CA on appeal from Commercial Court (Mr Justice Andrew Smith) before Ward LJ; Tuckey LJ; Clarke LJ. 22nd July 2002.

LORD JUSTICE WARD

1. I will ask Lord Justice Clarke to give the first judgment.

LORD JUSTICE CLARKE:

Introduction

2. On 5th October 2001 Mr Justice Andrew Smith granted an injunction against Richards Butler restraining them from continuing to act for Ariadne Maritime Limited ("Ariadne") in a London arbitration against Koch Shipping Inc ("Koch"). The injunction was granted on the ground that there was a real risk of disclosure of confidential information relevant to the arbitration by Koch's former solicitor, Ms Jane Peaston.

3. Koch's solicitors in the arbitration are Jackson Parton. Ms Peaston was a partner at Jackson Parton and acted as Koch's solicitor in the arbitration from April 2000 until leaving Jackson Parton on 5th April 2001. Since 2nd July 2001 she has worked for Richards Butler as a consultant. She is employed to work for three days each week.

4. The judge would have refused an injunction if Richards Butler and Ms Peaston had offered an undertaking that Ms Peaston would work from home or somewhere other than Richards Butler's London premises at Beaufort House in the City.

5. The judge refused Richards Butler permission to appeal, but permission was subsequently granted by Lord Justice Rix, who observed that in one sense the ground of the judge's decision was narrow but that in another sense it had wide implications. Lord Justice Rix ordered expedition, but that is now not necessary because, as I understand it, Richards Butler no longer act for Ariadne in the arbitration. They nevertheless pursue the appeal.

6. The ground of appeal is that the judge was wrong in concluding that there was a real risk of disclosure by Ms Peaston of the confidential information in issue.

The arbitration proceedings

7. I take this account of the arbitration proceedings largely from the judgment, which is reported at [2002] 3 Lloyd's Rep PN 201.

8. The arbitration proceeding were brought by Ariadne as owners of the vessel Atlas M against Koch as charterers under a charterparty in the Asbatankvoy form dated 10th August 1999 for the carriage of a cargo of naphtha from one safe port in the Turkish sea off Marmara to one or two safe ports in the eastern Mediterranean. In August 1999 the vessel was loading at the Turkish refinery of Tutunciflik when there was a major earthquake in the region. Loading was disrupted and when the vessel did sail for Lavera, the nominated discharge port, she was carrying less than 20,000 mt of naphtha, which was the minimum amount stipulated in the charterparty. According to Mr George Arghyrakis, a partner in Richards Butler acting for Ariadne, she also sailed without loadport documentation, including any bill of lading. Ariadne claim deadfreight amounting to $82,747.70 and demurrage or damages for detention amounting to $54,008.40. Koch deny that the vessel was detained and that demurrage was incurred, and they deny liability for deadfreight on the grounds that the earthquake was an act of God and so an exception under the charterparty.

9. Ariadne engaged Richards Butler, and specifically Mr Arghyrakis, in August 1999. Mr Arghyrakis has received a substantial number of instructions over the last eight years or so from Styga Companie Naviera, the managers of the Atlas M, and companies associated with them, and has developed a close working relationship with them. Mr Arghyrakis has been assisted in relation to the arbitration proceedings, first, by Mr Charalambos Zografakis and, since June 2001, by Mr Michael Harakis, a non-practising barrister employed by Richards Butler.

10. In August 1999 Koch instructed Mr David Myers, a partner at Jackson Parton, in relation to the dispute. In March or April 2000 Mr Myers retired from practice to become a judge in Trinidad and Tobago, and upon his retirement the supervision and handling of the case was passed to Ms Peaston. Both Mr Myers and Ms Peaston were assisted by an employed solicitor, Mr Jonathan Clyne, who is still handling the case.

11. The judge considered how long the arbitration proceedings might last and said that they might last as much as two or three years.

Richards Butler

12. The judge described Richards Butler in some detail. They are a well-known firm of solicitors in the City of London with a long-established reputation in relation to shipping matters. They have offices in a number of countries, but they only have one office in the United Kingdom, which is at Beaufort House in London EC3. They occupy offices on the ninth, tenth, eleventh and twelfth floors of Beaufort House. They have some 260 lawyers in all, including partners.

13. The Shipping Group in London comprises 25 partners, an admiralty manager, three consultants (including Ms Peaston) and some 35 other lawyers, including paralegals and trainees. Lawyers who are not partners are assigned to a particular partner and work principally for him or her. The Shipping Group occupies offices on the tenth and eleventh floors of Beaufort House. There are 12 partners on the tenth floor and 13 partners on the eleventh floor.

14. The Shipping Group is not, however, divided into formal sections. Partners normally generate their own client contacts and areas of practice. There is no special system for allocating work, although a database is used to ensure that the firm avoids conflicts of interest. The partners hold formal shipping partners' meetings every other

week. There are informal shipping partners' lunches on Thursdays and from time to time there are Shipping Group "know how" lunches at which there are speakers.

Jane Peaston

15. The judge described Ms Peaston's previous history in some detail. She had in fact worked for Richards Butler before. Having left Jackson Parton on 5th April 2001, she returned to Richards Butler on 2nd July 2001. She then went away on holiday from 16th July to 1st August. Between 8th August and the hearing she had been working at home. Since rejoining Richards Butler, therefore, she had spent only some 12 days at their offices or at court representing the firm.

Charles Weller

16. Having planned to leave Jackson Parton at the same time as Ms Peaston, he joined Richards Butler on 6th April 2001 and is now a partner in the firm.

17. After Mr Myers' departure, Mr Weller became Koch's main contact at Jackson Parton. He handled a number of pieces of litigation for them and their associated companies and, when he moved firms, the Koch companies requested that he continue to handle at Richards Butler six of their cases that were live.

18. Thus one of the ironies of the case is that Koch were willing to instruct Richards Butler in some of their cases. However that may be, Mr Weller has not been involved with the Atlas M dispute between Koch and Ariadne during his time at either Jackson Parton or Richards Butler. I should note that Koch are not relying in support of their case upon any information that Mr Weller might have or has had. Their only concern was about information which Ms Peaston had. It is important to note that the purpose of the injunction was to ensure that none of that information was disclosed to those at Richards Butler who were acting for Ariadne against Koch.

19. Before considering the facts further, it is convenient to refer briefly to the relevant legal principles, which are not in dispute.

Legal principles

20. In ***Prince Jefri Bolkiah v KPMG*** [1999] 2 AC 222, the claimant was a former client of the accountancy firm KPMG which had been retained by him to provide forensic accounting services and litigation support. The litigation was settled in March 1998. In the course of that work KPMG were given access to confidential information. The project upon which they were working when they were working for Prince Jefri was, I think, called Project Lucy. KPMG were subsequently retained as auditors by a Government of Brunei investment agency of which the claimant had previously been chairman. The agency retained KPMG to investigate the whereabouts of certain assets which were said to have been used by the claimant for his own benefit. The claimant commenced proceedings for breach of confidence and sought an injunction restraining KPMG from acting for the agency.

21. Pumfrey J granted the injunction, holding that, although the defendants had an honest intention not to disclose confidential information, the barrier established by them was inadequate to deal with inadvertent disclosure. The Court of Appeal discharged the injunction on the grounds that there was no evidence that the claimant would suffer real prejudice unless there was an injunction and that a continuation of the injunction would set an unrealistic standard in the protection of confidential information. The House of Lords restored the injunction.

22. Although the instant case is not a case in which the claimant is seeking an injunction against his former solicitors, it was common ground before the judge, and is common ground before us, that the same principles apply where a claimant is seeking an injunction restraining a firm of solicitors from acting for a third party when it is necessary to do so in order to prevent the disclosure of confidential information in the hands of a former solicitor who now works for the defendant's solicitors: see e.g. ***Halewood International Ltd v Addleshaw Booth & Co*** [2000] Lloyd's Rep PN 298 and ***Newman v Phillips Fox*** (1999) 21 WAR 309.

23. In ***Prince Jefri*** Lord Millett made the principal speech, with which the other members of the appellate committee agreed. However, Lord Hope summarised the position as follows at pp.226-227:

"I consider that the nature of the work which a firm of accountants undertakes in the provision of litigation support services requires the court to exercise the same jurisdiction to intervene on behalf of a former client of the firm as it exercises in the case of a solicitor. The basis of that jurisdiction is to be found in the principles which apply to all forms of employment where the relationship between the client and the person with whom he does business is a confidential one. A solicitor is under a duty not to communicate to others any information in his possession which is confidential to the former client. But the duty extends well beyond that of refraining from deliberate disclosure. It is the solicitor's duty to ensure that the former client is not put at risk that confidential information which the solicitor has obtained from that relationship may be used against him in any circumstances.

Particular care is needed if the solicitor agrees to act for a new client who has, or who may have, an interest which is in conflict with that of the former client. In that situation the former client is entitled to the protection of the court if he can show that his solicitor was in receipt of confidential information which is relevant to a matter for which the solicitor is acting, against the former client's interest, for a new client. He is entitled to insist that measures be taken by the solicitor which will ensure that he is not exposed to the risk of careless, inadvertent or negligent disclosure of the information to the new client by the solicitor, his partners in the firm, its employees or anyone else for whose acts the solicitor is responsible.

As for the circumstances in which the court will intervene by granting an injunction, it will not intervene if it is satisfied that there is no risk of disclosure. But if it is not so satisfied, it should bear in mind that the choice as to whether to accept instructions from the new client rests with the solicitor and that disclosure may result in substantial damage to

the former client for which he may find it impossible to obtain adequate redress from the solicitor. It may be very difficult, after the event, to prove how and when the information got out, by whom and to whom it was communicated and with what consequences. In that situation everything is likely to depend on the measures which are in place to ensure that there is no risk that the information will be disclosed. If the court is not satisfied that the measures will protect the former client against the risk, the proper course will be for it to grant an injunction."

24. It was, and is, common ground that the relevant principles in this class of case may be stated 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 ER 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 DLR (4th) 249 at p.269). This is a heavy burden (per Lord Millett at p.239).

25. 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. In the instant case the question is whether there was any risk of a single solicitor inadvertently disclosing confidential information to others within Richards Butler such that it might come into the hands of those conducting ***Ariadne's*** case against Koch.

26. The facts of the ***Prince Jefri*** case were very different. A flavour of the differences can be gathered from two passages from the speech of Lord Millett. The first is at pp.230-231 as follows:

"On 8 July 1998 the BIA formally instructed KPMG to provide assistance in connection with the investigation of the withdrawal of assets from the BIA by means of the special transfers. It was about this time that it became clear that the assignment was at least in part adverse to Prince Jefri's interests. The work was covered by an engagement letter dated 13 August 1998. This required KPMG to assist in establishing the extent of the withdrawal of funds, the use made of the withdrawn funds, the assets acquired with them, the present location of such assets, and the identity of the persons or entities now controlling them. KPMG were instructed to work with the BIA's legal advisers in obtaining evidence and where appropriate to trace, secure and recover assets belonging to the BIA both in Brunei and overseas.

This further assignment was given the code name Project Gemma and Mr Harrison was appointed as the lead partner. He had never been in receipt of any confidential information relating to Prince Jefri's business, financial or personal affairs. Although he was to head the project, this was clearly not simply an extension of the audit; it would involve the tracing and recovery of assets and might well lead to civil and even criminal proceedings against Prince Jefri. It would be undertaken by members of the forensic accounting department and would be likely to involve them in the provision of litigation support services. It must have been obvious, and indeed is common ground, that some at least of the confidential information obtained by or provided to KPMG in the course of Project Lucy was or might be relevant to Project Gemma. It must also have been obvious, and again is common ground, that in relation to Project Gemma the interests of the BIA were adverse to those of Prince Jefri. KPMG did not inform Prince Jefri of their new assignment, nor did they seek his consent to their acceptance of the project.

KPMG employed some 50 people on Project Gemma, 11 of whom had previously been engaged on work for Prince Jefri. Most of them worked in Brunei but never more than 15 at a time. KPMG contends that none of the 11 was in possession of information confidential to Prince Jefri.

Over 7,500 hours were spent on work for the BIA between 18 June and 15 September when Pumfrey J granted an injunction to restrain KPMG from continuing with work on Project Gemma."

27. The second passage is at p.239, where Lord Millett said:

"The Chinese walls which feature in the present case, however, were established ad hoc and were erected within a single department. When the number of personnel involved is taken into account, together with the fact that the teams engaged on Project Lucy and Project Gemma each had a rotating membership, involving far more personnel than were working on the project at any one time, so that individuals may have joined from and returned to other projects, the difficulty of enforcing confidentiality or preventing the unwitting disclosure of information is very great. It is one thing, for example, to separate the insolvency, audit, taxation and forensic departments from one another and erect Chinese walls between them. Such departments often work from different offices and there may be relatively little movement of personnel between them. But it is quite another to attempt to place an information barrier between members all of whom are drawn from the same department and have been accustomed to work with each other. I would expect this to be particularly difficult where the department concerned is engaged in the provision of litigation support services, and there is evidence to confirm this. Forensic accountancy is said to be an area in which new and unusual problems frequently arise and partners and managers are accustomed to share information and expertise. Furthermore, there is evidence that physical segregation is not necessarily adequate, especially where it is erected within a single department.

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."

28. Clearly the facts of different cases can be almost infinitely variable. An example of a case nearer to this than the case of ***Prince Jefri*** is the decision of Laddie J in ***Young v Robson Rhodes,*** although one of the problems there was that the claimant did not know how many personnel might have the relevant confidential information. Laddie J made that point in para 41 of his judgment as follows: *"I do not accept Mr Malek's suggestion that Mr Pollock must give examples of instances where a harmful inadvertent leak of information could take place. Not only do the plaintiffs not know how many PKF personnel are to have been involved in one way or another with the events leading up to the Syndicate's actions or have since become involved in defending them, but they do not know where they are currently located, where they will be located if the merger goes ahead (assuming it does so), with whom they will be working and what other tasks they are engaged on which could give rise to contact with members of the Attwood team. The fact, as confirmed in the witness box ... that it is proposed that the RR and PKF forensic accountancy departments should merge, cannot reassure the plaintiffs. Furthermore, even if all these factors were known to the plaintiffs, it would still be unrealistic to ask Mr Pollock to describe an example of a damaging and inadvertent leak. It is impossible to tell in advance now mistakes might be made. The approach to be adopted by the court is to ensure that even if there are mistakes, no additional risk of damage is inflicted on the former client. Such damaging mistakes can occur when potential disclosers and disclosees are in regular and working contact with one another. The fact that there are fewer potential disclosers here than in the Prince Jefri case may alter the scale of the risk, but does not mean that it is fanciful."*

29. A key factor in the instant case is that there is only one potential discloser, which was far from so in the ***Young v Robson Rhodes*** case.

30. It was, however, the case in the ***Halewood International*** case, where the facts were in some respects similar to this. The judge, Neuberger J, would have granted an injunction restraining the defendant solicitors from continuing to act for the former client if they had not been willing to undertake that the person concerned, a Mr Robinson, would not work in the same building as members of the relevant team. In that case the judge said that he would have granted an injunction "*albeit very much on balance*". Moreover, that case is to be distinguished from this in at least two respects. The first is that no undertaking had been proffered under which Mr Robinson would have no professional contact with the relevant team. The judge also expressed some doubt about Mr Robinson's evidence relating to two arguably wrongful communications of what the judge said "*may be called `**private**' as opposed to `confidential' information*": see p.307.

31. A consideration of each of the cases to which we were referred emphasises that each case depends on its own facts. I refer to only one other, namely ***Newman v Phillips Fox.*** Mr Glennie relies upon a passage in the judgment of Steytler J at p.323, where he said this: *"That brings me, finally, to the question whether the respondent has discharged its burden in this case. It will be apparent from what I have said in the earlier part of these reasons that the respondent proposes to do so by means of the giving of undertakings and, in effect, the erection of a `Chinese wall'.*

*Walls or information barriers of that kind have not often found favour with the courts. In **D & J Constructions Pty Ltd v Head*** (1987) 9 NSWLR 118, at 122-123, Bryson J said: *`I would think that the court would not usually undertake attempts to build walls around information in the office of a partnership, even a very large partnership, by accepting undertakings or imposing injunctions as to who should be concerned in the conduct of litigation or as to whether communication should be made among partners or their employees. The new client would have to join in such an arrangement and give up his right to the information held by such parties and staff as held it. Enforcement by the court will be extremely difficult and it is not realistic to place reliance on such arrangements in relation to people with opportunities for daily contact over long periods, as wordless communication can take place inadvertently and without explicit expression, by attitudes, facial expression or even by avoiding people one is accustomed to see, even by people who sincerely intend to conform to control.'*

Those comments have many times since been quoted with approval: ..."

32. To my mind the proposed undertakings in the instant case do not involve the erection of the kind of Chinese wall referred to either in ***Newman v Phillips Fox*** or in the ***Prince Jefri*** case. In ***Newman*** the court was not considering the case we have here, where one person moves from one firm to another. It involved the moving of two solicitors who had acted for former clients together with two articled clerks and seven support staff. The court was thus considering a very different case from this. However, even there the judge drew attention to Lord Millett's statement in the ***Prince Jefri*** case that there was no rule of law that Chinese walls or other arrangements of a similar kind are insufficient to eliminate the risk; and to his view that the starting point must be that, unless special measures are taken, information moves within a firm. In short, he too stressed that all depends on the facts of the particular case.

The facts

33. The facts are not in dispute and have been set out by the judge. Richards Butler concede that Ms Peaston was in possession of information confidential to Koch which she remembers from the time that she was at Jackson Parton acting for Koch against Ariadne. As the judge put it at para 29: *"Koch have therefore been able to show a strong case with regard to the confidential information which Ms Peaston has. They have identified with particularity information which on its face is likely to be highly material to the future conduct of the `Atlas M' matter, both information relevant to any negotiations to settle the dispute and information about how any hearing might be conducted by Koch."*

34. It is common ground that Koch has not consented to disclosure of such information to Ariadne. It follows that Koch has established the facts set out in proposition (5) above. It further follows that the question for the judge was whether Richards Butler had shown that there was no risk of disclosure of that information to those acting for Ariadne.

Risk of disclosure

35. Before the hearing took place before the judge Richards Butler had offered both undertakings and assurances from the firm and from individual partners and employees. They are set out in an annexe to the judgment and are as follows:

"1. Mr Charles Weller and Ms Jane Peaston each undertake:

(a) To keep confidential to themselves and not to disclose to any other person, any confidential or privileged information acquired by them relating to the Atlas M arbitration or the affairs of the Claimants other than under compulsion of law or for the purposes of legal advice in connection with their position;

(b) Not to discuss or permit to be discussed in their presence the Atlas M arbitration or the affairs of the Claimants other than under compulsion of law or for the purposes of legal advice in connection with their position;

(c) Not to participate in or vote at any meeting at Richards Butler which directly or indirectly concerns the Atlas M arbitration;

(d) Not to communicate with George Arghyrakis or Michael Harakis save that Charles Weller may attend partners meetings and meetings of the Shipping Group.

2. Mr Charles Weller and Ms Jane Peaston each confirm that they possess no documents whatsoever relating to the Atlas M arbitration or the affairs of the Claimants save those disclosed in the Claimants' action against Richards Butler and those generated in that action since it was commenced on 3 September 2001.

3. Mr George Arghyrakis and Mr Michael Harakis each undertake:

(a) Not to discuss the Atlas M arbitration with, or permit it to be discussed in the presence of, any other fee earners at Richards Butler, other than under compulsion of law or for the purpose of legal advice regarding the action taken by the Claimants against Richards Butler;

(b) As regards Ms Jane Peaston and Mr Charles Weller not to discuss the Atlas M arbitration or the affairs of the Claimants with either of them for any purposes whatsoever.

4. Richards Butler undertake:

(a) Not to do anything to prevent compliance by Mr Weller, Ms Peaston, Mr Arghyrakis and Mr Harakis with their undertakings;

(b) To ensure that the Atlas M arbitration and the affairs of the Claimants are not raised directly or indirectly at any partner(s) meetings or any meeting of the Shipping Group at Richards Butler save solely to mention the fact that the existence of the Atlas M arbitration gave rise to the action by the Claimants against Richards Butler."

36. The judge noted that in the course of the hearing Richards Butler and Ms Peaston clarified the proposed undertaking about her not attending meetings of the Shipping Group by stating that they were content that this should apply to the *"know how"* lunches. They were also willing to undertake that Ms Peaston would not enter the offices of the Ariadne case handlers as long as Richards Butler were acting in the matter and that they would not enter hers.

37. The judge set out with care and in detail the considerations which reduced the risk of disclosure as follows:

"33. Mr Talbot has advanced powerful arguments that if the undertakings offered by Richards Butler are given, Koch's confidential information is safe from disclosure. He relies upon the evidence of Ms Peaston and other solicitors at Richards Butler, Messrs Arghyrakis, Harakis, Hunt and Weller. He is entitled to do so: there is no challenge to their credibility.

34. *First, it is only the risk of inadvertent disclosure which concerns Koch. It is common ground that Koch can rely upon Ms Peaston's integrity and standards to ensure that there is no deliberate breach of confidentiality. Furthermore, Ms Peaston's evidence makes it clear that she fully understands her duties of confidentiality to former clients. She had them well in mind before any challenge arose to Richards Butler acting against Koch or Mack Multiples. She explains in her evidence that from the time that she joined Richards Butler, she has been alert to the danger of accidentally contravening her duty; that she has been `acutely aware of the need to avoid a situation where there was any chance that confidential information about former clients might slip through'. She is able to say that `there certainly has not been a single occasion when it is possible that [information relating to the "Atlas M" case] has been passed to anyone at Richards Butler'.*
35. *As Mr Talbot observes, given that Ms Peaston understands her duties to former clients and will not deliberately contravene them, Koch's objection to her being connected to Richards Butler's central server is difficult to understand. I cannot conceive of Ms Peaston inadvertently placing Koch's confidential information on the central server, and consider that any such risk is properly to be regarded as unreal and fanciful in the extreme. Mr Jarvis refers to information about the `Atlas M' arbitration passing to or from Ms Peaston, but even assuming that there is some risk of her receiving information about the case, that is not in point.*
36. *Secondly, it is a striking feature of this case that Koch or their associated companies are themselves instructing Mr Weller at Richards Butler in relation to disputes other than the `Atlas M' arbitration. This indicates that they have some confidence in Richards Butler and more specifically in their Shipping Group. It also shows that they have no objection to Richards Butler having general information about them. Their concern in this litigation is not about such general information concerning their affairs, but about information specifically concerning the `Atlas M' dispute. As for that dispute, it appears to be a somewhat routine shipping arbitration. To use the terminology of Mr Justice Timothy Walker in* ***Re a Firm of Solicitors*** *(loc cit) at page 34 it `is hardly the stuff of which gossip is made'.*
37. *Thirdly, it is acknowledged by Richards Butler in the statement of Mr Hunt that the firm does not have `formal procedures to be completed when new solicitors join from another firm in order to prevent the dissemination of confidential information'. However, this case is about information in the possession of one person, an experienced solicitor. Moreover, only two solicitors in the Shipping Group are conducting the `Atlas M' matter for Ariadne. This is not a case where a team of people of differing seniority have come into possession of the confidential information that concerns Koch, and there is concern that it might come to be known to members of another such team. In this respect this case is markedly different from* ***Bolkiah,*** *where Lord Millett comments (at page 228H) upon the number of people engaged on the projects and on the `rotating membership' of the teams. It seems to me that in those circumstances the requirement for formal procedures as part of the organisational structure of the firm was the more compelling. Nor do I overlook the observations made by Mr Hunt, a solicitor with nearly 30 years' experience as a solicitor engaged in shipping litigation and arbitration in the City of London, including experience as the managing partner of Sinclair Roche & Temperley before joining Richards Butler. He says in his statement: `We do not give solicitors joining the firm express guidance or warning that they must not divulge (whether deliberately or inadvertently) information relating to their former clients. No such procedures are in place because it is fair to assume that qualified solicitors joining this firm will be aware of their professional duties and will avoid making such disclosure, or allowing such disclosure to happen in a casual way. We would not recruit someone if we considered that they required this type of warning. For similar reasons, we do not have procedures in place to stop solicitors joining from another firm talking to other members of Richards Butler. This sort of arrangement would plainly be unworkable. In my experience in running a large shipping firm, use of professional common sense is a much safer way of maintaining professional standards than imposing formal organisational procedures.'*
38. *Fourthly, I should record that there is no question of Ms Peaston having retained any documents or computer records emanating from her retainer by Koch.*
39. *Further, there is some degree of physical separation between the office that Ms Peaston would use at Beaufort House and the offices of the Atlas M case-handlers. The latter have offices on the tenth floor. Ms Peaston is on the eleventh floor, as is Mr Weller. Richards Butler have made it clear in correspondence that they are willing to undertake that this degree of separation will continue while they are acting for Ariadne in the arbitration. Moreover, Ms Peaston's secretary is in a different section of the building from Messrs Arghyrakis and Harakis, and different photocopying facilities are used.*
40. *Next, Ms Peaston offers to undertake that she will not communicate with the Atlas M case-handlers, and they too will give undertakings not to communicate with her. If these undertakings are observed, and I do not doubt that they would be, this answers the risk of Ms Peaston through inadvertence letting slip information in direct conversation with Mr Arghyrakis or Mr Harakis. Since joining the firm, Ms Peaston has not spoken to either of them, the only exchange being an occasion when at an informal shipping partners' lunch Mr Arghyrakis attempted to greet Ms Peaston and she signalled that she could not speak to him.*
41. *In considering the risk of information reaching the Atlas M case-handlers indirectly, I bear in mind that Ms Peaston is willing to undertake not to talk to anyone about the `Atlas M' matter. Moreover, her circumstances are such that she does not have much social life centred on Richards Butler. She is married with children who required child-care. Her evidence is that she attends `relatively few' social functions in the evenings, and has not attended any social occasion at Richards Butler since joining them. Nor has she been to Richards Butler's canteen.*
42. *Finally, although this is not an argument advanced by Mr Talbot, I have not overlooked that the sums in issue in the `Atlas M' dispute are relatively modest, and it might be said that the gravity of any information slipping out is*

therefore the less. I have not allowed this consideration to affect my decision. It seems to me that once it is established that information is confidential and privileged, it would be wrong, except possibly in an extreme case, for the Court to assess the need for its protection by such a measure. To do so would not give due weight to the importance to the administration of justice, which Lord Millett emphasised, of maintaining clients' confidence that what they tell their lawyers will remain secret."

38. The judge then turned to consider whether there was a risk of disclosure. He held that there was a risk of inadvertent disclosure by Ms Peaston. His reasoning was as follows:

"43. In these circumstances I certainly do not consider that there is much danger of Koch's information being disclosed, and in my judgment the risk could properly be characterised as slight. However, I have to consider whether the risk is so unreal that Koch should not be protected against it. I must do so bearing in mind Lord Millett's observation (at page 237H) that, the world being as it is, `unless special measures are taken, information moves within a firm'. I cannot confine myself to considering the danger of information being passed by Ms Peaston directly to the Atlas M case-handlers, but must also be concerned about the risk of information indirectly reaching them. Moreover, I must consider the risk of disclosure occurring at any time while the arbitration continues; that is to say, a period which could be as long as two or three years. Ms Peaston is working in the same Group as those handling the arbitration, and Richards Butler contemplate that she should work in the same building, albeit not on the same floor, as them. Despite all the reassurances which Richards Butler offer, it remains the case that, if she worked at Beaufort House, Ms Peaston would have regular professional contact with others in the Shipping Group three days a week.

44. In ***Young & Ors v Rhodes & Frank Atwood*** *[1999] Lloyd's Rep PN 641 at page 651 Mr Justice Laddie said, `It is impossible to tell in advance how mistakes might be made. The approach to be adopted by the Court is to ensure that even if there are mistakes, no additional risk of damage is inflicted on the former client. Such damaging mistakes can occur when potential disclosers are in regular and working contact with one another. The fact that there are fewer disclosers here than in the* ***Prince Jefri*** *case may `alter the scale of the risk, but it does not mean that it is fanciful'.*

45. Adopting the approach described by Mr Justice Laddie, I cannot, despite the undertakings offered by Richards Butler, dismiss as fanciful the residual risk of some relevant information being let slip by Ms Peaston through inadvertence and reaching the Ariadne case-handlers. Richards Butler have not discharged the burden of showing that there is no real risk of this. I add that I would have considered the risk would be so small as to be fanciful if Richards Butler offered an undertaking that Ms Peaston would work from home or from somewhere other than Beaufort House."

39. Mr Hirst, who has represented Richards Butler in this appeal, submits that the judge was wrong to hold that there was a risk, in the sense of real risk, of Ms Peaston inadvertently disclosing confidential information.

40. He submits, first, that in stating his conclusions the judge mis-stated the test. The judge posed the question whether the risk was so unreal that Koch should not be protected against it; whereas, as indicated earlier, the test is whether Richards Butler have shown that there was no risk of Ms Peaston inadvertently disclosing information about the arbitration such that it might come into the hands of the claims handlers for Ariadne.

41. I agree with Mr Hirst to this extent. It does seem to me that the test should be stated precisely as the House of Lords stated it. The judge's test might suggest that it is possible for the risk of disclosure to be unreal but not so unreal that Koch should not be protected against it. However, I do not think that the judge can have intended it in that way. He previously directed himself correctly and in paragraph 45 he said, in effect, that if he had held that the risk was so small as to be fanciful he would have refused relief.

42. Mr Hirst submits that the judge should have held that Richards Butler had satisfied the heavy burden of showing, on the basis of clear and convincing evidence, that they had taken effective measures to ensure that no disclosure would occur. He relies on the following particular matters:

(1)No one doubts Ms Peaston's integrity or her high professional standing: see judgment para 3.

(2)No one questions the integrity or high professional standing of the relevant case handlers at Richards Butler: see paras 3 and 33.

(3)Through Mr Weller Richards Butler have continued to act for Koch on six live cases, so they could have had no concern that general information about Koch might be disclosed: see paras 16 and 36.

(4)Ms Peaston fully understood the duties of confidence and confidentiality owed to former clients and had them well in mind: see para 34.

(5)The only suggestion was that of indirect disclosure.

(6)It was inconceivable that Ms Peaston would place confidential information on the Richards Butler server.

(7)She retains no documents: see paras 36 to 38.

(8)There was physical separation between Ms Peaston and the case handlers since they were on different floors, albeit in the same building.

(9)There was no risk of inadvertent direct disclosure to the case handlers because of the undertakings given by Ms Peaston not to communicate with the case handlers at all and by the case handlers not to communicate with her: see para 40.

(10)Ms Peaston gave the further undertaking not to talk to anyone about the Atlas M matter: see para 41.

43. Mr Hirst submits that in all these circumstances it is fanciful to suppose that Ms Peaston, despite those undertakings and in particular that last undertaking, might inadvertently let slip to someone at Richards Butler something about the Atlas M dispute which might be passed on to the case handlers for Ariadne.

44. Mr Glennie submits, however, that the judge was right. He recognises that if Ms Peaston was inadvertently to pass on some confidential information there would be a breach of her undertaking, but he submits that it might be done by body language or by Ms Peaston innocently referring, say, to the legal consequences of an earthquake which she might have learned while acting for Koch or, more realistically perhaps, to the difficulties of obtaining evidence in Turkey or the problems of seeking legal advice in relation to Turkey or Turkish law, or to some other matter which she had learned in the course of acting for Koch while at Jackson Parton. He submits that she might pass that information on to someone else in Richards Butler, who might in turn pass it on to the case handlers in the Atlas M arbitration.

45. Mr Glennie submits that it is plain that the judge had well in mind the undertakings which both Richards Butler and the individuals had given, because the judge sets them out in detail in the paragraphs in his judgment which I have quoted, but that the judge then took the view that there remained a risk of inadvertent disclosure. He says that it is not for the claimant to identify ways in which an error might be made.

46. I would accept that that may be so in the kind of case which Laddie J had in mind in the passage which I have quoted; but, as I have stressed, each case depends upon its own facts. To my mind the suggestion that in all the circumstances which I have described Ms Peaston might inadvertently let slip some piece of confidential information which she had learned when acting for Koch is fanciful. I recognise that anything is theoretically possible, but to my mind suggestions of the kind made by Mr Glennie are, as Lord Millett put it, merely fanciful or theoretical and not real.

47. It is clear that Ms Peaston is a conscientious solicitor of integrity. She has throughout been aware of her obligations and in particular of her obligation that she must not do anything which might have the effect of passing on, whether directly or indirectly, information learned while acting for Koch to the case handlers for Ariadne. It is in my opinion far-fetched in the extreme to suppose that she might inadvertently do something which had that effect.

48. The judge reached the contrary view, adopting the approach of Laddie J in the ***Young*** case. However, for the reasons which I have already given, this case is very different from that. We are concerned only about the risk posed by some inadvertence on the part of one individual solicitor, namely Ms Peaston. I have reached the clear conclusion that, on the basis of the undertakings which both she and the case handlers gave, Koch were fully protected because any risk of disclosure in the light of them was fanciful.

49. I have reached that conclusion with all due deference to the conclusion of the judge, who I recognise has considerable experience in these matters. But I have reached the clear conclusion that this appeal should be allowed.

LORD JUSTICE TUCKEY:

50. I agree.

51. The question we have to answer is whether the judge was right to conclude that there was a real (as opposed to a fanciful or theoretical) risk that Koch's confidential information would be disclosed. Only one solicitor had such information: Ms Peaston. She undertook not to disclose this information. To avoid inadvertent disclosure she undertook not to talk to anyone about Koch's case, not to communicate at all with the two Richards Butler handlers of Ariadne's case in the arbitration, not to enter their offices and not to attend the weekly "know how" lunches of the Shipping Group, so long as Richards Butler were acting for Ariadne. These undertakings were supported by undertakings from the two case handlers and from Richards Butler itself. Yet the judge concluded that there was an inadvertent risk of disclosure because Ms Peaston wou1d have regular professional conduct with others in the Shipping Group three days a week.

52. I do not think this conclusion was justified having regard to the undertakings, which in my judgment were, or would have been, effective to ensure that no disclosure would occur. One is bound to ask what more Koch could have been offered, short of Richards Butler ceasing to act for their opponents. Koch contended that Ms Peaston should have been physically separated from the rest of the Shipping Group, either in a separate building (which Richards Butler did not have) or working from home (which neither she nor Richards Butler were prepared for her to do) for the two or three years which the arbitration might have lasted. I do not see how this would have significantly reduced the risk. Working at a distance would not have lessened the need for regular professional conduct with her colleagues if she was to play her part in the firm's work.

53. Since the decision in the **Prince Jefri** case there have been a number of cases in which circumstances such as these have had to be considered by the courts. Lord Justice Clarke has referred to some of them. In these days of professional and client mobility it is of course important that client confidentiality should be preserved. Each case must depend upon its own facts. But I think there is a danger inherent in the intensity of the adversarial process of courts being persuaded that a risk exists when, if one stands back a little, that risk is no more than fanciful or theoretical. I advocate a robust view with this in mind, so as to ensure that the line is sensibly drawn.

54. For those reasons, as well as those given by Lord Justice Clarke, I too would allow this appeal.

LORD JUSTICE WARD:

55. I also agree.

56. The undertakings by Miss Peaston and by the Ariadne case managers are to be treated as being effective to prevent any direct disclosure of information by her to them. Her undertakings not to disclose confidential or privileged information to anyone, not to discuss the arbitration with anyone and not to participate in meetings or attend the "know how" lunches are to be treated as effective to prevent intentional disclosure of prohibited information. So the risk in this case has to be categorised as a risk of inadvertent disclosure, indirectly communicated to the Ariadne case managers.

57. It is important also to note that the nature of the information is confined to information relating to the arbitration, not to the general affairs of the respondent, which would be known to Richards Butler who act for them in other matters. Furthermore, there are no documents or computer records in Ms Peaston's possession and no risk, therefore, of a leakage of that kind.

58. I accept that it is not for the respondent to identify how a harmful leak of information is to take place, but in my view the court must do its best to assess the risk, accepting, of course, that mistakes can and do occur. Essentially, the risk is of some oral indiscretion. I am prepared to accept for the purpose of the argument, but not entirely with conviction, what Bryson J said in ***D & J Constructions Pty Ltd v Head*** (1987) 9 NSWLR 118 at p.123, namely that: *"... wordless communication can take place inadvertently and without explicit expression, by attitudes, facial expression or even by avoiding people one is accustomed to see, even by people who sincerely intend to conform to control."*

59. Nonetheless, some nuance of expression has to have been noted by somebody not involved in the Ariadne arbitration within Richards Butler and then conveyed by that person to the case managers, who would in turn have to infer from it some information relevant to the arbitration. In my view the risk of this occurring is becoming somewhat unrealistic.

60. I accept that to place Ms Peaston in purdah obviously reduces the risk of her talking to her colleagues or being seen by them when she does so, but the question remains whether Richards Butler have satisfied the court that there is no real (as opposed to fanciful) risk of disclosure were she to work on another floor in the building, in the light of the undertakings she has given. It is quite appropriate and proper for the court to have regard to the extensive nature of those undertakings, given, I stress, by officers of the court and by persons of high professional standing and integrity. For my part I do not see that it is necessary to banish her from the building to render that bundle of measures an effective protection for the confidential and privileged information that the respondents are entitled to protect.

61. May I conclude by reminding myself of at least part of the rationale of this rule. Lord Millett in ***Prince Jefri*** Bolkiah said at p.236: *"It is of overriding importance to the proper administration of justice that a client should be able to have complete confidence that what he tells his lawyer will remain secret. This is a matter of perception as well as substance. It is of the highest importance to the administration of justice that a solicitor or other person in possession of confidential and privileged information should not act in any way that might appear to put that information at risk by coming into the hands of someone with an adverse interest."*

62. For my part I am confident that the proffered undertakings do ensure that the administration of justice in this case is not imperiled, nor even appears to be imperiled, by Ms Peaston working within Richards Butler as they propose. Consequently, I too would allow the appeal. While readily acknowledging that the judge's view of the facts is entitled to proper deference, that does not remove this court's responsibility of interfering if we conclude that he was wrong, as, unhappily, I conclude in this case.

63. The result, therefore, is that the appeal is allowed.

Order: appeal allowed with costs here and below, to be assessed; costs below repaid with interest at 1% above base from date of payment until date of repayment.

Mr J Hirst QC and Ms C Ambrose (instructed by Messrs Richards Butler, London EC3) appeared on behalf of the Appellant Defendants.
Mr A Glennie QC and Mr M Jarvis (instructed by Messrs Jackson Parton, London E1) appeared on behalf of the Respondent Claimant.