CA on appeal from Commercial Court (HHJ Mackie QC) before Mummery LJ. Scott Baker LJ; Brooke LJ. 26th May 2006.

Lord Justice Mummery :

Introduction

1. This is an appeal from an order dated 21 October 2005 made by HHJ Mackie QC, sitting as a deputy High Court Judge in the Commercial Court. He dismissed an application by Gus Consulting GmbH (previously known as CAIB InvestmentBank AG and referred to as "CAIB" by the parties and in this judgment) under section 44(2)(e) of the Arbitration Act 1996 and/or the inherent jurisdiction of the court for an order restraining LeBoeuf, Lamb, Greene & MacRae (LLGM), an American law firm with offices in London (as well as in New York and Moscow), from acting for, advising or otherwise assisting DCL-KF Corporation (DCL) in relation to the pending arbitration proceedings brought by DCL against CAIB and others in the London Court of International Arbitration (LCIA). The arbitration hearing is due to start at the beginning of October 2006.

2. The arbitration is about share investments in a Russian company (Gazprom) in 1997. The claims arise out of the misappropriation of shares. Fraud and dishonesty are alleged against CAIB. Under Russian law direct foreign investment in Gazprom is not permitted. The transactions and structures through which DCL made their investment in Gazprom were designed to meet this requirement. In the arbitration DCL claim that CAIB are the true principals in the contractual arrangements through which DCL invested in Gazprom, and that the transactions into which DCL entered were shams and were an abuse of the corporate veil. In relation to the "corporate veil" issue DCL seek wide disclosure in the arbitration.

3. The application for an injunction against LLGM was made on the ground that the firm had previously advised or acted for CAIB and related entities in respect of their business in the Russian Federation between 1996 and 1999. There was a series of transactions, which have been put in issue to some extent in the arbitration. Advice was given on such matters as the use of powers of attorney, guarantees and the formation of subsidiaries.

4. The claim is that LLGM had acquired from CAIB client confidential information, which was relevant to the Russian operations of CAIB and to issues in the pending arbitration. It is alleged that LLGM have increased the risk that that confidentiality will be unwittingly breached, either through accidental oral disclosure or misuse of the information, by having accepted instructions to act for, and by continuing to act for, DCL against CAIB in the arbitration. CAIB submit that the matters stated in the unchallenged evidence of LLGM and the undertakings offered by LLGM to the court are not sufficient to eliminate the risk. They do not provide CAIB, as former clients, with the degree of protection to which they are entitled for confidential information imparted by CAIB while they were clients of LLGM. Nothing less than the injunction sought will do.

5. The judge held that, having regard to all the circumstances of the case, including detailed undertakings offered to the court by LLGM, there was no "real risk" of disclosure or misuse of the confidential information and that there was no need to grant an injunction.

6. Permission to appeal was refused by the judge, but granted by this court on a renewed application on 20 January 2006.

Confidential information

7. The first question addressed by the judge was whether CAIB had established that LLGM possessed confidential information, which is, or might be, relevant to the arbitration issues. On that point the judge held that CAIB had "clearly shown that [LLGM] have confidential material at the heart of the corporate veil claims.." (paragraph 29). LLGM have not cross appealed against that finding.

Risk of disclosure and misuse of information

8. The risk of disclosure and misuse arises and has been increased because, although DCL were represented in the arbitration by another law firm, Debevoise & Plimpton, when the arbitration process began in May 2002, six members of that firm, who had the conduct of DCL's claim in the arbitration, left in July 2005. They migrated to the London offices of LLGM, a firm with 20 partners and 47 lawyers.

9. Two of the arbitration team, Mr Arthur Marriott QC and Ms Ruff, became partners in LLGM. No criticism attaches personally to them or to any of the other migrating lawyers. They had taken care to seek to identify in advance whether or not there was any risk of a conflict of interest. There was, however, a failure in the LLGM conflict system with respect to former clients of the firm. As mentioned earlier, LLGM had advised CAIB in relation to transactions in Russian investments during the late 1990s, with which period issues in the arbitration are also concerned, one of them being use of the corporate veil. When notified of the change, CAIB objected to LLGM acting for or advising DCL.

10. The second question addressed by the judge was whether LLGM had discharged the "heavy burden" (see Lord Millett in ***Bolkiah v. KPMG*** [1999] 2 AC 222 at 237H) of showing that there was no real risk of disclosure and misuse of confidential information.

11. On that point the judge was satisfied by the evidence and by the undertakings offered to the court by LLGM that there was no real risk to CAIB. In refusing the injunction sought by CAIB to prevent LLGM from acting or advising DCL in the arbitration, the judge identified a number of key features.

12. First, measures had been taken by LLGM to deal with the risk of disclosure and misuse of confidential information. On 5 August 2005 LLGM had erected an "ethical wall" (Chinese wall) preventing Mr Marriott and members of his arbitration team from having access to any relevant CAIB files in hard copy form or held electronically. In

September 2005 the ethical wall was extended to preventing all employees from having access to the files. (LLGM had had an ethical wall policy in place for many years, at least from 1987, and was familiar with the procedures to be followed when setting up ethical walls to deal with particular situations).

13. Secondly, there was unchallenged evidence from Mr Marriott and other members of the arbitration team that they did not know that CAIB were former clients of LLGM until it was brought to their notice by CAIB's solicitors, Speechly Bircham; that none of them had any idea that there were any documents produced for CAIB in LLGM's possession relating to the matter in issue in the arbitration; and that none of them had any reason to inquire after any documents, which they did not know existed.

14. The judge said that he was satisfied by unchallenged evidence from LLGM that the firm had *"a conscientious and sophisticated ethical wall system, as one would expect from a firm of their standing. It is also clear that what I will call the Marriott team, all of whom have sworn witness statements, would not seek access to any of that material, but that, if they did, they would not get it."*(paragraph 43).

15. Thirdly, there were witness statements from partners in LLGM about the work done for CAIB and various CAIB companies in relation to share transactions in the 1990s when CAIB were part of the Credit Anstalt. The judge noted LLGM's unchallenged evidence on the extent of the ethical wall and the unquestioned integrity both of those engaged on the arbitration and of those who had received potentially confidential information when acting for CAIB about matters that had happened a long time ago.

16. Fourthly, after the end of oral argument but before judgment, LLGM offered undertakings to the court as follows (paragraph 55).

" (1) [LLGM] will issue an instruction to partners and staff formerly involved in CAIB's work that they will not discuss that work with any member of the arbitration team or amongst themselves. Evidence has already been given by the persons concerned that they have not and will not discuss the restricted matter with the arbitration team.

(2) Within seven days of today's date, [LLGM] will cause changes to be made to its working arrangements so that the arbitration team will not occupy office space on the same floor as those who had previously worked for CAIB and are still with the firm: Mr Sharp, Mr Waldron, Mr Greenwood, Mr Zimler and Mr Richmond; the last two of whom are already physically separate from the arbitration team."

17. The judge concluded (in paragraph 59) that, subject to formal undertakings in terms acceptable to the court, LLGM *" …will just have succeeded in showing that the risk is on the theoretical side of the line. The obligation and the burden on LLGM is of course a heavy one, but the ethical wall is as adequate as any. The absence of a wall at the outset, if one accepts, as everybody does, the truth of the witness statements, did not result in the arbitration team learning anything at all about CAIB. There are three people working closely with Mr Marriott and his colleagues who had information at some point from CAIB. Memories can be revived, and I accept the force of what Mr Lydiard says in relation to careless talk based on the authorities to which he referred me. There are inevitably accidental disclosures occurring in unforeseeable ways in any law firm. But the work here was done some years ago. It is transactional work, not likely to rush to the front of the mind in the same way as what litigators would see as the rather more exciting matters with which they deal. The absence of physical separation is a concern, so far as inadvertent disclosure is concerned, which can be allayed by undertakings in appropriate terms. But, above all, where one has the testimony of these lawyers as to how they are going to conduct themselves and the ethical walls, and weighs that up against the risk of careless talk, it seems to me that the solicitors will, after giving undertakings to the court which they know to be enforceable by contempt proceedings, keep confidential whatever they can remember."*

18. The judge said that two particular considerations had tipped the balance against the grant of an injunction. First, as he had noted earlier, the situation involved information relating largely to transactional matters conducted "some years ago." It was different from the risk of disclosure in a situation arising "when someone with current knowledge of a piece of litigation switches to the other side." (paragraph 60)

19. Secondly, a robust approach to drawing a sensible line on matters of client confidentiality was justified on the authorities (see paragraph 53 of **Koch** cited below).

20. The order made by the judge contained the following undertakings by LLGM to the court:-

"1) By 5pm on Friday 4 November 2005 the Defendant will cause changes to be made to its working arrangements at its London offices so that the Arbitration Team (Arthur Marriott QC, Deborah Ruff, Johanne Cox, Daniel Gal, Thomas Geuther, Kim Francis and Jan Hammond) will not occupy office space on the same floor as those who have previously carried out work for CAIB and are still with the Defendant, and who are listed in the table attached to this order ("the relevant partners and staff");

2) The Defendant will, as soon as is reasonably practicable, issue an instruction in writing by e-mail to the relevant partners and staff that they are not to discuss that work with any member of the Arbitration Team or amongst themselves;

3) None of the Arbitration Team will seek any information about CAIB from any of the relevant partners and staff, nor seek access to any paper or electronic files concerning CAIB;

4) None of the relevant partners and staff will discuss CAIB work amongst themselves or with any member of the Arbitration Team;

5) The Defendant will until otherwise agreed by the Claimant or approved by the Court;

(a) at all times maintain the ethical wall presently in place
(b) take reasonable steps to monitor the effectiveness of the ethical wall
(c) take reasonable steps to monitor compliance with undertakings (2)-(4) set out above.

6) The Defendant will, during the months of April and October of every year during the currency of LCIA Arbitration 2371
(a) issue a fresh instruction repeating the instruction in paragraph (2) above,
(b) verify that there has been no breach of the ethical wall presently in place, and that the integrity of the ethical wall is maintained
(c) notify the Claimant in writing that it has taken the steps referred to in 6) (a) and (b) above."

Grounds of appeal

21. Mr Lydiard, appearing for CAIB, submitted that the judge had misapplied the relevant legal principles, which he accepted he had correctly set out in paragraph 7 of his judgment by citing the summary of the law contained in the judgment of Clarke LJ in ***Koch v. Richards Butler*** [2002] EWCA Civ 1280; [2002] 2 All ER Comm 957 at paragraph 24.

22. Mr Lydiard contended that, although CAIB made no imputation of dishonesty or deliberate wrongdoing on the part of LLGM, they were entitled to the injunction. He accepted that there was no real risk that the arbitration team would have access to CAIB's files and documents in the possession of LLGM. The real risk faced by them was of inadvertent or accidental transmission of confidential information orally or by conduct, such as by an off-the-cuff remark or a raised eye brow. His overall submission was that LLGM should be restrained from acting for DCL in the arbitration because, by choosing so to act against CAIB in relation to disputed transactions of the type on which it had advised CAIB, LLGM exposed CAIB to an avoidable real risk of disclosure and misuse of confidential information. Mr Lydiard made a number of supporting detailed points, which I would summarise as follows.

23. First, the history of the implementation of the "ethical wall" was "far from re-assuring." The conflict of interest was not spotted at the outset. There was delay in implementing safeguards. The system was not foolproof. CAIB are dependent on the say-so of LLGM that the system is now effective.

24. Secondly, a relatively small number of people were involved, working in close proximity with one another in a relatively small litigation department in one building and in circumstances in which the required formal restraints on contact would be impractical. The impracticability of restraining the members of the arbitration team and the LLGM partners, who had done work for CAIB in the past, from having any professional contact with one another had been asserted by LLGM, who had accordingly not been able to offer any undertaking to that effect.

25. Thirdly, it was not enough for LLGM to say that those members of the firm who previously advised CAIB had forgotten about it or could not recollect it. Facts not previously recollected can come back into a person's mind, even after some years.

26. Fourthly, it was not enough that all concerned in LLGM promised not to talk about past CAIB matters. The starting point, as stated by Lord Millett in ***Bolkiah v. KPMG*** at 237G, was that confidential information, "unless special measures are taken, moves within a firm." In the absence of an injunction to restrain a firm of solicitors from acting against him, a former client could not be completely protected from the risk of inadvertent or accidental disclosure of confidential information within the firm. The judge erred in the degree of reliance placed by him on the evidence from members of the firm engaged on the relevant work. He cited another passage from the speech of Lord Millett *in* ***Bolkiah v. KPMG*** at 239D-H- *"In my opinion an effective Chinese wall needs to be an established part of the organisational structure of the firm, not created ad hoc and dependent on the acceptance of evidence sworn for the purpose by members of staff engaged on the relevant work."*

27. Fifthly, the undertakings offered were inadequate protection for CAIB. They should not have been treated by the judge as a reason for refusing an injunction. There was no formal restraint on professional contact between members of the arbitration team and those who previously advised CAIB, nor could there be compatibly with the conduct of LLGM's business. Continuing professional contact involved a risk of careless talk and accidental disclosure of confidential information.

28. Sixthly, the judge had well-founded reservations about the appropriateness of LLGM's decision to act against CAIB in an arbitration in which their former client's honesty and integrity was under attack. This judicial disquiet should have been reflected in the grant of an injunction rather than a refusal. The judge said

" 62. ….In view of the evidence put forward, I am conscious that, if I reached any other conclusion, it would be coloured by my reservations about the appropriateness of LeBoeuf's decision to act rather than by any considered application of the law of breach of confidence. The court in this case is concerned with application of the law of breach of confidence and not with expressing views about wider considerations. LeBoeuf decided that they were free to act against former clients of the firm, even though the dispute involves a consideration of work they themselves did for those clients in the late 1990s and an attack on the honesty and integrity of their former clients in those very transactions. In reaching its conclusions the court is not approving or validating LeBoeuf's decision to assume and pursue the conduct of this case."

Discussion and conclusion

29. 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.

30. The burden on the defendant law firm is to show that there is no real risk of disclosure or misuse of the former client's confidential information. It is a heavy burden, but it is not an impossible one to discharge. The law is that there is no need for a restraining order against acting or advising in an adverse interest, if the court is *" satisfied on the basis of clear and convincing evidence that all effective measures have been taken to ensure that no disclosure will occur..."* (per Clarke LJ in ***Koch*** at paragraph 24(8).)

31. 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. In my judgment, CAIB have not shown that the result reached by the judge on this point was wrong.

32. It is agreed that the judge correctly directed himself as to the relevant applicable legal principles. The criticisms focused on his application of the law to the unchallenged evidence in determining whether the risk of disclosure or misuse was "real." That turns on the effectiveness of the precautions taken, which is a matter of judgment for the court of first instance. This court should only interfere with that judgment if satisfied that the judge's assessment of the position was "wrong."

33. I fully understand why the judge entertained and expressed reservations about the appropriateness of the decision of LLGM to continue to act for DCL in the face of the objections of CAIB. I share those reservations. The circumstances understandably gave rise to serious concerns on the part of CAIB. It does not follow, however, that the judge was wrong to refuse an injunction preventing LLGM from acting against CAIB in the arbitration.

34. Detailed undertakings have been offered to the court, which will minimise the risk of disclosure or misuse of confidential information. There is every reason to believe that the undertakings will be observed in the spirit and in the letter. All those concerned appreciate the seriousness of undertakings to the court and that a breach of any of the undertakings would be an extremely grave matter. The combined effect of (a) the undertakings by LLGM to the court, (b) the conscientious and sophisticated ethical wall system erected by LLGM in accordance with established procedures, (c) the unchallenged evidence of the members of the arbitration team about their ignorance of and lack of access to CAIB information and of the LLGM partners, who had acted for CAIB, about their current state of knowledge of transactions advised on 7 or 8 years previously, and (d) the unquestioned professional integrity of all those involved in LLGM, was sufficient, in my view, to entitle the judge to conclude that the evidence established that the various precautions taken would effectively protect CAIB from disclosure or misuse of their confidential information. In these circumstances it is not possible to say that his decision to refuse an injunction was wrong within CPR Part 52.11(3)(a).

Result

35. I would dismiss the appeal.

Lord Justice Scott Baker:

36. I agree.

Lord Justice Brooke:

37. I also agree.

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LORD NEILL QC & MR MARK HOYLE (instructed by LeBoeuf,Lamb, Greene & MacRae) for the Respondents