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2016/38094

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

IN THE CHANCERY DIVISION

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BETWEEN:

ALFRED STREET PROPERTIES LTD

Plaintiff

and

DUNNES STORES (BANGOR) LTD

Defendant

_____

KEEGAN J

Introduction

[1] This case comes before the Court by way of Notice of Motion dated 26 April 2017 brought by the defendant to the main action seeking:

(1) An order pursuant to the inherent jurisdiction of the court requiring a firm of solicitors to cease acting on behalf of the plaintiff in the action herein on the grounds set out in the grounding affidavit herein and upon such terms as to this honourable court shall deem fit and just.

(2) Such further or other orders or directions as to the court may seem fit and just.

(3) An order providing for the costs of and incidental to this application.

I heard this application over the course of one day on the basis of substantial written and oral arguments. Mr Shaw QC and Mr Jonathon Dunlop BL appeared on behalf of the moving party, the defendant. Mr Orr QC and Mr Colmer BL appeared on behalf of the respondent/plaintiff. I am grateful to all counsel for their diligence in filing helpful written arguments and for their focused oral submissions.

[2] I begin by remarking that this is an unusual application and I note the representations made both in writing and orally that such an application is not

brought lightly before the Court. The application was supported by affidavit evidence filed on behalf of the moving party. Firstly, an affidavit of a solicitor instructed for the defendant was opened before the Court. This affidavit sets out the basis of the application which at paragraph 3 is encapsulated in the proposition that the solicitors for the plaintiff are unable to continue to act for the plaintiff as "they formerly acted for the defendant in High Court proceedings concerning the same lease and the same parties which concluded in 1998 and there is a clear conflict of interest." I should say that conflict of interest was wrongly asserted as all parties accepted given that this case really involves alleged breach of confidentiality and it was argued on that basis alone.

[3] The second ground averred in support of the application, was that the solicitors were acting for the defendant in separate litigation concerning another lease until 2015 when instructions were withdrawn. In the grounding affidavit reference is made to a chain of correspondence which began on 8 March 2017 between the two sets of solicitors. Suffice to say, without dilating upon it, that the defendant's solicitors raised the issue of breach of confidentiality and the plaintiff's solicitors rejected the argument that they should come off record. Much ink was spilt in relation to this issue and it is clear that the respective positions of the parties became entrenched.

Factual background

[4] In broad terms the subject matter of this action is in relation to a lease. The plaintiff is a landlord. The lease is dated 1 December 1983, between a property company of the one part and the defendant on the other part as lessee. The lease relates to premises known in situate at Unit 24, Connswater Shopping Centre in the townland of Ballyhackamore, parish of Holywood, Barony of Castlereagh Lower in the County and City of Belfast. The premises were demised to the lessee for the term of 150 years from 1 August 1983 subject to an annual rent and the covenanted and conditions contained therein. The plaintiff refers to the lease for the full terms and effect thereof and the plaintiff is the successor in title to the lessor named in the lease.

[5] The Writ of Summons sets out that the lease contains the following salient points at Clause 13A.

> "To keep the demised premises opened … during normal opening hours … and to keep the shop front and the fittings, fixtures and equipment of the demised premises in manner in all respects in keeping with the needs of a good class shopping centre … and to keep the shop window of the demised premises properly illuminated at all times when the shopping centre is open to the public …".

[6] The lease contained a forfeiture clause and it is stated in the Writ of Summons that since on or about 23 February 2015, the premises have been closed for business and the defendant is therefore in breach of covenant. It is pleaded that as a notice was given by 15 March 2016 the defendant has failed to remedy the breach. Hence the action is for forfeiture and the plaintiff claims possession of the premises, mesne profits, damages for breach of contract, and further relief in relation to costs and such like.

[7] The action is not yet listed for hearing. After the Writ of Summons was served a Memorandum of Appearance was served dated 16 May 2016. The defence is dated 9 September 2016. The Particulars of Defence at paragraph 15 are as follows:

> "(a) Clause 13A of the lease is void, contrary to section 2 of the Competition Act 1998 and the notice purported to be pursuant to the Conveyancing Act 1881 is invalid and/or of no effect.
>
> (b) Further or in the alternative, the plaintiff has been guilty of delay/laches in applying for forfeiture.
>
> (c) Further or in the alternative, the defendant paid to Conn water Property Ltd, as landlord of the premises, a premium of £620,000 for the demise of the term of 150 years.
>
> (d) Further or in the alternative, the plaintiff is in breach of the provisions of the lease and/or has derogated from grant by carrying out development/redevelopment of the Connswater Shopping Centre and/or so operating the Centre to the laws and harm to and prejudice of the defendant."

[8] A Notice of Further and Better Particulars brought by the defendant is dated 9 September 2016. The reply to defence is dated 20 September 2016. The plaintiff's replies are dated 20 September 2016. The plaintiff issued a Notice for Particulars dated 20 September 2016. The defendant's replies are dated 5 October 2016. In relation to the replies reference has been made to the Notice dated 20 September 2016 issued by the plaintiff and in particular question 10 which reads:

> "With reference to paragraph 8 of the Defence, specified precisely the works of development/redevelopment alleged to have been in derogation of grant setting out the dates upon which such works began to cause alleged loss."

The reply to this dated 5 October 2016 and states that "This is matter of evidence and/or expert evidence in due course".

[9] I note that directions were given for service of any expert reports by 17 March 2017. That appears to have been extended to 6 April 2017. Discovery lists have been exchanged. Proceedings remain before the Chancery Division. I was informed that the filing of a Competition Report will not take place as that part of the case is now not being pursued.

[10] The grounding affidavit states that as proceedings progressed and as the defendant completed a detailed review of files in preparation of the list of documents, it became apparent that the issues on which the solicitors who advised in the past would be a key component in this litigation. It is important to note that in the previous litigation which began in the 1990s, a written judgment was given by Campbell J which sets out the issues at play.

[11] In that judgment Campbell J states at the outset that the central factual issue is the extent, if any, to which the value of Dunnes Stores (Bangor) Ltd long-term lease-hold interest in the shopping centre has been diminished by the redevelopment of the centre. Notwithstanding this core issue which the court determined I will summarise some of the other features of the ruling as follows.

[12] The judgment also deals in detail with the history of the lease, the original form of the shopping centre, the reconstruction of the centre. Dunnes' claim is then set out at page 4. That states that according to Dunnes the reconstruction was carried out despite objection from them and as a result their use and enjoyment of their store and premises has been substantially interfered with and disturbed. They sought a mandatory injunction calling on the owners to create an entrance to the shopping centre in a position as near as is practically possible to that which existed before the reconstruction, a pedestrian access from Bloomfield Avenue as close as possible to that which existed before and the creation of car parking spaces as near as possible to those which previously existed. Dunnes asked for the re-opening of a vehicular entrance for customers from Bloomfield Avenue and the relocation of the service area and service access. In addition or as an alternative, Dunnes sought damages for injury done to their interest in the property. There was also a claim for an account and inquiry as to the enhanced profits on the basis that if the Court refused injunctive relief and damages for diminution in the value of the lease-hold interest of Dunnes, it would leave the landlord with profits which have been made at Dunnes' expense.

[13] The next section of the judgment deals with how the news about reconstruction was given and Dunnes' reaction. Then the judge deals in detail with the valuation evidence and he recites his view of the evidence from Mr Kenneth Crothers FRICS who gave expert evidence on behalf Dunnes. He also heard from an expert for the other party, namely Mr William McComb ARICS.

[14] It is clear that this expert evidence took up a substantial part of the case given the exposition of it by the judge in his ruling. At page 29 of his judgment the judge refers to the legal submissions and he refers to the submissions of counsel that Dunnes were not entitled to relief under any of the four heads of claim which they have advanced. The judge states that "…I have decided that Dunnes have not suffered any diminution in the value of the leasehold interests as set out in the submissions of counsel". He then refers to a breach of an expressed covenant for quiet enjoyment, derogation by the landlord from his grant, nuisance and express covenant. In the concluding section of the judgment the judge says:

> "… for Dunnes to succeed in a claim that the landlord has derogated from his grant, would depend upon the extent to which it could be said that the premises were materially less fit. In the absence of any finding that the premises were proved to be any less fit, I do not find it possible to make any further comment on this issue."

[15] He further concludes:

> "… for the reasons already given, the claim by Dunnes, based as it is on a diminution in the value of their leasehold interest, must fail."

This is a substantial judgment which recites the evidence and provides a determination of the core issue in that case which was clearly the diminution in value.

Details of the objection

[16] If I return to the substance of the objection, the affidavit filed on behalf of the defendant sets out the substantive case alleged against the solicitors at paragraph 12. This covers the headlines points in detail which I will not repeat. Suffice to say that the argument is comprehensively made that because of the previous litigation the solicitor is in possession of relevant confidential information. Various points are made about how the information could pass within the firm. Reference is made to the fact that derogation from grant is common to the past and current Connswater litigation. It is averred that the Abbey Centre litigation is relevant. Finally, the argument is made that no adequate assurances have been given to militate against the risk of disclosure.

[17] In addition, an affidavit was filed by a solicitor representative of the defendant client and that affidavit avers to the following in response to the affidavit of the plaintiff, at paragraph 5:

> "The defendant is conscious that this is a serious complaint. We do not take this action lightly and are

> hesitant and indeed reluctant to do so, however we strongly believe that what the solicitor has done is inappropriate and their actions have left us with no choice but to bring this application. At the time of accepting the instructions to act against Dunnes in this case, it's a question of the solicitors assessing their obligations against their own interest and they elected to risk breaching their duty to us, which they have done, in order to protect their interest."

[18] Paragraph 8 of this affidavit deals in particular with issues of delay and in broad terms the averment is that the reason that the application was not brought at the outset was:

> "(i) It was not until we had conducted more thorough investigations into the matter, including the preparation of discovery, that the full extent of the conflict became clear.
>
> (ii) As the solicitor rightly notes we raised those concerns at an early stage in April or May 2015 and have made the arguments since. However, the case had not proceeded in court at that stage and it appears that there was a hope that the solicitors would come off record of their own volition. "

This affidavit also avers to the fact that no satisfactory assurances were or have been given about the potential breach of confidentiality in the circumstances of this case.

The defence to this application

[19] The plaintiff relied upon the affidavit of the solicitor who is currently conducting the case on behalf of the plaintiff. In this affidavit the solicitor begins by setting out the procedural context. At paragraph 8 he states "… clearly, therefore, the defendant has been aware of the concerns it now raises for around 2 years". The affidavit goes on to refer to the application being in the context of default by the defendant within proceedings, in particular in relation to the filing of an expert report. The solicitor avers that there is a tactical motivation to the application. Then under the heading "relevant confidential information" the solicitor avers that even at the stage of having written lengthy correspondence and issued this application, the defendant still has not identified any fact or category of facts which it says are in the firm's possession. The solicitor under the heading of "possession of documents" states at paragraph 30:

> "… the only document from the 1990s proceedings, specifically mentioned by the defendant, is the judgment.

> The solicitor implies that because I have referred to the judgment I must have seen it and if I've seen the judgment it must be because the solicitors have papers from 1990s litigation."

[20] The solicitor states that the files have been destroyed from the 1990s litigation. He also states at paragraph 39, that the paper file was destroyed on a date unknown, no soft copy documents were transferred onto the current case management system which was installed in the early 2000s and that the solicitor previously acting in the proceedings has filed an affidavit about his involvement. The solicitor also goes on to refer to the related litigation in relation to the Abbey Centre and in summary says that there is no credible suggestion that the firm is subject to a conflict of interest and no reason why the firm should be prevented from acting for the plaintiff in the matter.

[21] It is important to note that the solicitor who acted throughout the 1990 litigation has filed an affidavit in relation to his involvement in the proceedings. This affidavit is important because it sets out his knowledge and in particular at paragraphs 3 and 4 formal averments are made as to the destruction of files after 7 years and the fact that no material was placed onto the case management system as this only came into operation in 2000.

[22] This affidavit goes on to explain his involvement with the case and explains that whilst he was the solicitor handling the file, the solicitor who received instructions from Dunnes was a commercial property litigation lawyer at Cameron McKenna, Solicitors in London.

Correspondence during 2014/2015

[23] The other relevant information is the up-to-date correspondence from the solicitor's firm to Dunnes in relation to separate litigation involving the Abbey Centre. The chain of correspondence I have been referred to begins on 14 November 2014 and it emanates from another solicitor within the firm. It follows an email of 5 November 2014 from Dunnes Stores and it refers to the "attached draft judgment found on file relating to the Connswater proceedings." The email from Dunnes says, "I would not think it would have changed significantly but had noted there was a mistake on page 32, second last paragraph, regarding Kirk Reynolds QC who acted for us, not the landlord." The response says "Thank you for your email of yesterday's date with enclosures which I am reviewing". Thereafter there is a substantial piece of advice sent by letter of 14 November 2014. This deals with the issue of the Abbey Centre lease. However, reference is also made to the Connswater case within the letter in the context of the advice being given regarding the Abbey Centre lease. There is reference to the grounds relied on the in the Connswater case such as breach of the express covenant for quiet enjoyment, derogation from grant and nuisance and in particular reference is made by way of an explanation of the judgment of Campbell J.

[24] There follows a further letter of 19 November 2014 and this is from the previous solicitor who dealt with the case and it is entitled "Advice on type of proceedings and development of litigation strategy".

[25] The final letter which I have been referred to is that dated 27 April 2015 and that is correspondence following the previous advice about the Abbey Centre. This correspondence deals with issues of conflict of instructions in the context of a retainer in place at that stage in relation to Abbey Centre. The letter includes the following statements:

> "We are also confident that adequate protections can be put in place to ensure that no information (confidential, relevant or otherwise) passes from the Abbey Centre team to the Connswater team.
>
> "I assure that for so long as we are acting for Dunnes in relation to the Abbey Centre we will of course continue to act to safeguard Dunnes' interests. I can assure you that myself and the solicitor will not discuss Abbey Centre with anyone involved in the Connswater matter and that the solicitor will inform you and I immediately if he feels that any conflict of interest or any issue of confidentiality does arise."

[26] The letter goes on to indicate that Dunnes can form its own views as to whether or not it is comfortable with the position whatever the position is going forward. The estimate is then sent out. The letter finishes with the following:

> "I await your instructions on whether you wish to continue to instruct us in the Abbey Centre case, although I do sincerely hope that we can do so and we would be happy to discuss with you any measures we can put in place to address any concerns. If Dunnes decides to instruct replacement NI solicitors in the Abbey Centre case, then we will of course promptly co-operate in the handing over of the papers."

Following from this, Dunnes did end the retainer in the Abbey Centre case.

Legal context

[27] The case of Longstaff and another v Birtles and others 2002 1 WLR 470 places this type of issue in the context of the fiduciary duty of a solicitor post retainer. That case establishes that the duty might endure based on the relationship of trust and confidence.

[28] The seminal case in this area is that of Prince Jefri Bolkiah v KPMG (A firm) [1999] 2AC 222. In this case Lord Millett deals with the issue of confidentiality between professional advisers and clients. The case deals with a set of accountants and it is important to note the factual backdrop whereby very many people in the firm were dealing with the affairs of the claimant over a period of time. Nonetheless, Lord Millett sets out some important points of principle which have been consistently applied. I should say that counsel in this case did not take any issue with the legal principles but rather submitted that it was the application of the principles which was at issue in this case. In particular in Lord Millett's ruling the issue of the law is set out from pages 233 to 238. I do not intend to recite all of that in extenso however it is important to note a number of sections in the case which have been referred to me.

[29] At page 235, Lord Millett states:

> "Where the court's intervention is sought by a former client, however, the position is entirely different. The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.
>
> Accordingly, 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. I do not think that it is necessary to introduce any presumptions, rebuttable or otherwise, in relation to these two matters. But given the basis on which the jurisdiction is exercised, there is no cause to impute or attribute the knowledge of one partner to his fellow partners. 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. In this respect also we ought not in my opinion to follow the jurisprudence of the United States."

[30] Further, in relation to the issue of the degree of risk if there is confidential information in possession of a party, Lord Millett says at page 236 of his judgment:

> "Many different tests have been proposed in the authorities. These include the avoidance of 'an appreciable risk' or 'an acceptable risk'. I regard such expressions as unhelpful: the former because it is ambiguous, the latter because it is uninformative. I prefer simply to say that the court should intervene unless it is satisfied that there is no risk of disclosure. It goes without saying that the risk must be a real one, and not merely fanciful or theoretical. But it need not be substantial. This is in effect the test formulated by Lightman J in *Re a Firm of Solicitors* [1997] Ch. 1, at p. 9 (possibly derived from the judgment of Drummond J in *Carindale Country Club Estate Pty. Ltd. v. Astill* (1993) 115 ALR 112) and adopted by Pumfrey J in the present case."

[31] Other authorities have been put before me dealing with the application of the Bolkiah case. It is important to note that all of these decisions are rooted in their own facts. However, I do take some considerable assistance from the dicta of Clarke LJ in Koch Shipping Inc v Richards Butler [2003] PNLR 11. At paragraph 24 of that case Clarke LJ sets out 8 principles derived from the Bolkiah case as follows:

> "(1) The court's jurisdiction to intervene is founded on the right of the former client to the protection of his confidential information (*per* Lord Millett at p.234).
>
> (2) The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence (*per* Lord Millett at p.235).
>
> (3) The duty to preserve confidentiality is unqualified. It is a duty to keep the information confidential, not merely to take all reasonable steps to do so (*per* Lord Millett at p.235).
>
> (4) The former client cannot be protected completely from accidental or inadvertent disclosure, but he is entitled to prevent his former solicitor from exposing him

to any avoidable risk. This includes the increased risk of the use of the information to his prejudice arising from the acceptance of instructions to act for another client with an adverse interest in a matter to which the information may be relevant (*per* Lord Millett at pp.235-236).

(5) The former client must establish that the defendant solicitors possess confidential information which is or might be relevant to the matter and to the disclosure of which he has not consented (*per* Lord Millett at pp.234-235).

(6) The burden then passes to the defendant solicitors to show that there is no risk of disclosure. The court should intervene unless it is satisfied that there is no risk of disclosure. The risk must be a real one, and not merely fanciful or theoretical, but it need not be substantial (*per* Lord Millett at p.237).

(7) It is wrong in principle to conduct a balancing exercise. If the former client establishes the facts in (5) above, the former client is entitled to an injunction unless the defendant solicitors show that there is no risk of disclosure.

(8) In considering whether the solicitors have shown that there is no risk of disclosure, the starting point must be that, unless special measures are taken, information moves within a firm (*per* Lord Millett at p.237). However, that is only the starting point. The Prince Jefri case does not establish a rule of law that special measures have to be taken to prevent the information passing within a firm: see also *Young v Robson Rhodes [1999] 3 All E.R. 524, per Laddie J. at p.538*. On the other hand, the courts should restrain the solicitors from acting unless satisfied on the basis of clear and convincing evidence that all effective measures have been taken to ensure that no disclosure will occur (*per* Lord Millett at pp.237–238, where he adapted the test identified by Sopinka J in *MacDonald Estate v Martin (1991) 77 D.L.R. (4th) 249 at p.269).* This is a heavy burden (*per* Lord Millett at p.239)."

[32] Clarke LJ does also reflect at paragraph 25 of his judgment as follows:

> "It is to my mind important to emphasise that each case turns on its own facts. For example, this is a very different case on the facts from the Prince Jefri case." …

The facts of the Prince Jefri case were very different. Clarke LJ sets out a flavour of the differences gathered from the two passages from the speech of Lord Millett at pages 230 to 231. Also he says at paragraph 28 "Clearly the facts of different cases can be almost infinitely variable".

[33] I have garnered some assistance from the dicta of Mummery LJ in the case of Gus Consulting GMBH v Leboeuf Lamb Greene & Macrea [2006] PLNR 32 at paragraph 29 of the discussion and conclusion Mummery LJ says as follows:

> "Although the legal principles governing client confidentiality set, for good reason, strict standards to be observed by lawyers towards their ex-clients, those principles and standards are not always easy to apply in practice. A "bright line" rule that a law firm can never act against a former client would be easier to apply, produce more predictable outcomes and give the former client comprehensive protection against the risk of unwitting disclosure or misuse of his confidential information. The confidentiality principles do not, however, go as wide as a blanket rule of that kind."

[34] At paragraph 31 the judge goes on to say:

> "Each case turns on a careful judicial analysis and assessment of the quality of the evidence about the effectiveness of the precautions taken to protect the confidentiality of the former client's information from the risk of disclosure and misuse. If there is clear and convincing evidence that the precautions taken will provide effective protection, there will be no real risk to justify the grant of an injunction."

[35] Finally, I gratefully adopt the characterisation of Neuberger J (as he then was) in Halewood International v Addleshaw Booth & Co 2000 Lloyds Rep PN 298 where he refers to the first stage of the analysis as the requirements stage in discerning whether there is confidential information of relevance to the case in the possession of the solicitor and the second stage as the exception when the burden shifts to the solicitor to prove that there is no risk of disclosure.

[36] I bear in mind that the test is rooted in the risk that confidential information may be disclosed. It is not a case of assuaging a litigant's perception of impropriety. The client cannot be unduly sensitive about matters. However, the client can expect confidentiality to ensure the proper administration of justice. That analysis must be based on an objective assessment of the facts. The court cannot base a decision upon issues such as disloyalty, uneasiness or discomfort. The court should not engage in a balancing of interests.

Arguments made by the parties

[37] Mr Shaw QC on behalf of the moving party the defendant to the action made the following submissions:

(i) Firstly he set out the decision of Bolkiah and helpfully pointed out that there was no substantial disagreement between the two parties in relation to the applicable principles. He also referred to a number of other cases in particular Marks and Spencers Group plc v Freshfields Bruckhaus Deringer [2005] PNLR 4 where Pill LJ stated at page 237(a):

> "I would accept that there must be a degree of relationship between the two transactions, but I am quite unable to accept the submission that the language used by Lord Millett in Bolkiah and the comparative strictness, with respect, with which he has stated the principles in this area of law it is confined to same transaction cases."

(ii) Mr Shaw also relied on Hilton v Parker, Booth and Eastwood (a firm) [2005] UKHL 8 which he said reviewed the law on confidentiality on solicitors and the predicament of irreconcilable duties.

(iii) Mr Shaw stressed the secondary issue which flows from the Bolkiah staged tests namely that if there is a risk identified there is a question as to how it can be managed and he made a number of points in his skeleton argument at paragraph 23 in relation to measures such as Chinese walls, physical separation, undertakings, professional integrity, lack of knowledge/access, small numbers with access.

(iv) Mr Shaw accepted that each case turns on its own facts and that the court must conduct an objective assessment of those facts.

(v) Mr Shaw submitted that the firm is in possession of information that is confidential to Dunnes and this information is or may be relevant to the current proceedings in which the interest of Alfred is plainly adverse to that of Dunnes as the former client of the firm. Mr Shaw submitted that the documentation does not have to be identified by way of inventory but he accepted that there has to be some explanation of it in generic terms.

(vi) The secondary argument made by Mr Shaw was that there were no safeguards offered by the firm and as such this is a flaw in the argument made by the plaintiff if the first two parts of his argument succeed as to the requirements.

[38] Mr Orr QC on behalf of the plaintiff made the following points which I summarise:

(i) He made the case that this application was made at an inexplicably and unconscionably late stage in the proceedings. He argued that it was essentially a tactical argument when the defendant's back was against the wall in relation to the late filing of an expert report. He also said that proceedings are well advanced and so the timing of the application is significant. Mr Orr argued that some of the defendant's actions to date may amount to litigation misconduct.

(ii) Mr Orr essentially said that the problem in this case is that the defendant applicant cannot in any sense identify what the relevant material may be. Hence he argues that the first stage of the Bolkiah test is not met. He says that there is no explanation of what the solicitor is in possession of which is confidential to him and secondly he says there is no explanation of what is relevant.

(iii) Mr Orr referred me to a number of cases where he said that the time issue was relevant in that no case had looked at previous involvement which was over approximately 9 years before and that as this was a case where the previous litigation was 20 years old the court should be very cautious about imposing an ongoing duty of confidentiality on the solicitors.

(iv) Mr Orr did accept that the 1990 proceedings comprised a claim based on derogation from grant. However he did point out that the judgment of Campbell J deals with diminution in value. Mr Orr made use of the pleadings to say that the defendant has purported to raise a point about derogation from grant in a wholly uninformative manner. He pointed out that particulars of this have not been given.

(v) Mr Orr also made the point that the competition act aspect of the case has been abandoned and so I should consider the efficacy of the pleadings in this matter.

(vi) Mr Orr submitted that the defendant could raise certain matters again which had been litigated already in the previous proceedings. He argued that the remaining defences related to breach of covenants in a lease for which the limitation period is 12 years. Accordingly, he said that the works complained of and any information imparted during the period 1995 to 1998 cannot

conceivably be relevant to the instant proceedings (commenced some 18 years after the end of that period).

(vii) In the alternative and very much as a secondary submission Mr Orr said that if the court was minded to consider that there was confidential information in possession of his client relevant to the current proceedings that the affidavit of the main solicitor in the firm effectively gave what was the most and only effective undertaking that could be given namely that there would be no correspondence or communication between the two solicitors involved within the firm. He said that it would not be necessary to define any further undertakings as this was sufficient to meet the justice of this case.

Consideration

[39] The court is being asked to make an injunction against a firm of solicitors. There are two core principles at play namely a party's right to choose a solicitor and a party's right to expect confidentiality from a solicitor. I agree with Mummery LJ that a bright line rule that a law firm can never act against a former client would be easier to apply, produce more predictable outcomes and give the former client comprehensive protection against the risk of unwitting disclosure or misuse of his confidential information. However, there is no principle in our law which provides a blanket rule of that kind. This type of case is not simply about loyalty or the choice of acting for one client over another. This type of case involves an assessment of the entitlement to act against a former client and that depends on the application of legal tests.

[40] There is established case law in this area which has been opened to me and which I have recited in this judgment and that must be applied to reach a result on the particular facts of this case. Before I turn to the law I do wish to comment upon the context of this case. This application arises within the sphere of commercial litigation. It is important to note that there is no issue raised regarding the integrity of the solicitors involved. I note that the solicitors consulted their professional body. It is also crucial that clients in Northern Ireland have the benefit of experienced solicitors and counsel in this area who have an expertise and work to the highest standards of practice. This is a small jurisdiction and the reality is that there will be a crossover of clients between solicitors and barristers. I venture that the Chancery Division has worked along this line for many years as have other divisions.

[41] It is also important to note that this is not a conflict case notwithstanding the references to that concept in both the correspondence and the affidavits. This case comes down to issues of confidentiality. I then turn to application of the legal principles. Firstly, it is important to note that the confidential material must be in the possession of the party who is objected to. I must say that it was difficult to discern exactly what the relevant confidential information was as the case was framed in the most general of terms. I pressed Mr Shaw on this point during the hearing and particularly during his reply to the submissions made by Mr Orr. In

answer he referred in broad terms to 'the 1990's litigation' and the 'Abbey Centre lease' case. I will now deal with these in turn.

[42] There was a case about Connswater in the 1990s. It is obvious that at one stage another solicitor in the firm received confidential information about the Connswater case. Exactly what that was is not defined. However, it must have been instructions upon which to file papers and present a case. That case was then heard in a public court. The materials utilised during court proceedings which are of public record lose the characteristic of confidentiality. The judgment of Campbell J is also a public record.

[43] I then turn to the here and now. The confidential information at issue must be in the possession of the solicitor. There was no dispute that the actual papers from the 1990s litigation were destroyed and I accept the argument that there is no electronic record. I accept that an inventory is not required but counsel agreed that there must be some identification of the generic information at issue.

[44] In relation to the 1990's litigation I am clear that the relevant confidential information is not of a documentary nature and so the case really comes down to whether confidential information is embedded in a solicitor's mind. The solicitor involved has averred that he retains no confidential information. That is fine as regards paperwork but not everything communicated to a solicitor will take that form. There may have been information kept back for tactical purposes or simply not used. Mr Shaw asserted that the solicitor would essentially have a memory bank and this could lead to an inadvertent breach within the office. Mr Shaw said that the issue was particularly potent as the 1990's case and the current case both involved derogation from grant. He said that the issue had not been adjudicated upon previously given the way the Campbell J judgment was framed. That is really the height of the case made and no particularity was given to the type of information involved save the reference to derogation from grant. I am bound to say that this articulation of the case was rather vague.

[45] There was understandably some debate in the hearing about the issue of time lapse between the two sets of proceedings. Mr Orr referred me to numerous cases where time was referred to but no case in which a gap of some 20 years was prevalent. I repeat that the cases are all fact specific and there is no absolute rule but it does seem to me that the longer time passes between litigation the more difficult it is to sustain an argument that there is information in the possession of a party which can be objected to. It follows as a matter of logic that a case adjudicated on 20 years ago and begun over 20 years ago is not going to be to the forefront of anyone's memory. Mr Shaw says that the danger is that the memory may be triggered and that that may be pertinent to the person who conducted the litigation but may also flow to other persons within the firm.

[46] I have not heard evidence however I have read the solicitor's affidavit and I have heard submissions on the point. The fact of the matter is that the relevant case

which he conducted concluded 20 years ago. I must take my own view on this with context in mind. I apply some common sense to this issue. I cannot ignore the significant time lapse in this case which in my view dilutes the strength of the point. The threshold may be low but there is still some threshold which must go beyond speculation or fancy. Considering all of the above, I do not consider that the objector has established a case on the basis of this argument.

[47] There is other information in this case which Mr Shaw relies on which is the more up-to-date information regarding the other lease in relation to Abbey Centre. It is correct that more up-to-date advice was given in 2014/2015 by different solicitors within the firm regarding that lease. The question is whether that is confidential and of relevance to the current set of facts.

[48] I can infer that confidential information has passed regarding the Abbey Centre lease. That must also follow as a matter of logic given the retainer in that case. However, that is a different case about a different shopping centre about a different lease. It was not argued that documents about that case were in the possession of the solicitor and of relevance to the current case. I do note that the advice given does refer to the Connswater case. However, that is by way of general comment about the legal principles at play drawing on the previous judgment. In my view it is not obvious that this correspondence in context represents confidential information of relevance to the current Connswater case which may be disclosed against the interests of the former client.

[49] The correspondence also deals with a conflict situation which ultimately was resolved as instructions were withdrawn. In relation to the Abbey Centre lease, I consider that there is a flaw in an argument which conflates the issue of confidential information with advice on legal principles. The references to Connswater emanate from the previous judicial ruling and are relevant as far as advice is given on the derogation point but in my view this is not confidential information of relevance.

[50] I do accept Mr Orr's argument about the lack of particularity in the pleadings. However, I do not consider it necessary to make any findings about the actual defence or the limitation point which has been raised. That would take me into the substance of the case and in any event I have decided against the objector on a more fundamental basis.

[51] My overall conclusion is that there is no relevant confidential information of a tangible nature or on an inferred basis that is discernible on a factual analysis of this case. The case made in relation to the 1990's litigation does not convince me even applying a low threshold. I do not consider that the objector has made out a valid case on the basis of the Abbey Centre correspondence either. As such I cannot find that the requirements needed to found a case are made out.

[52] I also see the force in Mr Orr's arguments as to delay in bringing the application and what he describes as the tactical element of this case. The timing of the application is a striking feature. It does seem highly coincidental that the application was brought just after pressure was applied in relation to submission of an expert report and in the context of other defaults in the litigation process. Also the issue was known for some years and yet the summons was only initiated after proceedings were well advanced. I accept the point that the list of documents filed does not highlight any prejudicial material. I simply cannot accept the affidavit filed in relation to delay which emanates from someone who is experienced in this type of litigation. There has been nothing put to me to substantiate the point that the discovery process highlighted the issue. As such I am driven to the conclusion that this application is tactical in nature.

[53] I did hear submissions in the alternative on the exception point and so I will also deal with it for the sake of completeness. The burden is upon the objected to party to establish that there is no risk that the confidential material would be disclosed. That assessment has to be conducted within the factual context of any case. I bear in mind the dicta of Clarke LJ in relation to this matter. The starting point must be that, unless special measures are taken, information moves within a firm. However, that is only the starting point and there is no rule of law in relation to this. I bear in mind the very different circumstances of the Bolkiah case. On the other hand the court should restrain solicitors unless satisfied on the basis of clear and convincing evidence that all effective measures have been taken to ensure that no disclosure will occur.

[54] I have read the affidavit of the solicitor who has carriage of the case, who was not involved in previous litigation, who has only been in the firm for the past 10 years and who has effectively through his affidavit given an undertaking that there will be no crossover between him and the other solicitors who have dealt with this client previously. I have also read the affidavit of the previous solicitor which as Mr Orr says is effectively an undertaking in relation to this matter.

[55] I had canvassed at trial whether the recent correspondence established a tacit acceptance that there is confidential material of relevance in the possession of the solicitor. I have reflected on this and I consider that conclusion is a step too far. The context of the correspondence was a potential conflict arising when the firm held instructions in the Abbey Centre case. The solicitor wanted to assuage any fears arising from that. The correspondence also refers to measures that could be taken in that context.

[56] In any event it seems to me that these assurances coupled with the solicitor's affidavits would be sufficient to meet any risk if the exception stage were reached. So even if the requirements had been met I consider that the exception can be made out in this case. The only point I make is one of form. In my view it is better practice that undertakings are confirmed in a letter or a proper legal document which forms

part of the current case papers. This avoids any doubt in relation to the parameters of the representation.

[57] I should also say that if I had found that there was confidential information of relevance and a risk of disclosure sufficient to found an injunction I can see no reason why the application should not have been brought at the outset of proceedings. Given the acquiescence in the situation throughout the important pleading stages of this case and before the court reviews, it would follow that on any successful application the objector would have difficulty resisting a liability for the costs bill from date of proceedings to date of application.

Conclusion

[58] Accordingly, I refuse the application. I will hear the parties as to costs.