be prevented from closing the Claimant's accounts. The Claimant's case is inter alia that the Defendant abused its dominant position in threatening to close its accounts. On the other hand, the Defendant's case is based on an alleged breach of contract by the Claimant and a refusal to supply relevant information required by its Regulators. The case also involves issues dealing with the interpretation of the Fair Competition Act and the Banking Act, together with issues as to whether the Defendant acted in collusion with other banks in deciding to close the Claimant's accounts.

[52]I would agree that any finding of a breach of the Securities Act in the case of the Claimant versus the FSC is clearly relevant to the possible reasons that the Defendant may have to close the Claimant's accounts. However, from the affidavit evidence filed in court; and the judgment of McIntosh (N) J., that information is in the public domain and, therefore, not confidential. In addition, there is no evidence that there has been a breach of confidentiality by Mr Hylton QC in passing confidential information to the Defendant that is harmful to David Smith or the Claimant.

[53]The following definition of relevance appears in Cross on Evidence 4th Edition at page 16:

> "It is difficult to improve upon Stephens definition of relevance when he said that the word relevant means that 'any two facts to which it is applied are so related to each other that according to the common course of events either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other"'

[54]As far as the Claimant's argument that the involvement of Mr Hylton QC in the case creates an appearance of injustice, Lord Millet again in ***Prince Jefri Bolkiah*** provides an answer. He says at page 234 that "the court's intervention is founded not on the avoidance of any perception of possible impropriety but on the protection of confidential information".

[55]Skievesland v Geveran Trading Company Limited [2002] EWCA Civ 1567 was a case in which there was an application by Mr Skjevesland for a retrial of a bankruptcy petition presented against him by Geveran on the basis that Counsel for Geveran was acquainted with Mr Skjesveran's wife and her friends during a period that was the subject of examination in the bankruptcy petition. The United Kingdom Court of Appeal rejected the appeal on the basis of the issue of relevance of the information and whether the information was confidential. It should be borne in mind that the exercise of the jurisdiction to order an injunction in a case such as this interferes with the Defendant's right to counsel of its choice. Consequently, an attorney should not lightly be restrained from acting or asked to withdraw.

[56]The court said at paragraph 43:

> "A judge should not too readily accede to an application by a party to remove the advocate for the other party. It is obvious that such an objection can be used for purely tactical reasons and will inevitably cause inconvenience and delay in the proceedings. The court must take into account that the other party has chosen to be represented by the counsel in question."

[57]I do not accept that the Claimant in this application objected to Mr Hylton's involvement for tactical reasons. In my judgment the information disclosed to Mr Hylton in the affidavits filed by David Smith, both "secret" and in court, are irrelevant to the issues in the case before the court. The Claimant has not disclosed the nature of the information contained in the documents shown to or given to Mr Hylton QC nor have they indicated the nature and contents of the documents seized by the FSC. On that basis, I was unable to assess the relevance the confidential information contained in those documents to the issues in this case.

[58]It should be borne in mind that the exercise of the jurisdiction to disqualify Mr Hylton QC from acting for the Defendant, in this case, interferes with the Defendant's right to counsel of its choice. Consequently, an attorney should not without a proper basis be restrained from acting or asked to withdraw. Mandie J puts it well in **Grimwade's case** when he said that the "objective test to be applied...is whether a fair-minded reasonably informed member of the public would conclude that the proper administration of justice required that counsel be so prevented from acting, at all times giving due weight to the public interest that a litigant should not be deprived of his or her choice of counsel without good cause". Applying this to the facts of this case, I cannot say that from the information provided by the Claimant that there is a proper basis to exercise such an exceptional jurisdiction as preventing Mr Hylton QC from acting for the Defendant who has chosen him as their attorney.

[59]Having regard to my conclusions, it is unnecessary to deal with the other issues in this case. In summary then, the Claimant having not established on the evidence that confidential information received by Mr Hylton QC is relevant to the issues to be determined in this or any connected matter against the Defendant, its application must fail with cost to Mr Hylton QC to be taxed if not agreed.