[2001–02 Gib LR 130]

MINISTER FOR TOURISM AND TRANSPORT and ATTORNEY-GENERAL v. ISOLA AND ISOLA (A Firm)

SUPREME COURT (Pizzarello, A.J.): June 27th, 2001

Legal Profession—duties to client—confidentiality—if solicitor retains confidential information from former client and acts for new client with conflicting interests, may be required to eliminate risk of disclosure or, if proposed measures inadequate, restrained from representing new client

Legal Profession—duties to client—confidentiality—waiver—failure by former client to intervene when aware that solicitor has new client with conflicting interests, militates against restraining solicitor from acting

The claimants applied for an order to restrain the defendant firm of barristers and solicitors from representing a client in particular proceedings.

The defendant acted as solicitors for the Government from 1988 to 1996, and received no further instructions when the Government then changed. In 2000 the defendant was consulted by Blands, a firm in the tourism industry, regarding certain fees in a Government contract. The defendant sought the Government's approval to act for Blands. The Minister for Tourism left it to one of the defendant's partners ("A.J.I.") to consider the appropriateness of taking instructions from Blands. The defendant continued to act for Blands and an agreement between Blands and the Government came into effect on January 1st, 2001.

The Government subsequently proposed to introduce an environmental levy which potentially affected the contract and Blands issued proceedings. The claimants applied to restrain the defendant from representing Blands on the ground that they had received relevant

confidential information when they had acted for the Government in discussions in 1993 relating to a nature reserve adjacent to property leased by Blands, the entry to which was conditional upon the payment of fees. Another of the defendant's partners ("P.J.I.") gave advice to the Minister in 1995 on the Government's right to make a general charge to persons entering the nature reserve.

The claimants submitted that there must be an inference that the defendant was in possession of confidential information from discussions regarding the 1993 agreement and the later 1995 issues. The only evidence against such an inference was a statement of A.J.I., and his credibility had been attacked.

The defendant submitted in reply that (a) it no longer held any confidential information communicated to it by the Government; (b) any such information it did hold from 1993 had ceased to be confidential, as it had become a matter of public record; and (c) P.J.I.'s advice was a legal opinion and was not relevant confidential information.

Held, declining to restrain the defendant firm from acting:

(1) The defendant firm had fulfilled its duty to ensure that the Government, as its former client, was not put at risk that confidential information obtained from their relationship might be used against it. Indeed, it could not be inferred, nor had it been shown, that the defendant in fact retained any relevant confidential information from its 1993 or 1995 dealings with the Government; to the contrary, there was a positive assertion from an officer of the court, A.J.I., that no such information existed and this assertion would be accepted as true notwithstanding that his credibility had been questioned. If, however, confidential information had been retained, the court would have been entitled to require the defendant to take measures to guard against the risk of disclosure by its members or employees or restrain it from representing Blands (para. 3; para. 13; paras. 27–29; paras. 31–32).

(2) In any case, even if there had been confidential information in existence, the fact that the Minister knew the defendant was representing Blands and did not try to intervene, militated against the making of a restraint order. So too did the fact that, had there been any such information, the opportunity would already have arisen to divulge it and the court would not have made an order which had already been negated by events (para. 33).

Cases cited:

(1) *Bolkiah (Prince Jefri)* v. *KPMG*, [1999] 1 All E.R. 517, followed.
(2) *Christie* v. *Wilson*, [1998] 1 W.L.R. 1694; [1999] 1 All E.R. 545, referred to.
(3) *Solicitors, In re a firm*, [1997] Ch. 1; [1995] 3 All E.R. 482, followed.

J.J. Neish, Q.C. and *D. Bossino* for the claimants;
Hon. P.J. Isola for the defendant.

1 **PIZZARELLO, A.J.:** In this case, the claimants apply for an order that the defendant, or any member of it, be restrained from representing and/or acting as solicitors or counsel or otherwise howsoever for M. H. Bland & Co. Ltd. of Cloister Building, Market Lane, Gibraltar, in any of the following proceedings, namely, Actions No. 2001 M79, 2001 M83 and 2001 Misc. No. 10, because the defendant acted for the Government of Gibraltar directly and through its agents, the Gibraltar Tourism Agency Ltd., in issues which are substantially the same as issues arising in those proceedings and are in possession of information acquired whilst so acting.

2 The law relating to this matter was recently reviewed by the House of Lords in *Prince Jefri Bolkiah* v. *KPMG* (1). It is clear that where, as in the instant case, it is a former client who is asking the court to intervene, the matter is not one of conflict of interest because there is none, as the fiduciary relationship which subsists between the solicitors and the client comes to an end on the termination of the retainer. I have no doubt that the firm of Isola & Isola ceased to act for the Government after a new administration came into power in April 1996. I accept Mr. Peter Isola's statement that since that date his firm has dealt with only one matter as a carry over of a matter in which Isola & Isola had been retained prior to April 1996. Two speeches are relevant, the first that of Lord Hope of Craighead and the second that of Lord Millett.

3 To set the matter in context, Lord Hope explained the basis of the jurisdiction for the court to intervene on behalf of a former client. He said ([1999] 1 All E.R. at 519):

> "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.
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> 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.
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> 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."

4 Lord Millett observed that the court's intervention is founded not on the avoidance of any perception of possible impropriety, but on the protection of confidential information. He turned to the question of the solicitor's duty and said (*ibid*., at 527):

> "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.
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> 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."

The jurisprudence to which Lord Millett refers, was the absolute rule which precludes a solicitor or his firm from acting for a client with an adverse interest to that of the former client in the same or a connected matter.

5 Lord Millett then went on to examine the extent of the solicitor's duty and he says (*ibid*., at 527):

> "It is a duty to keep the information confidential, not merely to take all reasonable steps to do so. Moreover, it is not merely a duty not to communicate the information to a third party. It is a duty not to misuse it, that is to say, without the consent of the former client to make any use of it or to cause any use to be made of it by others otherwise than for his benefit. 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; and 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 is or may be relevant.
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> It follows that in the case of a former client there is no basis for granting relief if there is no risk of the disclosure or misuse of confidential information. This was the ground on which the Court of Appeal discharged the injunction in *Rakusen v. Ellis Munday & Clarke* . . .
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> . . .
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> It is in any case difficult to discern any justification in principle for a rule which exposes a former client without his consent to any avoidable risk, however slight, that information which he has imparted in confidence in the course of a fiduciary relationship may come into the possession of third party and be used to his disadvantage. Where in addition the information in question is not only confidential but also privileged, the case for a strict approach is unanswerable. Anything less fails to give effect to the policy on which legal professional privilege is based. It is of overriding importance for 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 of coming into the hands of someone with an adverse interest.
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> . . . 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* . . . and adopted by Pumfrey J. in the present case."

And then he turned to the degree of risk (*ibid*., at 529):

> "In my view no solicitor should, without the consent of his former client, accept instructions unless, viewed objectively, his doing so will not increase the risk that information which is confidential to the former client may come into the possession of a party with an adverse interest."

6 It has to be remembered that the case of *Prince Jefri* (1) in fact referred to accountants and not solicitors and the question in issue in the instant case affects the position of solicitors. Nevertheless, the speeches in the House of Lords considered the law relating to solicitors because the accountants were in the business (among other things) of providing forensic accounting. It is clear that a careful analysis of the facts in that case showed that KPMG were unable to demonstrate that they could provide the protection to which Prince Jefri was entitled in order to ensure that there was no risk that confidential information acquired from him would be disclosed. A not dissimilar action to the instant matter is the case of *In re a firm of Solicitors* (3) where Lightman, J. made certain observations which are in my view relevant and do not conflict with the speeches of the learned Law Lords in the *Prince Jefri* case ([1997] Ch. at 10).

> "(5) On the issue whether the solicitor is possessed of relevant confidential information: (a) it is in general not sufficient for the client to make a general allegation that the solicitor is in possession of relevant confidential information if this is in issue: some particularity as to the confidential information is required: see *Bricheno v. Thorp*, Jac. 300 and *Johnson v. Marriott* (1833) 2 C. & M. 183. But the degree of particularity required must depend upon the facts of the particular case, and in many cases identification of the nature of the matter on which the solicitor was instructed, the length of the period of original retainer and the date of the proposed fresh retainer and the nature of the subject matter for practical purposes will be sufficient to establish the possession by the solicitor of relevant confidential information. (b) It may readily be inferred that confidential information is imparted to members of the firm having the conduct of the client's matter. Such information may, however, be imparted to other members in the course of partnership meetings or social meetings of members of the firm: see *In re A Firm of Solicitors* [1992] Q.B. 959, 978c. (c) The court attaches weight to

the evidence of the solicitor as to his state of knowledge and whether he has received confidential information, in particular where there is no challenge to his integrity and credibility: see *Robinson v. Mullett* (1817) 4 Pr. 353 (solicitor); *In re A Solicitor* (1987) 131 S.J. 1063, *per* Hoffmann J. and *Pavel v. Sony Corporation*, 12 April 1995 (barrister)."

7 In the instant case, what the claimants are saying is that the issues which arose in 1992 to 1993 and later in 1995 were the same issues arising in the current litigation, and extrapolating from an affidavit of Mr. George Gaggero sworn on March 30th, 2001, in another matter, these were that the restrictions imposed by the order:

(a) were in breach of the claimant's lease;

(b) run contrary to European law;

(c) are unconstitutional;

(d) are generally unlawful.

8 The facts that I find for the purpose of this judgment in this matter are these:

(a) The firm of Isola & Isola was retained primarily on an ad hoc basis to provide legal services to the Government of the day and broadly speaking to other agencies connected with the Government such as Gibraltar Information Bureau Ltd. and Sights Management Ltd. and, in so far as this issue is concerned, to G.T.A.L. throughout the two terms of the previous administration from 1988 to 1996. The primary conduit between the Government and Isola & Isola was the Minister for Tourism for Government and Mr. Albert Joseph Isola (A.J.I.) for Isola & Isola and their method of operating was very loose, informal and oral. Very little record was kept of any information or advice which flowed between them.

(b) There is a lack of records on the part of the Government and G.T.A.L. (the authorized agent of the Government in respect of the management of certain areas and facilities) appertaining to the matter in issue. However, certain documents are extant, from which I can draw what I trust is a fairly accurate picture of what transpired since 1990 and 1996.

(c) Blands (the defendants' present clients) operated in the Upper Rock Area, under a lease granted by the landlord (the Government) in 1968 and it seems clear that some alteration to the arrangements contained in the lease became necessary. Eventually, an agreement was entered between the landlord, the Government, through the Minister for Tourism, and Blands, dated May 17th, 1993. Why did that happen? The following factors at (d) and (e) below seem material.

(d) On May 9th, 1991, the Governor assented to the Nature Protection Ordinance, 1991. On June 20th, 1991, the Governor designated an area the Upper Rock Nature Conservation Area under the Nature Conservation Area (Upper Rock) Designation Order 1991 (L.N. No. 116 of 1991) and also on the same day the Nature Conservation Area (Fees and Admission) Regulations 1991 (L.N. 115 of 1991). The bill introducing the Nature Protection Ordinance was published on March 7th, 1991.

(e) I draw the inference that before this legislation was enacted, the Government advised, informed and/or consulted with all relevant entities which used the Upper Rock and would be affected by this legislation and in particular Blands, who held a lease from the landlord. I glean this from the terms of a letter dated October 28th, 1992, from Budhrani & Co. (the solicitors for Blands at the time) to Isola & Isola then acting for the Government, referring to Blands' increase of charges of April 1st, 1992 and more particularly from the reference in Mr. Richard Garcia's affidavit to a letter dated January 15th, 1990, from the then Minister for Tourism to Messrs. Triay & Triay, then acting for Blands, copied to the defendant, which letter is stated to have formed a part of a series of correspondence relating to the introduction of fees for rock tours.

(f) It is easy to infer also that Blands would have viewed with some concern any introduction of fees which might affect its rights under the lease and that legislation and would have sought legal advice on their position. It is easy to infer similarly that the Government would have sought advice from their legal advisers before embarking on this enterprise.

(g) It is easy to infer that Blands would have opened discussions with the Government as to their position.

(h) It is also easy to draw the inference that before the agreement was made, negotiations had had to start at some time and the Government would turn to its solicitors for legal advice—to state the obvious.

(i) It is my judgment that negotiations were under way long before the end of March 1992. On June 4th, 1992, there was a letter written from Blands to the Minister (referred to in Budhrani's letter of October 28th, 1992) referring to item xii of that letter, that no additional levy should be forced on the cable car if any new sites were to be included in addition to St. Michael's Cave and the Apes' Den. This letter of June 4th, 1992, is I assume, one of the missing documents, as it has not been produced to me. The Minister appears to have agreed to that, by a letter dated June 8th, 1992. This letter is also missing, but it shows that matters had advanced to the stage where fees were being discussed. Since this item was numbered xii, one is left to wonder as to the nature of the other items.

(j) The oldest record regarding this episode is a reference to a letter from Budhrani to the defendant dated July 24th, 1992, which enclosed a draft agreement, and is acknowledged by Mr. Peter Isola on behalf of A.J.I. both of the defendant's firm on September 11th, 1992, headed "Upper Rock Nature Reserve." I am assuming that this is the first draft of the 1993 agreement, having regard to Budhrani's letter of January 5th, 1993, which refers to a previous draft as the first draft, and that this draft is the one which A.J.I. returned amended to Budhrani on October 19th, 1992.

(k) The draft agreement is as follows:

"This agreement is made in triplicate between Sir Derek Roy Reffell K.C.B. Governor of the City of Gibraltar in the name and on behalf of Her Majesty the Queen of the first part, M. H. Bland & Co. Ltd. a company incorporated in Gibraltar under the Companies Ordinance with its registered office situate at Cloister Building, Market Lane, Gibraltar of the second part and the Minister for Tourism of the Government of Gibraltar of Duke of Kent House, Cathedral Square, Gibraltar of the third part.

Whereas:

1. By deed of lease dated April 2nd, 1968 and made between the landlord and Bland Aerial Ropeway Ltd., the landlord demised to the tenants certain pieces of land together with the buildings pylons supports and other erections thereon as more particularly delineated and identified on the plan attached to the lease, together with the privileges and rights therein contained and in particular the licence and authority for the tenants to operate an aerial ropeway carrying suspended cars between the said pieces of land for the term of 150 years from October 1st, 1966, for the consideration at the rent and on the terms and conditions therein reserved and contained.

2. By virtue of divers mesne assurances, the unexpired residue of the term created by the lease and the privileges and rights thereby conferred upon the tenants, is now vested in M.H.B.

3. By the Nature Conservation Area (Upper Rock) Designation Order 1991 (L.N. No. 116 of 1991), the landlord, in the exercise of the powers conferred upon him by s.18(1) of the Nature Protection Ordinance 1991, has designated the area to the south of one of the pieces of land demised to M.H.B. and known as the intermediate station, which area is more particularly shown on the map scheduled to the said order, as a nature conservation area known as the Upper Rock Nature Conservation Area, the entry to which is limited by reg. 4 of the said order, to Jews' Gate and St. Michael's Road and is conditional upon the payment of admission fees specified in the schedule thereto.

4. M.H.B. claims to be aggrieved by the limitation as aforesaid of the points of admission to the Upper Rock Nature Conservation Area and by the requirement of the payment of fees to secure entry thereto as contravening the rights enjoyed by M.H.B. pursuant to s.6 of the Conveyance and Law of Property Act 1881 (made applicable to Gibraltar by the English Law (Application) Ordinance).

5. The Minister disputes M.H.B.'s contention that its rights have been infringed.

6. M.H.B. and the Minister are desirous of avoiding litigation on the matter in issue between them and to that end have agreed to enter into these present negotiations for the purpose of securing mutual benefits to both parties.

Whereby it is agreed as follows:

1. The Minister shall permit entry into the Upper Rock Nature Conservation Area for those passengers carried by M.H.B. on its cable cars wishing to disembark at the intermediate station and in consideration thereof shall be entitled to charge the entrance fees reflected in the fare structure agreed between M.H.B. and the Minister and operational since April 1st, 1992, particulars whereof are contained in annex 1 hereof.

2. The said fare structure shall be subject to review from time to time and M.H.B. and the Minister hereby agree to co-operate and consult with each other to the fullest extent with a view to agreeing upon fares which are in the best interests of both parties. In the event of the parties being unable to agree upon a fare structure, either party may terminate this agreement as hereinafter provided.

3. The Minister shall deploy a member or members of his staff on M.H.B.'s premises at Alameda Grand Parade (the bottom station) for the purpose of selling tickets authorizing the entry of M.H.B.'s passengers into the Upper Rock Nature Conservation Area, provided always that the absence of the Minister's staff shall not preclude M.H.B.'s right to operate its cable cars in accordance with the fare structure afore-referred to and, in particular, to allow its passengers to disembark at the intermediate station and gain entry into the Upper Rock Nature Conservation Area there from.

4. M.H.B. shall be entitled to waive part or the whole of the fee payable for entry into the Upper Rock Nature Conservation Area by any of its passengers or class of passengers having regard to the special circumstances relating to such passenger or class of passengers, provided always that M.H.B. shall exercise its said discretion in accordance with guidelines from time to time agreed

with the Minister and that M.H.B. shall be accountable to the Minister for the exercise of its discretion aforesaid.

5. M.H.B. shall be at liberty to refund to passengers fees paid for the entry by them into the Upper Rock Nature Conservation Area, if the cable cars shall not be operational for any reason whatsoever.

6. M.H.B. and the Minister agree that variations in the future to the fare structure shall be aimed at harmonising the qualifying age for determining the fees payable in respect of children.

7. M.H.B. shall be at liberty to permit passengers holding valid entrance tickets acquired elsewhere to the Upper Rock Nature Conservation Area to disembark at the intermediate station upon payment only of the fare charged by M.H.B for the carriage of passengers of its cable cars.

8. The Minister hereby agrees that any future expansion of the Upper Rock Nature Conservation Area, by the inclusion of tourist sights in addition to St. Michael's Cave and the Apes' Den, will not result in an additional or increased entrance fee being applicable to the fare structure afore-referred to.

9. M.H.B. hereby agrees to account to the Minister on a monthly basis three months in arrears for all sums received by it from its passengers by way of fees for the entrance into the Upper Rock Nature Conservation Area.

10. For the furtherance of the parties' respective interests, the Minister will cause to be improved and enhanced the signage at the bottom station and at the upper station served by M.H.B.'s cable cars and on all highways affording access to the Upper Rock Nature Conservation Area, advising tourists on all aspects of the Upper Rock Nature Conservation Area and on means of access thereto.

11. M.H.B. and the Minister hereby expressly agree and acknowledge that this agreement is entered into by each of them without prejudice to their respective rights and remedies at law on the issues referred to in recitals 4 and 5 hereof.

12. Either M.H.B. or the Minister may terminate this agreement upon giving to the other not less than three months' notice in writing to that effect and upon the expiry of the said period of three months all the parties hereto shall be freed and discharged from all obligations hereunder without prejudice however to any right or remedy subsisting at the date of termination.

13. For the avoidance of doubt, it is hereby agreed that upon the due termination of this agreement, M.H.B. shall be at liberty to charge its passengers such fares as are approved by the landlord

pursuant to cl. 2(ii) of the lease for their carriage in M.H.B.'s cable cars.

14. In consideration and for the duration of the agreement hereby entered into between M.H.B. and the Minister, the landlord hereby waives the royalty to which he is entitled pursuant to cl. 1 of the lease and the landlord further authorizes M.H.B. to charge such fares as it may agree with the Minister pursuant to the terms hereof for the carriage of passengers on its cable cars.

15. All disputes between the parties hereto in connection with the performance by any party of the terms of this agreement shall be referred to arbitration pursuant to the Arbitration Ordinance or any amendment or re-enactment thereof for the time being in force in Gibraltar."

(l) The amendments proposed by A.J.I. were:

(i) G.T.A.L. for Minister for Tourism;

(ii) G.T.A.L. for Minister;

(iii) 14 days' notice in cl. 8 which dealt with future expansion which should not result in additional or increased fee being applicable to the fare structure introduced by the agreement;

(iv) deletion of the arbitration agreement;

(v) details of signage.

(m) Budhrani replied on October 28th, 1992:

(i) expressing concern over G.T.A.L. as principal;

(ii) noting that the 14 days' notice conflicted with the agreement reached with the Minister covered in the exchange of letters dated June 4th and 8th, 1992;

(iii) signage—describing what is required;

(iv) regretting no arbitration but accepting the position and commenting:

"and would suggest that arbitration is the proper forum for the airing of grievances in commercial arrangements of the sort proposed to be entered into between the parties. While I agree that the parties might be happier submitting fundamental issues regarding property rights and the like for adjudication by the courts . . ."

(v) introducing a new point of admission to the Upper Rock Nature Reserve, namely the breach in Charles V Wall;

(vi) proposing an addition to cl. 13 regarding fees charged by Blands between April 1st, 1992 and the termination of the agreement;

(vii) proposing amendment to cl. 14 to allow for charges imposed "in its commercial judgment."

(n) On October 29th, 1992, A.J.I. sent a copy of Budhrani's letter to the Minister and referred to a meeting on Friday afternoon.

(o) On November 16th, 1992, A.J.I. wrote to Budhrani:

(i) explaining the role of G.T.A.L.;

(ii) deleting the amendments proposed for cl. 8;

(iii) agreeing signage with a minor amendment;

(iv) not accepting arbitration;

(v) refusing the break in Charles V Wall as a point of admission;

(vi) rejecting the proposed amendment in cl. 13;

(vii) rejecting the amendment to cl. 14.

(p) Between November 16th and 30th, there was a meeting between Blands (J. Gaggero), Budhrani and the Minister for Tourism recorded in Budhrani's letter of November 30th, 1992. No representative of the defendant was present.

(q) On November 30th, 1992, Budhrani wrote:

(i) suggesting the parties to remain as in the original draft;

(ii) proposing an amendment of cl. 1 to cover the Charles V Wall breach;

(iii) agreeing signage;

(iv) objecting to no arbitration clause;

(v) accepting the position of cl. 13;

(vi) insisting that the Minister had agreed to the cl. 14 amendment.

(r) On December 21st, 1992, A.J.I. communicated to Budhrani that the agreement should be entered into and accepted that:

(i) the parties shall be the principals and not G.T.A.L;

(ii) clause 1 be amended with the deletion of the expression "the Minister."

(s) On January 5th, 1993, Budhrani replied to the defendant's letter of

December 21st, 1992 and enclosed a further draft of the agreement incorporating all the amendments finally agreed in correspondence and at meetings between Blands and the Minister.

(t) On January 6th, 1993, the defendant sent a copy of that letter and the new draft to the Minister. The Minister agreed to the second draft with certain clarifications to be considered and proposed an amendment of cl. 12. He questioned cl. 14 and proposed an amendment, namely, to insert a full stop after the word "lease" in line 4 and delete everything that followed.

(u) On February 4th, 1993, Budhrani replied agreeing to all of the requests made, save for the proposed amendment of cl. 14 and he insisted that cl. 14 should remain as drafted.

(v) On February 11th, 1993, the defendant pointed out that "this agreement is intended, insofar as certain matters are concerned, to supersede the lease between the Crown (and Blands) for the duration of the agreement only" and as to cl. 14 suggested that cl. 2 could be amended appropriately. A.J.I. signed off expressing a desire to conclude the agreement.

(w) In a letter of February 26th, 1993, Budhrani referred to a conversation of February 23rd, regarding the outstanding issues raised by the defendant's letter of the 11th as well as a meeting in Engineer Lane/Bell Lane and asked A.J.I. to expedite.

(x) On April 21st, A.J.I. wrote to the Minister seeking final approval to the agreement.

(y) The agreement is dated May 12th, 1993 and was sent to Budhrani on June 2nd, 1993. There appears still to be a need for clarification and reference is made by Budhrani in his letter of June 11th, that a "valid entrance ticket" is understood by Blands to mean a ticket for zone A.

(z) The agreement as finally signed is the same as the original draft save for:

(i) the insertion in cl. 1 of the breach of Charles V Wall and annex 1 (entrance fees) is attached;

(ii) in cl. 4 annex 2 (guidelines) is attached;

(iii) in cl. 7 there is added "entrance tickets shall be valid only for the dates shown therein";

(iv) cl. 10 has annex 3 (signage) attached;

(v) cl. 12 adds that upon the termination of the agreement the rights and obligations of the parties reverts to the position prior to April 1st, 1992;

(vi) cl. 14 incorporates "the commercial judgment of Blands" with regard to charging of fees.

9 On November 20th, 1995, in a letter by A.J.I. to the Minister headed "Bland Aerial Ropeway Ltd.," A.J.I. referred to fees and a note from Peter J. Isola (P.J.I.). Mr. Garcia in his affidavit in support of the application states that he has found no correspondence or records which might show how or why this occurred other than a fax from George Gaggero to A.J.I., dated August 25th, 1995, which is exhibited in R.G. 2. The fax reads:

"It was agreed with Sights Management that as from December 1st, 1994 Calypso would pay in full (£1.50 per pax) and would be refunded by cheque the £0.50 discount. This system was set up by Joe Viales because he did not trust either his or our staff not to let the secret out of the bag.

However, the above system was never put into practice.

On May 31st, 1995, we received a credit note for those clients that we had carried up until March 31st, 1995. As agreed with J.P., we were given this additional concession while the increase was effected to everybody else on December 1st, 1994. Hence, the actual system which was put into operation was that we would pay the net fee of £1 and receive a credit note for £0.50.

From March 31st, 1995, we have been paying net £1.00 expecting Sights to send us credit notes for the £0.50 per pax.

The problem arises that I thought that we were only receiving the credits for the pax for which we had contracts. Obviously, the contracts were never received by Sights. Therefore, they thought that we were claiming on all clients. Should Sights not have let us know that they had not been receiving the contracts and therefore the requests for the credit notes were invalid?

It seems odd that Sights have kept their mouths shut from March 31st, 1995, up until August 3rd, 1995, despite the fact that they had been receiving £1 net for four full months and therefore must have had an enormous debit in their accounts for which they were not chasing for payment. Surely, Joe Viales should have picked up the phone and told us some time ago (seeing as we are all supposed to be one big happy family looking after each other's interests and working together in an atmosphere of trust) that this matter was still outstanding and that problems would arise as a result if we did not fulfil our part of the bargain.

I have also spoken to Paddy Greech who informs me that they sent in six contracts (not two or three) dated Febuary, March, April, August, October and November 1994.

Paddy thinks that they were sent in March 1995 to the Minister.

History

I must take issue with the fact that the letter sent by the Minister states that we notified that the entrance fee would go up to £2 as from December 1st, 1994. Not only was that notification made null and void by taxi protests, but the eventual fee structure was not £2 but a sliding scale which we were told would not affect us until April 1st, 1995. The sliding scale was notified to us in a letter from Sights on December 5th, 1994, but of which the contents and implication on us, Bruno, I and Bland Ltd. did not discuss with Joe Viales until January 23rd, 1995. Previously, we had also been assured not only that contracts that had had to be confirmed due to the imminent start of the season would be honoured, but that we would be given the opportunity to discuss to what extent we would incur the increases. Hence our surprise when at that meeting Joe Viales stated that the three of us would suffer the increase on March 31st, 1995, without discussion, negotiation or account for our concerns or contracts.

Calypso, Exchange and Bland Ltd. also had been advised on November 30th, that we would be eligible for some form of concession and that contracts would be honoured. Not only that but we had also been told that the letters being sent out were only sent in order to cover Sights in the event of problems."

10 This fax is a reply to a letter dated August 14th, 1995, from the Minister to Blands (G. Gaggero, Calypso Tours), which in turn refers to a letter from G. Gaggero dated August 4th, 1995, "regarding the Calypso contracts with your various operators" and also makes reference to a letter dated November 1st, 1994, from Sights Management Ltd. on behalf of Gibraltar Information Bureau Ltd. on the restructuring of entrance fees to Upper Rock Nature Reserve, which is duly exhibited. There is also attached in Exhibit R.G. 2 a letter of December 5th, 1994, headed "Restructuring of entrance fees to the Upper Rock Nature Reserve." It is clear and I find that all this correspondence deals with and concerns only fees, and as regards the matters in issue in the instant application I draw no inferences at this stage. But of course, the question has to be asked why the letter was written to the Minister? And why should P.J.I. have been asked to advise on the matter? In his witness statement of May 15th, 2001, A.J.I. concedes that in 1995 the defendant was instructed in relation to the disputes with Blands, but he unhelpfully does not particularize which issues were then at stake. In his statement, A.J.I. states vaguely that the Government felt the need to revise the 1993 agreement. I pause to ask rhetorically, to deal with the points at issue, or with fees? A.J.I. also states that further discussions took place between the parties (*i.e.* Blands and the Minister) and handled in an open and frank manner to the extent,

he avers, that it was agreed between the Minister and Blands that if no agreement could be reached, proceedings would be issued by the Government for a declaration as to the proper interpretation of the lease. For this purpose, he states that the Minister asked for an opinion from P.J.I.

11 P.J.I.'s recollection is that it was an internal memo from him to other lawyers in the firm. Clearly, the very fact that A.J.I. sent the letter to the Minister shows Isola & Isola were giving the Government advice. P.J.I. may have written an internal memorandum but once that was sent to the Minister it became advice to the Government. It also shows and I find that there were no "Chinese walls" set up within the firm to contain information, so that I find that any information disclosed to any one member of the firm is imparted to all the members of the firm. As was observed in *Bolkiah* (1) by Lord Millett ([1999] 1 All E.R. at 529): "the starting point must be that, unless measures are taken, information moves within a firm." This advice touches on the s.6 derogation from grant point and on the right of the Government to make a general charge to persons entering the nature reserve. It suggests that s.24(a) of the Nature Protection Ordinance 1991, be clarified and it touches on the detail of points of entry. It makes observations on Blands' position under the regulations, recommends a new set of regulations and it touches on Community law (the exemptions of residents of Gibraltar from payment). The memorandum reads:

> "(1) I have seen and looked at the proposed originating summons to be issued by H.M. Attorney-General to clarify the legal position in respect of Bland Aerial Ropeway Ltd.
>
> (2) I have noted that Budhrani claims that because of s.6 of the Conveyancing and Law of Property Act 1981, no fees can be charged in respect of the Bland Aerial Ropeway passengers alighting at the middle station. Section 6 of the Conveyancing and Law of Property Act is a section under which when a lease is granted or a conveyance is made to any particular person, the law implies certain results, such as the right of that person to go in and out of the premises demised or granted and other similar rights. Effectively, Mr. Budhrani is arguing that there is a derogation of grant in what the Government is seeking to do.
>
> (3) Without going into the details of my reasons for this, I do not believe that Mr. Budhrani is right in his assessment. The Government, in charging fees pursuant to powers given to it by the Ordinance, is not derogating from the grant to Blands. It is not charging Blands any extra fees that are not in the lease. It is making a general charge to any person, except for a resident of Gibraltar, who goes into the nature reserve. It is not a matter that Blands can

complain about to the Government. It is something that the individuals affected could complain about. It is a provision that is of general application and deemed to be necessary for the maintenance and preservation of a conservation area in relation to the duties undertaken by the Government. There is, however, a slight weakness in this argument, but I do not think it overrides the principle in that an exception appears to be made for residents of Gibraltar who do not have to pay.

(4) I have looked at the Nature Protection Ordinance 1991, s.24. Although I feel that on balance that section empowers the Governor to make charges or charge fees for entry into the upper rock area, it has to be remembered that to make people pay money, the courts will always insist on clear language in the Ordinance giving such powers. I must say that s.24(a) is not very clear in this respect and if at any future date the Ordinance is changed or amended, opportunity should be taken to make provision specifically for the charging of fees to enter the nature reserve.

(5) There is, however, a more serious matter and that is the regulations under which fees are charged. The Nature Conservation Area (Fees and Admission) Regulations 1991, which have now been repealed, gave three points of admission to the Upper Rock Nature Conservation Area:

(a) Jews' Gate;

(b) St Michael's Road at its junction with O'Hara's Road;

(c) the north entrance to the Apes' Den.

The latest Nature Conservation Area (Fees and Admission) Regulations 1993, however, have changed the points of admission to the Upper Rock Nature Reserve and they now are at:

(a) Jews' Gate;

(b) Willis's Road.

It looks, therefore, as if the intermediate station is no longer a point of admission, nor indeed, the top station. If it is not a point of admission, this would seem to me to help Blands' argument that people arriving from the aerial car into the top station of the intermediate state are entitled to walk into the Upper Rock Nature Reserve by virtue of the provisions of their lease. I suppose it could also be argued that as a result of the regulations, all their passengers can do is get off at the different stations, stay in the area leased to Blands and then go back without any right to go into the Upper Rock Area.

(6) I would accordingly recommend that a new set of regulations are drawn up so as to include the middle station and the top station as points of admission to the nature reserve.

(7) Having said the above, I notice from the agreement dated May 12th, 1993, between the Governor, Blands and the Government of Gibraltar, that Blands had noticed that there was a limitation on the points of admission to the Upper Rock Nature Conservation Area and felt that this conflicted with their rights under s.6 of the Conveyancing and Law of Property Act 1981. They might well have an argument if in fact the Government prohibited entry into the Upper Rock Nature Conservation Area of all persons coming out of the intermediate station. This argument would not be valid in the case of passengers coming out at the top station.

(8) The intermediate station could only have been built in order to enable passengers of the Ropeway to go and see the monkeys. Blands would have an arguable case in respect of the intermediate station if their passengers were prohibited from entering the reserve at that point. It is a very different situation, however, if you say, you can come in but you have to pay an admission fee, to just saying, you cannot come in at all. This is why I feel that the regulations should be changed in relation to the points of admission and then fees charged to the passengers themselves.

(9) This may cause administrative problems. Whichever way one looks at it, decisions ought to be made and implemented before an originating summons is issued because you will see from the form of the summons that I have prepared, that the summons assumes that there will be points of admission at the intermediate station area and the top station area.

(10) However, I must say that in respect of the top station area, Budhrani would have great difficulty in arguing his case under s.6 of the Conveyancing and Law of Property Act 1881. In other words, it is not necessary to make the top station an admission point, but I believe it is necessary to make the intermediate station an admission point."

12 The originating summons suggested to the Minister and his reply in my view indicates that what was foremost in the mind of the Minister was the question of fees. It seeks relief by way of declaration that the Government is entitled to charge admission fees with the necessary caveat in the knowledge that the s.6 point has been mooted. Naturally all other legal issues, *i.e.* the issues at para. 7 above (essentially the matters touched upon by the memo of P.J.I.) would inevitably be in the melting pot. The Minister's reply to A.J.I.'s letter is instructive. A.J.I. writes:

> "I enclose herewith a draft summons to be issued for your approval together with a note from P.J.I. to myself and I would refer you specifically to para. 5, from which you will note that the regulations of 1991 were repealed and replaced by regulations which now only indicate two points of admission to the Upper Rock Nature Reserve Area as being Jews' Gate and Willis's Road. It therefore appears that the intermediate station is not a point of access to the nature reserve and therefore people cannot be charged on entering a nature reserve from this area. The advice is therefore that this be amended before the summons is issued."

The Minister replies:

> "Albert, I do not agree since the points of entry were regulated following agreement by which the £1 was being paid by Bland for entry into the nature reserve at the station. As such, the cable car station became *de facto* a point of entry into the reserve. J.P."

13 As I read this, it strikes me that what the Minister was saying is that a deal had been made with Blands and there is no need for this rigmarole. Isola & Isola were proactively and properly advising their client of the best way forward as they saw it in relation to fees but that the question of fees, if matters went to litigation, would raise the formidable and fundamental issues posed in para. 7 above. The advice proffered was not accepted or pursued. From all this I now draw the inference that there were no confidential matters running between Government and the defendant in respect of the issues in 1995. The issues were all plain to see. Fees were in issue; fees are paid in regard to entry points; all the other issues were matters of law primarily arising out of the construction of a document, the 1968 lease.

14 In 1996 a new government was elected in Gibraltar. The defendant received no further instructions and the retainers ceased *de facto* as outlined in para. 2 above. It matters not that the Government has not expressly revoked them.

15 Some time in about 2000, the defendant was consulted by Blands regarding fees. A letter undated but received on April 20th, 2000 by the Minister for Tourism from the defendant is headed "Admission to Upper Rock Cable Car." In it, A.J.I. refers to a conflict of interest and seeks the approval of the Government to act for Blands.

16 Between the time of letter of April 2000 and February 2001, the defendant continued to act for Blands in the matter of a new format for charges from passengers of the cable car. The fact that the defendant was acting for Blands was known to the Government and no issue was taken. The Minister had written on May 31st, 2000, leaving it to A.J.I. to consider whether it was appropriate that he should take instructions from

Blands. The charges were agreed and an agreement was entered between Blands and the Government which came into effect on January 1st, 2001 and substituted a new annex 1 to the 1993 agreement.

17 The Government subsequently proposed to introduce a new charge called the "environmental levy" and as a result Bland issued proceedings in which the issues at para. 7 arise. Hence this application.

18 Mr. Neish for the claimants submits that in all the circumstances there must have been discussion between the defendant and the previous Minister arising from the preparations dealing with the 1993 agreement and that these discussions must have entailed the exchange of factual information, the giving of legal advice, the assessment of the strengths and weaknesses of the Government's position, the acquisition of knowledge of the reasons which motivated the Government towards the May agreement and later the situation in 1995, and the defendant must be in possession of confidential or privileged information and that there is a risk that such information might be disclosed to Blands.

19 Mr. Neish acknowledges that what confidential or privileged information the defendant has is a matter of inference and the claimants have no direct knowledge of what it is, and asks the court following on the decisions already referred to, to draw the necessary inferences. He makes the point that confidential information includes advice communicated by the solicitor to the client and that such advice must be presumed to have been so communicated and therefore the court can infer that the defendant is in possession of confidential information.

20 He acknowledged that the burden of proving that the defendant is in possession of confidential information and that the information is or may be relevant to the new matter in which the interest of the new client is or may be adverse to that of the Government, is on the claimants. But it is not a heavy one and he submits that the claimants have discharged it. The former client is then to be protected from the risk of exposure and any doubts on this should be resolved in the client's favour. The duty on the solicitor is strict: "he must ensure that the former client is not put at risk" and that any relevant confidential information may not be used against him in any circumstances. There is no justification to expose the former client without his consent (and here the Government has not consented) to any avoidable risk however slight. Mr. Neish draws attention to Lord Millett's phrase in the *Prince Jefri* case (1) ([1999] 1 All E.R. at 528): "Where in addition the information in question is not only confidential but also privileged, the case for a strict approach is unanswerable." The court should intervene unless it is satisfied that there is no risk of disclosure. Once the burden is on the defendant, it is for the defendant to show that there is no risk and the defendant has not discharged it.

21 For the defendant, Mr. Isola draws attention to the judgment of Lightman, J. in *In re a firm of Solicitors* (3) ([1997] Ch. at 9):

> "The law regulating the freedom of a solicitor who, or whose firm, has at one time acted for a client subsequently to act against that client reflects the need to balance two public interests. First there is the interest in the entitlement of that client to the fullest confidence in the solicitor whom he instructs and for this purpose that there shall be no risk or perception of a risk that confidential information relating to the client or his affairs acquired by the solicitor will be disclosed to anyone else. Confidential information includes not merely information communicated in confidence by the client to the solicitor but also confidential information acquired by the solicitor on behalf of his client, e.g. on consulting experts, as well as advice communicated in confidence by the solicitor to the client. Second there is the interest in the freedom of the solicitor to obtain instructions from any member of the public, and of all members of the public to instruct such solicitor, in all cases where there is no real need for constraint: there must be good and sufficient reason to deprive the client of the solicitor or the solicitor of the client of his choice. A similar balancing is required in determining whether a barrister who has at one time acted for one party may subsequently act against him. The same principles plainly should and do apply in both cases: see *Bricheno v. Thorp* (1821) Jac. 300 and *Pavel v. Sony Corporation* (unreported), 12 April 1995; Court of Appeal (Civil Division) Transcript No. 336 of 1995."

22 A balancing exercise is required, submits Mr. Isola, and there is no evidence adduced in Mr. Garcia's affidavit in the instant case that the defendant is in possession of relevant confidential information. It is all supposition and only if the necessary inferences can be drawn, which he submits the court cannot properly do, can the claimants begin to found their claim. But what relevant information can be deduced? He concedes that they may well have been in the exchange of information between solicitors and client at the start of any discussions and concedes that at some stage those would be confidential, but since the agreement was reached in 1993, he submits these confidences cease to become confidential because it is all in the agreement. Lightman, J. said (*ibid.*, at 9): "[C]onfidential information . . . may . . . subsequently cease to be confidential." One cannot draw wide-ranging inferences where none are needed. P.J.I.'s memo is not relevant confidential information: it is a legal opinion and refers to law and is not ground for restraining Isola & Isola from acting for Blands in this case. He refers to *Christie* v. *Wilson* (2).

23 He submits an analysis of the substance of what was being talked about was fees for persons in the aerial cable car—and since all that

happened were negotiations on that question, what confidential information of substance can there be to be used against the Government? The parties were arguing about £1 or 50p., hardly a matter of confidence, hardly a matter to keep notes on. The matter was too fiddling for that and what is more, Blands and the Minister in 1993 and 1995 were communicating with each other directly. If one looks at the agreement, what sort of confidential information can survive the agreement? Furthermore, there is positive evidence that there is no relevant confidential material in A.J.I.'s statement when he submits A.J.I.'s credibility is not attacked. The same is true for the 1995 memo. That is an opinion of law and no more and no confidential information was imparted to the defendant. In so far as Lightman, J. indicated otherwise, he is incorrect; it is not what the *Prince Jefri* (1) case says and were he correct, and that advice constrains a solicitor, then no lawyer would ever be able to act against a former client and in the light of the *Prince Jefri* decision that is clearly not right.

24 Furthermore, he submits the application should be dismissed on other grounds:

(a) that the claimant did not make full disclosure of all the correspondence passing between the Minister and A.J.I., in relation to the question of conflict. Two letters were exhibited and there were two others which ought to have been disclosed. It is surprising, he suggested, that the Minister could not recall these two, noting that this was a recent matter and the events of 1993 and 1995 are far more distant; and

(b) that the affidavit discloses no cause of action and the application should be dismissed *in limine*.

25 Finally, he is prepared to give an undertaking that neither the defendant nor its servants or agents will disclose any confidential material obtained from the Government to Blands, but this does not take the matter further because the defendant has no such information.

26 Mr. Neish in reply reiterated his skeleton arguments and urged that the inescapable inference is that the defendant gave legal advice throughout and perforce received confidential information relevant to the matter now in issue. He takes issue with the manner Mr. Isola has attempted to trivialize the matter by making it appear a matter of 50p. or £1, when it is not: those figures hide the substantial issues which are at stake; it is the underlying issues which are the important ones. The law, he submits, is protective of former clients and few solicitors are enabled to work against their former clients. The Minister has not given his consent. As to Mr. Isola's point that the application does not show a cause of action, he submits that is implicit in the application itself and the affidavit in support but, if need be, he would ask the court to allow him to amend.

27 In outlining the facts, I have already come to the conclusion that I should not infer that the defendant has any relevant confidential information in respect of the 1995 memo of P.J.I. The question in respect of the 1993 agreement is somewhat more complicated. I do not accept Mr. Isola's analysis that it was all about the question of fees. When the 1993 agreement, at paras. 3 and 4 of the recitals, makes mention of the s.6 point and the Minister's negation of it, that shows clearly to my mind that before the parties moved on to negotiate, ascertain and agree the fees, that fundamental issue had been met and resolved by being put to one side before the parties could move on. That follows on my findings at para. 8 (a) to (h) and, to have put the matter to one side as they did, both parties must have had to make the conscious decision not to resolve the issues at stake. The claimants' case can stand only if these negotiations were full, lengthy and involved. Mr. Neish suggests a lot of facts must have been discussed and Government's thinking of it and on it would be pertinent. That might well have been the case, but it could equally have been agreed to set the matter to one side right from the outset. It is not a necessary inference that that decision should have entailed much effort. If the parties' aim was to regulate fees and get to grips with that, then I would have thought discussions about fundamentals would quickly have been put to one side with hardly a murmur. The question of arbitration is clearly a late introduction to cover what Budhrani considered commercial arrangements rather than fundamentals. The only evidence against inferences is the statement of A.J.I., who states categorically that he has no confidential information and the question is, should I disbelieve him in the face of inferences? I turn to consider this point.

28 While Mr. Peter Isola submitted that A.J.I.'s credibility was unassailed, that is not so, as it was attacked in the following manner. The originating summons referred to in the P.J.I. memo is clearly intended to be issued by the defendant and that runs counter to A.J.I.'s statement in his letter of May 24th, 2000 that the defendant would not have acted in litigation against Blands because Blands was an old client. The statement does not sit easily with the fact that Triay & Triay was acting for Blands in 1990. I have to consider whether A.J.I. can be trusted to be accurate as to his recollection or, perhaps more pertinently, as I am considering credibility as to what he says is his recollection, that no confidential information is possessed by the defendant. In considering this point it strikes me that even though he says that the defendant when representing the Government in this matter was more in the nature of a benevolent middleman and was advising the Government in respect of procedures, can it be right that the Government would have countenanced this? And if so, as A.J.I. appears to suggest, the obvious question would have been who would the Government have used as their solicitors? There is a dearth of detail. If the defendant was not to act, why not in the draft

originating summons use (a) the obvious channel, namely the law offices of the Attorney-General, (b) an alternative lawyer to Isola & Isola, or (c) leave the name of the issuing solicitor blank. All Mr. Peter Isola did was to suggest that the originating summons might have originated from Budhrani's office in view of the typeface.

29 I think in view of the high duty on a solicitor and of the need to protect a former client from a substantial risk, I have to consider the discrepancy on the part of A.J.I. with great care. If his recollection is at fault in this, why then not also as to the confidential matters? However genuinely forgetful, ought not the court then to restrain the defendant from acting? It goes without saying that if I were satisfied that the discrepancy is the result of an attempt to mislead the court, whether or not confidential matters exist would be beside the point and a restraint order would issue forthwith. Only if the court is satisfied that there is no risk should it not interfere, but if in doubt it should hold for the former client. In the *Prince Jefri* case (1), the court was not satisfied and, on the facts, not surprisingly. In *In re a firm of Solicitors* (3), Lightman, J. was quite satisfied that the former client ran no risk and on the facts, not surprisingly. In the instant case, I have set out the facts in as objective a manner as I can. Taking into account all Mr. Neish's submissions to persuade me that there is indisputably relevant confidential information retained by the defendant to be drawn from inescapable inferences, I have to say that I am not so persuaded, as I have already indicated. I do not consider those are inescapable inferences and I am convinced there is no risk.

30 As to the Government's thinking, I do not accept that is relevant at all. The policies of the last administration do not bind the present Government, which may well have its own agenda and its own thinking on this problem and at its worst, even if confidential and disclosed, cannot have any adverse effect on the claimants' position—it is not relevant.

31 As to A.J.I.'s statement, I must make it plain that despite the inconsistency above referred to, I would hold that his evidence (to the effect that there is no confidential information) is to be accepted as credible. Notwithstanding that the statement is not verified by a statement of truth, A.J.I. tenders it asserting that the contents are true. He is an officer of the court and as far as my experience is concerned, the firm of Isola & Isola has never knowingly misled the court. The discrepancy noted is not one which goes to the nub of the recollection, namely that there is no relevant confidential information.

32 I am not disposed to grant the claimants' application.

33 In any case, the grant of a restraint order is in the discretion of the judge. It seems to me that if the Government has come to an agreement

with Blands, substituting annex 1 of the 1993 agreement, in the knowledge that the defendant was acting for Blands, the Minister cannot have felt aggrieved enough to call off negotiations with Blands while the defendant was their solicitors. I have endeavoured to explain above that every time fees were discussed, the underlying issues were ever-present and the consequence of no agreement would have been litigation. This litigation would affect fees and necessarily the underlying issues. I take note that the last agreement of 2001 results from correspondence headed "Admission to Upper Rock Cable Car" whereas the 1993 matters refer to the "Upper Rock Nature Conservation Area" and the two things may not necessarily be the same. I am of the opinion that they are not the same, but for the purposes of the matters before me I do not believe it makes any difference. I do not think this estops the Government from making this application, but it does seem to me that if confidential information were there, the opportunity to have divulged it would already have occurred and the court will hardly make an order which is negated by events. This is an additional reason why I consider the application should be dismissed.

34 As to the argument for non-disclosure on an *ex parte* application, that would, in my opinion, have been a good ground to discharge any injunction which might have been given, but this is a hearing with both parties present and so the facts are before the court and I would not refuse to grant the restraining order on that ground.

35 As to the submission that the application form showed no cause of action, I think that the court and the defendant was sufficiently apprised of what was in issue. But Mr. Isola has a point and the amendment sought by Mr. Neish would have been granted had I acceded to the claim.

36 Finally, and it is not a point raised by either side, the application to restrain the defendant is to restrain the defendant in the proceedings 2001 M79, 2001 M83 and 2001 Misc. No. 10. The affidavit of Mr. Garcia in support of the application is in relation only to Action 2001 No. 79 and 2001 No. 83. The witness statement of A.J.I. also refers only to these two actions. I do not know what has happened to 2001 Misc. No. 10, but there is, in technical terms, no evidence in support of the application in respect of 2001 Misc. No. 10.

37 I dismiss the application.

Application dismissed.