Neutral Citation Number: [2005] EWCA Civ 1302

Case No: A2/2004/0948

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
THE HONOURABLE MR JUSTICE TUGENDHAT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 November 2005

Before :

THE RIGHT HONOURABLE LORD JUSTICE AULD
THE RIGHT HONOURABLE LORD JUSTICE LAWS
and
THE RIGHT HONOURABLE LORD JUSTICE SEDLEY

- -

Between :

1) NICOLAE CHRISTOPHER RATIU	**Appellants**
2) SIMON HARRY KARMEL	
3) REGENT HOUSE PROPERTIES LTD	
- and -	
DAVID PETER CONWAY	**Respondent**

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- -

Sir Sydney Kentridge QC, Mr Kenneth MacLean QC & Mr James Goldsmith (instructed by **Clifford Chance**) for the **Appellants**
Mr Romie Tager QC & Mr William Bojczuk (instructed by **David Conway & Co**) for the **Respondent**

Hearing dates : 15th & 16th March AND 24th and 25th May 2005

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Judgment Approved by the court for handing down (subject to editorial corrections)

Contents

Lord Justice Auld :

Introduction

1. This is an appeal of Mr Nicolae Ratiu, Mr Simon Karmel and Regent House Properties Ltd (all of whom I shall collectively call "Regent" unless otherwise indicated) against a jury's finding of liability and award of damages of £96,000 on 31st March 2004 in favour of Mr David Conway, a practising solicitor with the London firm, David Conway & Co., in his claims against Regent for damages for libel and malicious falsehood in a trial presided over by Tugendhat J.

2. The claims arose out of a letter of complaint by Regent to the agent for the Trustees of the Eyre Estate ("Eyre"), owners and vendors of a development site in St John's Wood. Regent complained that Mr Conway, whom they had instructed through a nominee company called Pristbrook Limited ("Pristbrook") to act for them as their solicitor in the purchase and, then, sale of a development site at No. 32 Elm Tree Road ("No.32") in St John's Wood, had, in his personal capacity, competed with them in bidding for another nearby and closely related site, Nos. 24-26 Elm Tree Road ("No. 24"). In particular, Regent complained that he sought to re-open the bidding after Mr Karmel had informed him that Eyre had accepted Regent's offer. Before making his rival bid, Mr Conway had contemplated that he might accept instructions from Regent to act for them on the acquisition of the site or that he might enter into a business deal with them for the purpose of such acquisition.

3. The letter, which was written by Mr Ratiu on behalf of Regent to Mr Julian Briant of the firm of Cluttons, chartered surveyors, acting as agents for Eyre, read as follows:

> "Further to your fax of earlier today, we are extremely concerned that we are being asked to bid against Mr Conway.
>
> We have reached agreement with you on two separate occasions. We informed Mr Conway that you had accepted an unconditional offer for the property from us and asked him to act for us in the purchase.
>
> He then used this confidential information to put in a higher offer.
>
> We are aware of your duty as trustees to obtain the highest price for the property. The trustees will however want to complete the purchase. If you proceed with the sale to a person who used confidential information obtained through a solicitor/client relationship, we will do all in our power to prevent the formalisation of a contract in breach of the duties owed by the solicitor.
>
> We will do everything in our power to prevent Mr Conway using this information to our detriment.
>
> We have already contacted the Law Society on this matter and are awaiting their response. We are ready and willing to

> exchange and complete on the basis of the offer that you have already accepted and have confirmed our meeting tomorrow morning at the offices of Pemberton Greenish together with our solicitors Clifford Chance."

4. It should be noted that the core allegation in the letter is that Mr Conway, in his capacity as solicitor for Regent, had misused confidential information imparted to him by Regent that Eyre had accepted its unconditional offer for No 24. There is no express reference in the letter to the *amount* of the offer. I should also record at this stage that, on the same day, Mr Ratiu also wrote letters to Mr Conway and the Law Society complaining in similar terms, though, contrary to the assertion in his letter to Mr Briant, he had not contacted the Law Society.

5. The nub of Regent's complaint, as expressed in that letter to Eyre's agent, Cluttons, was that that Mr Conway should not have bid for No 24 or sought to re-open the bidding once Regent had informed him that Eyre had accepted its offer. Regent maintain that he thereby put himself in a position of conflict between his duty as a solicitor to them as his clients and his personal interest in which he would inevitably (consciously or subconsciously) misuse his clients' confidential information.

The main issues at trial

6. Regent accepted at trial that the letter was defamatory in that it contained an allegation of unprofessional conduct of Mr Conway as a solicitor. The Judge, Tugendhat J, ruled that the letter was protected by qualified privilege, a ruling that Mr Conway does not challenge. The main issues for the Jury were (i) the meaning of the defamatory words and whether such meaning was justified (ii) if not, whether Regent had lost the protection of qualified privilege because they had been actuated by malice and (iii) damages. If Regent established justification or Mr Conway failed to establish malice, the claim would fail. However, the jury found that the defamatory letter on its true meaning was not justified and that, in writing it, Regent had been actuated by malice.

7. The issues of justification and malice both turned on the duties, if any, of trust, loyalty and confidence, owed by Mr Conway as a solicitor to Regent, whether viewed as a past, existing and/or prospective client. Regent maintain that the Judge's directions to the Jury on the law and on its application to the facts of the case were wrong and/or contradictory and that, as a result, the Jury's verdict is unsafe and ought to be set aside. They argue that if the Judge had properly directed the jury on these aspects of duty, they could not reasonably have found, as they did, in Mr Conway's favour.

8. Regent's case, in summary is that when Mr Conway made his bid for No 24 he owed them a fiduciary duty of loyalty and, in any event, a duty of confidence, and was in breach of both duties. They contend that the Judge erred as a matter of law and fact in a number of important directions to the jury on the issues of justification and malice, withdrew from them an essential part of Regent's case on both issues, namely that Mr Conway had a fiduciary duty to Regent, and, in any event, wrongly left the issue of malice to them when there was insufficient evidence of it. In the result, Regent ask the Court to enter judgment for them, alternatively to order a re-trial.

9. Mr. Conway's case is that he was never, whether as a solicitor or otherwise, at any stage under a fiduciary duty to Regent, and certainly not in relation to Nos 32 or 24, because such retainer as he had had was from Pristbrook, not Regent, and then only in relation to the purchase and sale of No. 32. He contends that the Judge's rulings and directions were sound in law and in fact.

The Facts

Mr Conway and Regent

10. Mr Conway was admitted as a solicitor in 1970 and has since been in private practice, initially in partnership with others and more recently as a sole practitioner in the West End of London. His main fields of practice are commercial and residential property transactions and company and commercial work. He has particular expertise in leasehold enfranchisement. Much of his practice involves transactions in residential properties in and around St John's Wood, where he has lived for over 30 years, and acting in enfranchisement claims by tenants of major residential property owners in that area, including Eyre.

11. Mr Ratiu and Mr Karmel are friends and business partners. Regent House Properties Ltd is a property investment company, ultimately controlled by Mr Ratiu's family and of which Mr Ratiu, but not Mr Karmel, was a director. It owned and controlled a company called Warleggan Group Limited ("Warleggan"), of which Mr Ratiu and Mr Karmel were directors. Warleggan, in turn, owned Pristbrook, of which they were also directors. The Judge directed the jury not to distinguish between Mr Ratiu and Mr Karmel on the one hand and Regent on the other for the purposes of the case, a direction not challenged in the appeal. But, as will appear, he directed them as a matter of law to distinguish between Pristbrook and Regent, a direction that is challenged in the appeal and goes to the heart of the issue between the parties on justification and, to a lesser extent, on malice.

12. Regent had had a long history with Elm Tree Road. Mr Karmel had lived at No 20 Elm Tree Road ('No 20') since 1987. From July 1994 to September 1999, Mr Ratiu, on behalf of Regent, corresponded with Eyre with a view to purchasing Nos. 32 and/or 24, together with Mr Karmel. No 32 was a semi-detached house on a development site in a prime residential area subject to a compulsory purchase order ('CPO') by Westminster Council ('the Council'). By 1999 it had become derelict. No 24, situated virtually opposite Mr Karmel's house at No 20, was a cleared development site approximately three times the size of No 32, which was suitable for building up to three houses, but which was also under threat from a CPO. Building on both sites required the consent of the Council and Eyre.

13. In November 1999, Mr Ratiu, on behalf of Regent, participated in a tender process to purchase No 32 from Eyre. He offered £1.2m, in the name of "Regent … or its nominee", an offer that Eyre accepted. Mr Ratiu's evidence was that the purchase of No 32, although it had to stand on its own as a commercial proposition, was intended to convince Eyre of Regent's credentials as a serious purchaser for the larger plot at No 24.

Mr Conway's involvement as a solicitor in the acquisition and sale of No. 32

14. On 19th November 1999, following the success of Regent's bid for No 32, Mr Karmel orally retained Mr Conway on behalf of Regent, to act as their solicitor in respect of their intended purchase of that property and, so Mr Karmel maintained, also its re-sale. At the time, Mr Conway was already acting for Mr Karmel in the enfranchisement of the lease on No 20, having been instructed for the purpose three years earlier in August 1996. In the course of that retainer Mr Conway had inevitably learned something of Mr Karmel's business affairs and his finances. By letter of 24th November 1999 Mr Conway confirmed to Regent his acceptance of their retainer to act for them on the purchase of No 32 and also, in his quotation of his charges for both purchase and re-sale, his expectation that he would be instructed and would accept instructions on the re-sale when the time came. Mr Conway's first attendance note in relation to the property records that the purchase was to be made in the name of "Regent or its nominee" and that a special purpose vehicle ('SPV') might be set up to acquire the site. On 2nd December, on Regent's instruction, Mr Conway acquired Pristbrook, an off-the-shelf company that became a subsidiary of Warleggan, to act as the nominee of Regent in the purchase and holding of No. 32.

15. On 14th December 1999 contracts for the purchase of No. 32 were exchanged in the name of Pristbrook. The purchase was financed partly by a mortgage taken out in Pristbrook's name, partly guaranteed by Mr Karmel and Regent. Mr Conway sent confirmation of exchange to Regent not Pristbrook. Completion took place on 12 January 2000.

16. Whether or not Regent at this early stage had formally instructed Mr Conway and whether Mr Conway had accepted instructions to act on the re-sale of No 32, it is plain that both parties proceeded in the confident expectation that he would act on the re-sale, and Regent took care to keep him informed of their plans and progress in connection with the property and to involve him in them from time to time. In February 2000, Mr Karmel instructed him to seek information from Eyre in connection with Regent's application for planning permission. He also kept Mr Conway informed on progress in relation to matters bearing on the re-sale, of No 32, including securing the Council's agreement not to implement the CPO and obtaining planning permission, and in its move to secure an undertaking from Eyre that it would not attempt to enforce its standard restrictive covenants.

17. Prospective purchasers immediately began to show an interest in purchasing No 32. Mr Conway, in his evidence at the trial, said that he had understood that the disposal of the property might take the form of transfer of the shares in Pristbrook rather than sale of the land itself, so as to avoid stamp duty. In April 2000 he advised Mr Karmel on that as a possible course.

18. In June 2000 the price paid by Pristbrook for No 32 was referred to in expert evidence before a Leasehold Valuation Tribunal on the hearing of an application for enfranchisement of another property in St John's Wood, a matter which, as will appear, has some relevance to an issue canvassed at trial as to whether Mr Conway's knowledge of the purchase price, derived from his involvement in the purchase as Regent's/Pristbrook's solicitor, imposed on him a duty of confidence in respect of it. In August 2000 planning permission for the redevelopment of No 32 was granted to

Pristbrook. And, on 11th and 14th September 2000, Mr Karmel and Mr Conway discussed a possible legal problem concerning the validity of that permission.

Regent's proposed purchase of No. 24

19. Returning to Regent's proposed acquisition of No. 24, on 11th September 2000 they made successive offers of £3.6m and £3.75m to Eyre to purchase it in the name of "Regent … or its nominee (most probably Pristbrook)", the latter offer being conditional on Eyre withdrawing the property from the market. Eyre, which appears to have been looking at that stage for an unconditional offer at a figure closer to £4m, refused both offers.

20. On 20th September, Mr Karmel telephoned Mr Conway to bring him up to date on the planning position in relation to No 32. Mr Conway's evidence was that, at that time, he considered he was still under retainer in respect of No 32. In the course of the call, Mr Karmel informed him that Regent were also negotiating to acquire No 24. Mr Conway's evidence was that he had an interest in acquiring part of if Mr Karmel was successful in his negotiations. His evidence was that he had also "hoped", or expected that Regent would instruct him as the solicitor on its purchase if the negotiations for it were successful.

21. On 21st September 2000, Mr Karmel wrote to Mr Conway on Pristbrook headed writing paper about No 32, enclosing correspondence with the Council about the threat of compulsory purchase of the site, a copy of the planning permission relating to it and correspondence with Eyre on the matter. Mr Karmel concluded the letter by stating: "We are now planning to actively market the site and doubtless will be in touch in due course"; and he added "We are still progressing matters with … [Eyre] in respect of the larger plot [No 24] and I will let you know the outcome".

22. Mr Conway immediately began preparing his own plans for No 24. On the same day he contacted Ms Emma Poyser and Mr Briant of Cluttons, and he wrote to his architect. In his evidence he claimed that he had learned from Ms Poyser that the best offer received for No 24 thus far had been £3.75m.

23. On 22nd September Mr Conway telephoned Mr Karmel, who indicated to him that the £3.75m bid had probably been "his" bid. He maintained in evidence that he had told Mr Karmel he intended to bid for the whole of the site, and produced two attendance notes of that telephone call, one in the name of Pristbrook but under the Regent file reference in his filing system, and one without any file reference. Neither attendance note records that Mr Conway told Mr Karmel of his intention to bid against Regent for the whole of the site, as distinct from a suggestion that he should be a party with Regent to some sort of joint venture in relation to it. In cross-examination, Mr Conway said that, if he had not made clear in the telephone call that he intended to bid for the whole site, or if Mr Karmel had not understood that, he had made it clear in a telephone call the following week. But there is no attendance note or other record of such a conversation.

24. On the weekend of 23rd and 24th September 2000, Mr Karmel and Mr Conway met twice. They discussed, on Mr Karmel's recollection, a proposal from Mr Conway that he should purchase part of No 24 from Regent should they succeed in the bidding, or, on Mr Conway's account, that he should enter into some other form of joint venture

with Regent for the site. Mr Ratiu also acknowledged in evidence, as he did in the unsent letter to the Law Society of 6th December 2000 (see paragraph 4 above), that Mr Conway had at one stage approached Regent with a proposition for joint purchase with them of No 24. But he and Mr Karmel emphatically denied in their evidence that Mr Conway had ever told them he intended to compete against them by seeking to purchase the whole of the site. Mr Karmel's evidence was that at about that time, 29th September 2000, Mr Conway told him that he could not afford to buy the whole site.

25. It is common ground that in the course of the meetings over the weekend of 23rd-24th September, Mr Karmel spoke to Mr Conway of his development ideas for No 24 and left him, overnight, copies of architects' plans and drawings relating to existing planning permission for the site. Mr Conway photocopied part of one of the plans, which had features he liked.

26. It is also common ground that Mr Conway did not suggest at this stage or later that Regent should seek legal advice about dealing with him personally in connection with No 24. However, on 25th September he drafted a letter to Pristbrook under the Regent file reference as a proposed response to Mr Karmel's letter of 21st September (see paragraph 21 above), in which he stated, "we, of course, have met twice over the weekend and clearly in the prevailing circumstances my firm could not act whilst there remained a conflict of interest". But he never sent the letter to Regent or Pristbrook. In evidence, he explained that he had drafted it to make clear that he could not act for and against Pristbrook in relation to No 24 at the same time.

27. Mr Conway's evidence at trial was that, shortly after the weekend of 23rd-24th September, in a conversation with Mr Karmel of which there is no record, Mr Karmel suggested to him that he should pay Regent £500,000 to drop out of the bidding for No 24. Mr Conway asserted that, in the same conversation, he made clear to Mr Karmel that he would bid for the site, and warned that, as he was acting for Regent on the sale of No 32, Mr Karmel should not discuss with him any information relating to Regent's bidding intentions for No. 24. Mr Karmel, in his evidence, denied any such conversation, or that he had ever suggested to Mr Conway that he should pay Regent £500,000 not to bid. Although there is no record of the alleged conversation, Mr Conway's wife and his secretary, Ms Coulson, gave evidence that he had informed them of the alleged £500,000 offer at around that time.

28. According to Mr Conway, from about that time, the end of September 2000, neither Mr Ratiu nor Mr Karmel said any more to him until November 2000 about their interest in purchasing No 24.

29. Returning for a moment to the progress towards sale of No 32, on 4th October 2000, Regent/Pristbrook agreed its sale by private treaty to a Mr and Mrs Richard Green at a price of £1.65m. On the same day Mr Karmel instructed Mr Conway over the telephone to undertake the conveyance to them, which instruction Mr Conway accepted by a letter addressed to Pristbrook of 5th October.

30. The apparent sale by Regent/Pristbrook of No 32 at such price appears to have given Mr Conway some encouragement and impetus to pursue his own plans for No 24. A day or so later, on 6th October 2000, he wrote to his bank requesting a loan to enable him to acquire No 24, indicating a purchase price of at least £4m. In his letter to the

bank, he cited No 32 as one of three comparables giving a good indication as to value. Mr Conway attached a plan of Elm Tree Road on which he had shaded No 32. The Bank appears to have agreed in principle to consider a loan facility of some £4m for the purchase.

31. However, Mr Conway's reliance on the sale of No 32 was premature, for it fell through on about 10th October 2000 because of the compulsory purchase order to which the property was subject. This led, on 1st November 2000, to Mr Karmel seeking advice from Mr Conway on the course recommended by a firm of local estate agents, of sale of the property by tender. On the 8th November, Mr Conway took part in a three-way telephone call with Mr Karmel and a representative of those agents to finalise arrangements for the tender on No 32.

32. On the same day, 8th November, Mr Conway and Regent were separately invited to take part in a tender to purchase No 24 set for late November.

33. On the 10th November, according to Mr Conway in his evidence at trial, he telephoned the Law Society's Professional Guidance Section, seeking guidance on (i) money laundering concerns relating to Regent (a wholly unfounded and unsupported suggestion not previously raised) and (ii) being involved in tenders for and against the same clients on different and proximate properties at the same time, with specific reference to the impending transactions relating to Nos. 32 and 24. On his account, this is what he said to the official to whom he spoke at the Law Society:

> "… I explained that I was acting for clients … I told the person I spoke to that I was proposing – I was acting for people that were preparing to sell this site by tender; that I was acting for them; I had prepared the tender documents; and that I was also competing with them to buy another property."

It is plain that, in seeking advice as to his professional position in that way, he was not at that time distinguishing between Regent and Pristbrook or between those corporate clients and Mr Ratiu and Mr Karmel. He said that the official advised that he should not be the collection point for tenders for the purchase of No 32 and that he should not become privy to the details of its sale until after the bidding had closed on No 24. As will appear, Mr Conway did not follow that guidance.

34. On 13th November 2000, Mr Conway sent Regent's/Pristbrook's estate agents, Aston Chase, the tender documentation for the sale of No 32, seeking bids in excess of £1.5m. In his covering letter he stated that the letter of invitation to tender was to come from his firm, David Conway & Co, acting on behalf of Pristbrook and that the agents should notify his firm of the names of the interested parties. Although Mr Conway suggested in evidence that he had instructed a change in the tender documentation so as to substitute the agents for his firm as the recipient of the tenders, no amended documents to that effect have ever been disclosed.

35. On the 16th November, a private buyer was found for No 32 at a price of £1.6m, on the basis of quick exchange. On Mr Karmel's instructions, Mr Conway offered to transfer the property to the purchasers by selling them Pristbrook, but the purchasers declined, and contracts were prepared for exchange with Pristbrook shown as the vendor.

36. The next day, Mr Conway wrote to his bank in connection with his request of 6th October for a loan facility of £4m to enable him to bid for No. 24, citing the invitation to tender for No. 32 of offers in excess of £1.5m. as further market evidence to support higher gross sale prices.

37. On 20th November, four days before the deadline for submission of tenders for No. 24, Mr Conway's firm exchanged contracts with the solicitors for the purchasers of No 32, the contracts still showing Pristbrook as the vendor. As a result, Mr Conway knew the re-sale price for No 32 and thus the gross profit margin of £400,000 that Regent, through Pristbrook, had achieved on their short-term investment in No. 32. Completion and redemption of the mortgage on that property were scheduled to take place on 21st December 2000.

38. However, as to No. 24, neither Regent nor Mr Conway took part in the November tender, which, seemingly, did not produce any bids acceptable to Eyre. On 28th November 2000, Eyre issued a further invitation to interested parties, including both of them, to take part in a second tender exercise for the property, with a closing date for tenders of 4th December.

39. Mr Conway telephoned Mr Karmel on 30th November 2000 to find out, according to Mr Karmel, whether Regent had taken part in the first tender exercise and whether they intended to take part in this one. Mr Conway did not produce any attendance note of that discussion, but said in evidence that they had discussed why neither of them had bid in the 24th November tender. And he said he had told Mr Karmel that he intended to bid in the forthcoming tender, whilst at the same time indicating possible interest in a joint venture between them for the site. He also said that he had told Mr Karmel not to discuss his bidding intention with him. Mr Karmel's evidence was that Mr Conway said nothing about his intention to bid and did not advise him not to discuss Regent's bidding intentions with him – on the contrary, he said, the purpose of Mr Conway's call was to discover what Regent intended to do about No 24.

40. At about that time Mr Briant of Cluttons told Mr Conway that Eyre would prefer an *unconditional* bid of £3.5m to the highest *conditional* offer in the November tender, which had been just over £3.750m. Mr Conway thereupon arranged with his bank to revise the facility agreed of £4m to £3.5 or £3.75m, based on a maximum purchase price of £3.75m.

41. In the mid-afternoon of 4th December 2000 Mr Conway telephoned Mr Karmel again. He produced in evidence an attendance note for this conversation, but he acknowledged that he may not have made it until after a further telephone conversation with Mr Karmel on the morning of the 5th. By reference to the note, he said that he had again indicated to Mr Karmel that he intended to bid for No 24. The note read:

> "I told him that having talked matters over, I did not feel I could agree a deal at this stage with him but that we could talk if either he or us were successful in the re-tender.
>
> I asked him if he was intending to re-tender. He said he thought they probably would."

Mr Karmel, in his evidence, denied that Mr Conway gave him any more indication in that conversation than in earlier conversations as to his bidding intentions for No 24.

42. The second tender exercise attracted 11 bids by the closing time of 5 p.m. on the 4th. Regent made an unconditional offer of £3.75m in the name of "Regent … or its nominee (most probably Pristbrook)", namely the same amount that it had bid in September 2000 conditionally on the property being removed from the market. And Mr Conway made an unconditional offer of £3.5m. On the evening of the 4th, Mr Briant informed Mr Ratiu that he intended to recommend Eyre to accept Regent's bid.

43. On the morning of the 5th December, Mr Briant confirmed to Mr Ratiu that Eyre had accepted his recommendation, had agreed with him to exchange contracts two weeks after receipt of documents and had asked for the name of Regent's solicitor. Within a short time of that call, Mr Karmel telephoned Mr Conway and informed him Eyre's acceptance of Regent's offer. Mr Conway did not respond that he had been a competing bidder or that Mr Karmel should not disclose to him any further confidential information. Rather, he asked when the deal had been done, to which Mr Karmel replied that Regent's bid had been accepted on the previous evening and that they had been informed of the Eyre Trustees' approval that morning. He then asked Mr Conway to act for Regent in the purchase of the site. Mr Conway did not say he could not act. He said that he needed to make a telephone call first. Mr Karmel said that he hoped that the call was not to Eyre. Mr Conway repeated that he needed to make a telephone call and hung up abruptly. It is common ground that, until that conversation, there had been no invitation to Mr Conway to accept a retainer to act for Regent or Pristbrook or any other associated company in the purchase of No 24 and that the conversation itself did not amount to acceptance by Mr Conway of such a retainer.

44. On his own evidence, Mr Conway immediately telephoned Mr Johnson, the Chief Executive of Eyre (rather than Mr Briant) and sought to re-open the bidding for No 24 by putting in a higher unconditional offer of £3.8m and offering to exchange contracts within 48 hours. Mr Johnson then telephoned Mr Ratiu and told him that someone had made a higher bid than that of Regent, to which Mr Ratiu responded that, if the bid was from Mr Conway, Eyre should know that he was Regent's solicitor.

45. Eyre then informed Mr Conway that his bid of £3.8m was rejected, whereupon he faxed a further offer of £4m and contacted his bank to raise his loan facility back up to £4m

46. On the following day, 6th December, Eyre re-opened the bidding by inviting final offers in excess of £4m from Mr Conway and Regent. Mr Conway responded immediately by faxing a further increased bid of £4.12m. Regent's response was to seek urgent legal advice from Clifford Chance, solicitors, and then to write the fateful letter, the subject of these proceedings, to Mr Briant, in his capacity as Eyre's agent, complaining about Mr Conway's behaviour. The letter, the terms of which I have set out in paragraph 3 above, was drafted by Clifford Chance on the instructions of Mr Ratiu and Mr Karmel, and was written on Regent's headed writing paper.

47. As I have said, Mr Ratiu wrote two further letters on 6th December, both on Pristbrook headed writing paper. One was to Mr Conway, which he sent. The other was to the Law Society, which he did not send. Mr Ratiu's explanation in evidence for not

sending the latter was that they had intended to send the letters in a different order but were overtaken by events, and he added, as was the case , that Regent informed Eyre the next day that they had not sent it.

48. The letter to Mr Conway throws some light on Regent's attitude at the time to his behaviour. It read as follows:

> "Further to telephone conversations of yesterday in which you were informed that Pristbrook Limited had made an offer for the above property which had been accepted, I am extremely concerned to learn that you have also made an offer for the property.
>
> We informed you of our offer, and invited you to act for us on the purchase. After a certain delay you declined to accept our instructions. We believe that is wholly inappropriate for you to then use this information that we disclosed to you, by way of a confidential conversation between ourselves as your respective [sic] client, and our legal adviser.
>
> We do not believe that this is appropriate conduct for a professional person.
>
> We would take this opportunity to inform you that if you continue to pursue your interest in the property, we will inform the Law Society of the recent events.
>
> In actuality your making an offer for the property may cause us to raise the price that we are paying for the property.
>
> Please confirm by return that you will desist from your interest in the premises, you will withdraw any existing offers and will not make any further offers. …"

49. The letter which Mr Ratiu, with the assistance of Clifford Chance, wrote to the Law Society, but which he did not send, also throws some light on Regent's attitude at the time towards Mr Conway's conduct:

> "We are writing to inform you of our concerns regarding the conduct of a solicitor.
>
> We made an offer to purchase a house. This was an unconditional offer which was accepted by the vendor. We then spoke with our solicitor and asked him to act for us on the purchase. The solicitor approached us some time previously with regard to purchasing the property jointly with him but these discussions did not come to fruition. This had emanated from an existing client/solicitor relationship between us on an almost adjacent property with the same vendor. When we contacted him to ask him to act for us on this purchase, we explained that we had reached agreement with the vendor. He

> responded by saying only that he needed to make a telephone call. He did not expressly state that he would not act. He certainly did not indicate that he would be making an offer for the property.
>
> The solicitor was then able to make a higher offer for the premises solely on the basis of the information disclosed in our telephone conversation. This was disclosed solely on the basis that it was a conversation between ourselves as a prospective client and him as a lawyer.
>
> We assume that this is a practice which the Law Society would find unacceptable. The solicitor has clearly acted against the best interests of ourselves as a prospective client. This must bring into disrepute the solicitor's profession, and we would ask for your urgent assistance on what action the Law Society might be able to take in this situation.
>
> We believe that it cannot be in the public interest for a solicitor to use information obtained in this manner to outbid his client when acting on a personal level."

50. In the event, Mr Johnson, who was called as a witness by Mr Conway, gave evidence that Eyre resolved to adhere to its acceptance of Regent's offer of £3.75m regardless of Regent's letter to it of 6th December. Exchange of contracts took place the following day, 7th December 2000, and the transaction was concluded with a transfer to a further nominee of Regent, Hoolway Limited.

51. Before leaving the evidence and turning to the issues, I should mention two matters.

52. The first is that in none of the three letters written by Mr Ratiu on 6th December 2000, did he complain that Mr Conway had not been entitled to bid because he had been or was acting for Regent or Pristbrook in relation to No 32. His complaint was of a specific breach of confidence in relation to the telephone conversation of Mr Karmel and Mr Conway of 5th December 2000 in relation to No 24.

53. The second is that Mr Conway's case before the jury included an allegation of a "dirty trick" by Regent. He maintained that Regent wrote and sent the letter of 6th December 2000 to Eyre's agent with the intention of securing No 24 at £3.75m without having to raise their bid in response to Mr Conway's renewed bid and, for the purpose, to blacken his name.

The issues on appeal

54. The two principal issues at trial were, as I have said, justification and malice. As to both, a great deal of time was spent on the meaning of the defamatory letter, going to two important sub-issues raised by Regent's defence, namely: 1) whether Mr Conway, by competing with Regent in the bidding for No 24, had put himself in a position in which their respective interests conflicted so as to put him in breach of fiduciary duty to Regent; and/or 2) whether, in his conduct leading up to and

including his competition with Regent in the bidding for No 24 he had breached a duty of confidence to Regent.

55. The main issues on the appeal were whether the Judge:

i) wrongly directed the jury that Mr Conway was not in breach of fiduciary duty in bidding for No 24, as his only duty of loyalty was to Pristbrook, Regent's wholly-owned and controlled SPV, thereby, so Regent contend, wrongly withdrawing the issue of breach of fiduciary duty to Regent from the jury;

ii) wrongly directed the jury that there could be no conflict of interest unless Mr Conway was acting for and against his clients on the "same matter" in the sense that it could adversely affect Pristbrook's interests in relation to No 32, whereas Regent contend that the Judge should have directed the jury that Mr Conway had put himself in an inevitable position of conflict between his interest and his duty in acting for them on the sale of No 32 and bidding against them on No 24;

iii) wrongly directed the jury that it was open to them to find that Regent had given their informed consent to Mr Conway acting for them on No 32 and against them on No 24, an option for which Regent maintain there was no evidential support;

iv) on the issue of breach of duty of confidence, wrongly directed the jury: (a) that Mr Conway was in possession of only minimal, if any, relevant confidential information and that it was for Regent to prove that he had misused it; whereas Regent maintain that there was evidence for the jury's consideration of possession of more than minimal relevant confidential information, and that proof of his misuse of it was not a necessary ingredient of the breach of duty;

v) wrongly directed the jury on the law and approach to the meaning of justification;

vi) should have withdrawn the question of malice from the jury on the grounds that there was insufficient evidence on which a reasonably minded jury, properly directed, could find it, and wrongly directed them on the law and approach to malice; and

vii) wrongly directed the jury on the law and approach to damages (or whether the jury's award of £96,000 was perverse).

Breach of fiduciary duty and breach of duty of confidence

56. Before considering each of the matters of which Regent complain, it may be helpful to set out some basic and uncontroversial general propositions of law as to a solicitor's fiduciary obligations and his overlapping, but sometimes distinct, duty of confidence to his client.

57. As to fiduciary obligation, where better to start than the following treatment by Millett LJ (as he then was) in *Bristol & West v Mothew* [1998] Ch 1, at 18A-C:

> . "… A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. The core liability has several facets. A fiduciary must act in good faith; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. As Dr Finn pointed out in his classic work *Fiduciary Obligations* (1977), p 2, he is not subject to fiduciary obligations because he is a fiduciary; it is because he is subject to them that he is a fiduciary."

58. In short, as he was later to put it in *Bolkiah v KMPG* [1999] 2 AC 222 at pp 234H-235A, a fiduciary must not put himself in position of actual or potential conflict with his client without the latter's fully informed consent.

59. As to "possible" or potential conflict, as Lawrence Collins J observed at paragraph 9 of his judgment in *Marks & Spencer PLC v Freshfields Bruckhaus Deringer* [2004] EWHC 1337 (Ch), a judgment upheld by the Court of Appeal [2004] EWCA Civ 741, "The cases establish that the potential conflict must be a reasonable apprehension of a potential conflict, not a mere theoretical possibility". A common instance of such conflict, whether actual or potential, is where a solicitor acts so as to make or attempt to make an unauthorised profit; see *Boardman v Phipps* [1967] 2 AC 46, HL.

60. As to a solicitor's duty of confidentiality, it can come into its own as a separate obligation from that of a fiduciary when the fiduciary relationship has come to an end with the end of the solicitor/client relationship. Lord Millett, in *Bolkiah v KPMG*, which was a breach of confidence, not a breach of fiduciary duty, case, sought to emphasise this distinction at 235C:

> "Where the court's intervention is sought by a former client, however, the position is entirely different. The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence."

Issues arising as to the existence of and breach of fiduciary duty

i) Whether Mr Conway owed a fiduciary duty to Regent

61. The first matter for consideration by the jury, on a proper direction of law, was the nature of the relationship of Regent and Mr Conway at the material time, namely from late November 1999 to 6th December 2000. Was there, throughout, a solicitor/client relationship between Regent and Mr Conway in respect of the purchase and sale of No. 32, as Regent maintains, or was it broken with Regent's introduction on 2nd December 1999 of its sub-subsidiary, Pristbrook, as its nominee for the purchase, as Mr Conway maintains? And, in either event, what, if any, duty did it impose upon Mr Conway towards Regent in his competition with Regent for the purchase of No.24?

62. The first issue for the Court arises out of the Judge's direction that that Mr Conway was not in breach of fiduciary duty to Regent in bidding for No. 24 because his only duty of loyalty was to Pristbrook. This affects, not only Regent's defence of justification, but also their plea of qualified privilege in the face of Mr Conway's allegation of malice.

63. Regent maintain that they, not Pristbrook, were the true clients of Mr Conway in respect of the purchase and sale of No 32, that he was their prospective solicitor on the purchase of No 24 and that, as a result of one or both of those relationships, he owed them a fiduciary duty in relation to the latter purchase of which he was in breach.

64. Mr Conway's case is that he owed no fiduciary duty to Regent in the purchase of No 24 and did not, therefore, put himself in a position of actual or potential conflict with Regent, or for that matter with Pristbrook. His stance was that Pristbrook, not Regent, instructed him on the sale of No 32, that the telephone conversation between him and Mr Karmel on 5th December 2000 about the purchase of No 24, and/or the circumstances leading up to it, did not make him the prospective solicitor for Regent for that purchase and, that, even if it had done, it would have imposed no fiduciary duty, only a possible duty of confidence, and that, in any event it would have created no actual or potential conflict of interests as the two transactions were unrelated.

65. There were thus two main questions for the jury under this head, namely: 1) whether Mr Conway owed a fiduciary duty to Regent, as distinct from Pristbrook, and, if so, 2) whether his conduct in relation to No. 24 put him in breach of it, namely, whether it arose in the context of the same matter giving rise to a potential conflict of interest.

66. The Judge directed the jury as a matter of law that Mr Conway was not in breach of fiduciary duty to Regent in bidding for No. 24 because his only duty of loyalty was to Pristbrook. This is how he put it:

> "In relation to number 32, Mr Conway's client was Pristbrook Limited, they were the owner of number 32 and they were selling it. Normally, when a solicitor acts for a company, his duty is to that company and not to the shareholders or owners of that company. It is a matter of fact for you but you may think that Mr Conway would not have expected Pristbrook Limited to be the bidder for number 24. As you remember,

> Pristbrook Limited is what is called a special purpose vehicle: its special purpose was to own that one property, number 32. Pristbrook never actually did bid for number 24. It is true that its name was mentioned by Mr Ratiu as a possible owner … [in the letter of Regent to Eyre of 4th December 2000; see paragraph 42 above] …
>
> *As a matter of law*, the existing client of Mr Conway at the relevant time in December was Pristbrook Limited and it was to Pristbrook Limited that he owed his duties of loyalty under the retainer in respect of number 32.
>
> So, Mr Conway did not owe a duty of loyalty to Regent … in November and December 2000. He was not in breach of his solicitor's duty of loyalty by bidding for number 24. …" (my emphases)

67. The effect of the direction was to remove from the jury the responsibility of deciding to whom, if anyone and in what respect, he owed a fiduciary duty. Also, as will appear, it largely undermined Regent's defence of justification, regardless of the meaning to be attributed to the 6th December letter. If, as a matter of law, Pristbrook, not Regent, was the client at all material times, then Mr Conway owed no fiduciary duty to Regent, including Mr Ratiu or Mr Karmel, of which he could be in breach or in respect of which they could rely upon the defence of justification for the undoubtedly defamatory letter. Nevertheless, as will appear, the Judge went on to direct the jury in great detail on the defence of justification with reference to a number of different possible meanings to be attributed to the allegation in the letter.

68. Sir Sydney Kentridge QC, on behalf of Regent, submitted that the direction effectively withdrew from the jury essential parts of Regent's case and was sufficiently serious to render the decision of the jury unsafe – in the words of Lord Halsbury LC in *Bray v Ford* [1986] AC 44, HL, at 47, HL, amounting to "a substantial wrong" in which "the defendant was not permitted to present his case to the jury with the argument that his original complaint was true". He maintained that, as a matter of law and/or fact, Regent was Mr Conway's client in material respects and that, in any event, a solicitor instructed on behalf of a company may also owe a duty to others for, example, its controlling shareholder or shareholders; it all depends on the facts.

69. Mr Romie Tager QC, on the other hand, submitted that Mr Conway owed no fiduciary duty to Regent, since, apart from a brief period at the start of the move to purchase No 32, Pristbrook, not Regent, was the client for both the purchase and the sale. As to the purchase, Pristbrook's retainer had been substituted for that of Regent on 2nd December 1999 and, he maintained, terminated with the completion of the purchase in early January 2000. As to the sale, although the parties had apparently contemplated throughout that he would be instructed on that transaction when the time came, he submitted that he was not formally retained until 4th October 2000 and then, by Pristbrook, not Regent. Accordingly, he maintained that, because such a duty can only arise out of a fiduciary relationship, Mr Conway owed no fiduciary duty to Regent. Drawing on Lord Millett's distinction in *Bolkiah*, he submitted that, as distinct from a duty of confidence, it does not extend to a potential retainer, for

example to a solicitor who is consulted by a potential client, but who declines to accept instructions or, as happened here in relation to No 24, does not accept them. Similarly, once the transaction in respect of which the solicitor was retained is completed, he submitted, the retainer comes to an end, and with it the fiduciary relationship, citing *Donsland v Van Hoogstraten* [2002] EWCA Civ 253, per Tuckey LJ at para 18, applying *Underwood, Son & Piper v Lewis* [1894] 2 QB 306.

70. Mr Tager added that there is no authority for the proposition that a solicitor acting for one company in a group cannot act contrary to the interest of another company in that group or to the personal interests of directors or shareholders of his client company unless it or they were a party to the retainer. Accordingly, he submitted, the Judge correctly directed the jury that there was no conflict of interest, or duty or breach of duty on the part of Mr Conway to Regent in bidding for No 24 because Pristbrook, not Regent, had been his client on the sale of No 32.

71. Before looking at this issue in a little more detail, it is important to keep in mind that the reason for a solicitor's fiduciary duty to his client, though engendered by the retainer, is distinct from the contractual obligations arising under it. It arises from the relationship of trust and confidence that is an important consequence and feature of the retainer. But the solicitor/client retainer is not the only form of association between two or more persons that carries with it such a duty. It has a separate and more broadly based jurisprudential justification. In his analysis in *Bolkiah*, Lord Millett focused on the solicitor/client relationship for the purpose of contrasting a duty of confidence with a fiduciary duty. As I have noted, he concluded as part of that analysis, that the latter, when arising out of such a relationship, is coterminous with it, but that matters of confidence imparted to a solicitor in anticipation of or flowing from it, may create a duty of confidence that is not coterminous with it.

72. With respect, Lord Millett, in drawing that distinction in a breach of confidence case, may have tied more tightly than he intended the principle of fiduciary duty to contractual duty, something that he had been at pains not to do in giving his broader and non-exhaustive description of a fiduciary in the passage from his judgment in *Bristol & West Building Society* that I have set out in paragraph 57 above. Lord Walker of Gestingthorpe made much the same point in *Hilton v Barker Booth & Eastwood* [2005] 1 WLR 567, HL, at paras 28 - 30, that a solicitor's fiduciary duty to his client is not necessarily to be found in or confined to the terms of the contractual retainer:

> "28. A solicitor's duty to his client is *primarily* contractual and its scope depends on the express and implied terms of his retainer. …
>
> 29. The relationship between a solicitor and his client is one in which the client reposes trust and confidence in the solicitor. It is a fiduciary relationship. …
>
> 30. A solicitor's duty of single-minded loyalty to his client's interest, and his duty to respect his client's confidences, do have their roots in the fiduciary nature of the solicitor-client relationship. But they may have to be moulded and informed by the terms of the contractual relationship."

73. Where there is a contractual retainer and where it provides expressly or by implication obligations of a fiduciary nature, such obligations must clearly prevail, or "mould" or "inform" the fiduciary nature of the contractual relationship. But where there is a relationship involving, say, a transaction or transactions between a solicitor and a person who, having regard to that relationship and the solicitor's profession, reposes trust and confidence in him, a fiduciary duty may arise without a retainer. So much seems to be clear from the historic development and continued separate existence of the notion of a fiduciary relationship and one created purely by contract. It is clearly acknowledged in the following passage from the judgment of Mason J in *Hospital Products Ltd v United States Surgical Corpn* (1984) 156 CLR, 41, at 97, cited with approval by Lord Browne-Wilkinson, giving the judgment of the Privy Council in *Kelly v Cooper* [1993] AC 205, at 215:

> "That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its construction."

74. Mason J's approach is instructive in that, whilst it subordinates the effect of a fiduciary relationship to the terms of any concurrent contract, it also acknowledges – depending upon the circumstances - the potential coming into being and continuation of a fiduciary obligation without or regardless of any contract.

75. Illustrative of such an approach is *Longstaff v Birtles* [2002] 1 WLR 470, in which this Court held on the facts, that the defendant's solicitors' fiduciary duty extended beyond the termination of the retainer. In that case solicitors who had acted for a couple in an abortive negotiation to purchase a public house and whose retainer had been terminated, persuaded the couple to join with them, without advising them to seek independent legal advice, in what turned out to be a disastrous commercial venture. In allowing the couple's appeal against the first instance judge's dismissal because the solicitors' retainer had been terminated before the matters of which the couple complained, Mummery LJ, with whom Laws LJ and Sir Anthony Evans agreed, said at paragraphs 1 and 35 of his judgment:

> "1. … The source of the [fiduciary] duty is not the retainer itself, but all the circumstances (including the retainer) creating a relationship of trust and confidence, from which flow obligations of loyalty and transparency. As long as that confidential relationship exists the solicitor must not place himself in a position where his duty to act in the interests of the confiding party and his personal interest may conflict. …

> 35. This case can and, in my judgment, should be decided on the simple ground that there was a relationship of trust and confidence between the Longstaffs and the solicitors; that the relationship did not cease on the termination of the retainer in respect of the intended purchase …; that during the course of that relationship a personal business opportunity presented itself to the solicitors; that the solicitors took advantage of that opportunity to propose that the Longstaffs buy into the … [solicitors' business venture]; that in the context of the relationship the proposal gave rise to a situation in which the duty of solicitors might conflict with their interest; and that they acted in breach of a fiduciary duty in continuing to deal with Longstaffs, in a situation of a conflict of duty and interest, without insisting they obtain independent advice."

Mr Tager suggested that the decision in that case was incorrect and arrived at per incuriam, as *Bolkiah* was not cited to the Court, it had not been argued at first instance or, initially, on appeal by reference to fiduciary duty but on the common law duty of care, and it was a special case on the facts. However, it is an authoritative illustration of the readiness of the courts, regardless of the precise issue involved, to draw back the corporate veil to do justice when common-sense and reality demand it.

76. Moreover, it is of interest to note that the Judge, contrary to his direction to the jury that Mr Conway owed no fiduciary duty to Regent because Pristbrook, not Regent, retained him for the purchase and sale of No 32, in a later passage of his directions to them, slipped into the same sort of reasoning as Mummery LJ in that case. When dealing, in the context of breach of confidence, with Mr Conway's own anxieties in September 2000 about possible conflict of interest between his and Regent's interest in the purchase of No 24 (see paragraph 26 above), he observed:

> "There was undoubtedly, you may think, a potential confusion at that point. As well as a potential business role Mr Conway was also the potential or prospective solicitor for the sale of number 32 by Pristbrook Limited and indeed he became the solicitor for Pristbrook Limited some days, a week or two, or ten days later.
>
> As a matter of law at that point even if there were no formal relationship of solicitor and client between Mr Conway and the defendants there had been a relationship of solicitor and client between Mr Conway and Regent … in the past, and there had been a relationship between Mr Conway as solicitor and Mr Karmel as client in the past; and even if there was not formally such a relationship in the second half of September you may think that there, nevertheless, was a relationship of trust and confidence arising out the past solicitor relationship with Regent … and Mr Karmel and the past retainer from Regent … and from Pristbrook … in relation to 32, and the potential retainer or prospective retainer on 32. … But that does not resolve the question whether there was any confidential information because… information does not become

> confidential simply because you tell it to your solicitor. It has to be confidential in the first place."

77. In short, I see strong jurisprudential support for the proposition that the answer to the question whether a fiduciary duty, which has its start in a solicitor/client relationship, may outlive it is highly fact-sensitive. Lord Millett's distinction between fiduciary duty and a duty of confidence in *Bolkiah* arose, as I have said in a much narrower focus and one that was primarily concerned with the extent of the latter duty.

78. There is, it seems to me, a powerful argument of principle, in this intensely personal context of considerations of trust, confidence and loyalty, for lifting the corporate veil where the facts require it to include those in or behind the company who are in reality the persons whose trust in and reliance upon the fiduciary may be confounded.

79. Such was the approach of this Court in *Johnson v Gore Wood* [1999] BCC 474, at 485, where the issue was whether it was arguable so as to defeat an abuse of process application that solicitors to a company alleged to have been negligent in its advice to the company, also owed a duty of care to its controlling shareholder, Ward LJ, giving the judgment of the Court, held, at page 485C-E, that it was arguable, citing with approval the reasoning of Staughton J (as he then was) on a similar issue in *R P Howard Ltd v Woodman Matthews & Co (a firm)* [1983] QB 117:

> "… arguments of a very similar nature prevailed in the judgment of Staughton J in … *Howard v Woodman Matthews* …where the solicitor knew that the company was a family company effectively run by Mr Witchell from whom they received their instructions. He held at p. 121A:
>
> > 'In my judgment, in the circumstances of this case, Mr Witchell as well as the company was the client of Mr Mason. That seems to me to reflect the reality of the situation. Mr Mason knew that Mr Witchell … was the company. He probably knew that Mr Witchell derived his livelihood and some profit from the company, and was vitally concerned in its well-being. Mr Witchell had first been his personal friend, and had then come to him in connection with other matters for legal advice, both as the representative of the company and in a personal capacity. When Mr Witchell sought his advice on … [a matter concerning the company] Mr Mason owed a contractual duty of care both to the company and to Mr Witchell."

80. Nor, in my view, should it matter in principle, where a fiduciary duty is engendered by a contractual relationship, whether the client has entered into a direct contractual relationship with the fiduciary or through an agent or, in the case of a corporate client, through the use of a nominee company, as Regent used Pristbrook in this case.

81. It is also important to remember that the issue of fiduciary relationship is usually tried by a chancery judge in direct claims of breach of trust or other fiduciary duty as a mixed question of law and fact. In the context of defamation it is in this instance transposed into a supposed issue of objective fact for a jury as to whether a defendant

can justify not only his understanding of his relationship with the other party, but also the validity of the complaint of a violation of that relationship. In such a context there may well be a greater imperative, already signposted in some of the authorities to which I have referred, for allowing reality to prevail over technical aspects of corporate law.

82. With all those considerations in mind, I return briefly to the facts of this case. The evidence before the jury showed, as I have summarised it in paragraphs 10 to 53 above, that, between November 1999 and December 2000, Regent, acting on its own and then through its nominee, Pristbrook, retained Mr Conway as its solicitor for the purpose of its purchase and then re-sale of No. 32. Both before and after completion of the purchase of No 32 in January 2000, he provided legal advice and assistance to Regent, in particular in connection with planning permission in February and September 2000 and the anticipated sale of Pristbrook (instead of No 32 itself) in April and November 2000. Provision for disposal of Pristbrook as a proxy for the property, as an encouragement to its ready and profitable disposal for Regent, is hardly consistent with the suggestion made by Mr Conway at trial that Pristbrook, not Regent, was his sole client in respect of No. 32.

83. It is also apparent from Mr Conway's call to the Law Society on 10th November 2000, seeking guidance as to his potential conflict of interest with Regent over No. 24 arising out of his involvement with No. 32 (see paragraph 33 above), that he did not at the material time distinguish between Pristbrook and Regent for this purpose. Mr Karmel's letter to Mr Conway of 21st September 2000 (see paragraph 21 above) on Pristbrook headed writing paper about Nos 32 and 24, attaching as it did correspondence of Regent with the Council as to the former and stating "we are still progressing matters with … [Eyre] in respect of the larger plot [No 24] and I will let you know the outcome", made plain that the moving spirit in relation to the proposed sale of the former and purchase of the latter was Regent. So much is clear from Mr Conway's unsent letter to Mr Karmel of 25th September 2000 (see paragraph 26 above), in which, under his Regent file reference, he observed as to No 24, "we, of course, have met twice over the weekend and clearly in the prevailing circumstances my firm could not act whilst there remained a conflict of interest". He, therefore, knew by 20th November 2000 that Pristbrook had not been sold together with No 32, so that it was still available to be used as a nominee for the purchase by Regent of No 24. As Sir Sydney observed, in such circumstances, Mr Conway could not realistically maintain that the continuation of such conflict of interest depended upon his uncertainty as to which company would be used for the purchase of No 24. In the event, as must have been within his contemplation, Regent's offer for No 24 was made in the name of "Regent … or its nominee, most probably Pristbrook".

84. The reality of the case here, as Mr Conway well knew, was that his client in relation to No 32 was Regent, not Pristbrook, and that Pristbrook was effectively a vehicle controlled by Regent.

85. In such circumstances, the Judge's direction to the jury that, as a matter of law, Mr Conway's only "client" was Pristbrook and that, therefore, he owed no duty of loyalty to Regent in respect of No 32 of which his bid for No 24 could put him in breach was a serious error – serious in that, on that aspect alone, it effectively withdrew the issue of breach of fiduciary duty from the jury.

86. Given: 1) the partial dependence of Regent's defence of justification on the existence of a fiduciary relationship between Mr Conway and Regent; 2) the legal and factual complexity of that notion involving, as it did here, relationships between companies as well as individuals; and 3) the various possible meanings of the acknowledged libel as candidates for justification; it would have been better for the Judge, with the agreement of the parties, to have dealt with this issue himself as one of mixed law and fact.

87. However, once embarked on the process of directing, and leaving to, the jury the whole issue of justification the Judge should at least have directed them that there was evidence on which they should consider whether Regent had retained Mr Conway in respect of the No 32 transactions and that, as a result of those retainers and their discussions with him of their interest in purchasing No 24, he had a fiduciary duty to Regent at the time of his bidding for No 24. In giving such a direction, he should, of course, have given them some guidance on the law and their application of it to the primary and secondary facts that they found proved. That guidance, in my view, should have included a reminder that Pristbrook was simply a nominee and as to the legal and possible factual implications of that. And, after rehearsing the evidence going to the relevant facts, he should have left them to determine as a matter of fact whether and to whom at the time of the bidding for No 24 Mr Conway owed a fiduciary duty. As it was, removing half their task in the way that he did denied the defendants a verdict on a crucial issue. It follows that I am of the view that he erred in directing the jury that, as a matter of law, at the material time Pristbrook, not Regent, was Mr Conway's client, and that Mr Conway did not, therefore, owe a duty of loyalty to Regent of which he could be in breach by bidding for No 24. For reasons that will become more apparent in the remainder of this judgment, I am of the view that this error of the Judge alone amounted to a substantial wrong to Regent, effectively depriving them of presenting their defence of justification to the jury.

ii) Conflict of interest

88. Regent maintain that the Judge made a further error in his direction to the jury on the issue of Mr Conway's fiduciary duty to Regent and of his breach of it, in directing them that there could only be a conflict of interest in relation to one matter – the same matter – and that the sale of No 32 and the purchase of No 24 were different matters. This is how he put it to the jury:

> "… When a solicitor agrees to act for a client in a particular matter, that gives rise to a relationship which lawyers refer to as a relationship of trust and confidence. The client is then entitled to the single minded loyalty of the solicitor. … he must not put himself in a position where his duty to the client and his own interests conflict. He may not act for his own benefit or for the benefit of the third party in relation to that matter without the informed consent of his client. …
>
> …
>
> A clear example of a conflict of interest is where a solicitor buys or sells something from or to his own client. You will recall that both Mr Conway and Mr Karmel agree that a

> possibility of that happening was discussed in September 2000, namely the possibility of … [Regent] selling half the site of number 24 to Mr Conway if they succeeded in buying it. …
>
> …if Mr Conway were to have entered into a joint venture like that with … [Regent] or if he were to have bought the site from … [Regent], then there would have been a glaring conflict of interest. …
>
> It is equally clear that if and so long as Mr Conway was contemplating bidding for number 24 in competition with … [Regent], then Mr Conway could not advise … [Regent] in relation to number 24. …
>
> Neither side suggests that Mr Conway was ever actually instructed by … [Regent] in relation to number 24. Mr Ratiu specifically explained he did not want to instruct a solicitor in relation to number 24 before … Eyre … had agreed to sell it to him. …
>
> That is, I hope, a comprehensible outline of the relevant law. …"

89. The Judge gave associated directions to the jury that there was no complaint or evidence that Mr Conway, in bidding for No 24, had an adverse interest so as to cause him to act in conflict with his retainers on the purchase or sale of No 32. He correctly identified Regent's case, albeit interspersing his directions with their case on breach of confidence, "that … [Mr Conway] acted in breach of his duty of loyalty" in that he put himself in a position where "his own interest conflicted with those of … Regent who, they allege, were existing clients who had instructed him in relation to 32." However, he made plain in his directions that Regent's proposed purchase of No 24, on which it had not instructed Mr Conway, was to be regarded as a quite separate matter.

90. Regent maintain that the Judge, in those directions, took too narrow an approach in instructing the jury that there could be no conflict of interest unless Mr Conway was acting for and against his clients on the 'same matter' in the sense that it could adversely affect Pristbrook's interests strictly in relation to No 32. They maintain that he should have directed the jury that Mr Conway had put himself in an inevitable position of conflict between his interest and his duty in acting for Regent on the sale of No 32 and bidding against it on No 24.

91. Sir Sydney submitted that "no conflict rule" is not limited to dealings or advice in relation to the same matter, but also applies to reasonably related matters. He submitted that in the present case there was clearly a reasonable relationship between the purchase and sale of No. 32 in which Mr Conway acted for Regent, acting through its nominee, Pristbrook, and the purchase of No. 24 in which he acted against Regent's interest.

92. Mr Conway's case is that the fiduciary duty, and for that matter the duty of confidence, of a solicitor to avoid a conflict of duty and/or interest with his client

arises directly from his duty to protect and advance that client's interests in the matter, or any linked matter, in which he is retained by that client. He maintains that it does not extend to other matters unrelated to the retainer in respect of which he may have a personal interest or in respect of which he may be instructed by another client.

93. Mr Tager, in support of that case referred to formulations of the Court, when articulating the conflict of interest rule, of such terms as "in a particular matter" (see *Bristol & West Building Society v Mothew*, CA, per Millett LJ, as he then was, at 18A), "in the transaction in hand" (see *Hilton v Barker Booth*, per Lord Walker of Gestingthorpe at para 31) and to the period of the retainer (see *Bolkiah*, per Lord Millett at 235C). In summary, he submitted that when considering whether a solicitor is acting in breach of his fiduciary duty, there is no such thing as "a general retainer" so as to impose on the solicitor a duty to advance or protect the interests of the client in all matters affecting or potentially affecting the client; see per Oliver J (as he then was) in *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp (a firm)* [1979] Ch 384, at 402H-G.

94. Applying those propositions to the evidence in the case, and putting aside for this purpose the issue of a duty of confidence and its breach, Mr Tager submitted that Mr Conway owed no fiduciary duty to Regent or was not in breach of any such duty because: 1) the sale by Pristbrook of No 32 and the proposed purchase by Regent of No 24 were different matters involving respectively different clients and prospective clients; 2) even if they were so inter-linked as to be capable of creating a conflict or risk of a conflict of interest if the clients and prospective clients had been the same, no such conflict of interest arose because when, in early October 2000, Pristbrook retained Mr Conway for the sale of No 32, he had not been instructed by either in respect of the proposed bid for No 24; 3) Regent knew by that time that he had a personal interest in No 24 and nevertheless, through Pristbrook, instructed him on the sale of No 32; and 4) when, on 5th December Regent approached him as a prospective client for the purchase of No 24, it did so with full knowledge of what he had learned through his retainer and otherwise of Regent's financial position and the purchase and sale price of No 32 and of his interest to date in No 24 as a personal investment.

95. The point was recently considered in *Marks & Spencer PLC v Freshfields Bruckhaus Deringer*, in which Marks & Spencer successfully secured an injunction against Freshfields restraining them from acting on behalf of a consortium seeking to take it over, on the ground that they had an actual or potential conflict of interest arising from past and continuing retainers for Marks & Spencer in respect of certain matters, in particular its contractual arrangements in relation to one of its most successful lines. Lawrence Collins J, whose judgment was specifically upheld on this issue by a two - judge Court of Appeal, consisting of Pill and Kay LJJ, in refusing an application for permission to appeal, (in which both parties were represented by leading counsel), observed, with *Bolkiah* firmly in mind, at paragraph 16 of his judgment:

> "Most of the cases refer to the problem in the context of conflicting interests in the same transaction, but it seems to me clear that it goes somewhat beyond that. Although *Bolkiah* is not directly in point because it is a former client conflict and not, therefore … an application of the double employment rule, the way in which Lord Millett expresses himself is wholly

> inconsistent with the double employment rule being limited to same matter conflicts."

In the Court of Appeal, Pill LJ, in agreeing with that approach and specifically rejecting the notion that it was outlawed by Lord Millett's language in *Bolkiah*, said at paragraphs 10 and 11 of his judgment:

> "10 Mr Brindle [QC, for the applicants] submits that the [*Bolkiah*] principle cannot extend beyond the same transaction situation. He gave examples which indicate situations with no possible conflict of interest arising from the fact that a solicitor's firm, which may of course have a number of branches spread around the country and abroad, is in one transaction acting contrary to a client for whom it acts on another. I would accept that there must be a degree of relationship between the two transactions, but I am quite unable to accept that the language used by Lord Millett in *Bolkiah* and the comparative strictness, with respect, with which he has stated the principles in this area of the law is confined to same transaction cases.
>
> 11. Moreover, while there must be limits upon the application of the principle, it is, in my judgment, a sound one and I accept the submission of Mr MacLean [QC], for the proposed respondents] on that point. The court must consider what the relationship is between the two transactions concerned. "

Kay LJ, in his concurring judgment, put the reality of the potential conflict of interest for Freshfields very clearly in terms which have even greater application to the circumstances in this case, involving as it does two rival bidders. At paragraph 33, he said:

> "Mr Brindle argues that all attempts to define the circumstances in which conflict might arise have failed and as such any potential risk is no more than a theoretical one. That argument, in my judgment, fails to recognise the reality of the situation. If the defendant is to act for those making the bid its partners may be called upon at various stages to give advice as to the tactical approach to be adopted by the bidders in the circumstances of the bid becoming hostile. The claimant company is entitled to know that any such advice cannot possibly be influenced in any way by the knowledge that the defendant has of its affairs as a result of its relationship with the defendant as its client, even if the defendant does not directly reveal the information to the bidders. Where there is a matter which may feature prominently in any attempt to win over the shareholders of the claimant company, it seems to me wholly impossible to have the necessary degree of confidence that the claimant company will not be adversely affected by the bidders having the benefit of the defendant as their solicitors with the solicitors having previously acted for the claimant company on the very subject

> matter which may come to prominence in the bid. This, in my judgment, precludes the defendant from acting for the bidders."

96. In my view, in the present case, the near-contemporaneous sales of Nos. 32 and 24, the former by Regent and the latter by Eyre to Regent, and Mr Conway's involvement in both, albeit in different roles, were reasonably capable of being found by the jury to be related matters in two respects. First, on Regent's case and evidence, they had told Mr Conway that the No 32 transaction was a precursor to the No 24 transaction. And, second, as Sir Sydney pointed out, the two sites were comparable properties in the same road that were being marketed and offered for sale at the same time, at one point both by private tender. The particular features of No 32, namely the threat of compulsory purchase, the planning environment and the impact on Eyre's restrictive covenants, which Mr Conway himself described as distinguishing it from other transactions, were shared with No 24. Being on the market at the same time, it was possible that the fact that, or the price at which, one site was offered or sold would have an impact on the other. It will be remembered that Mr Conway, in his letters to his bank of 6th October and 17th November 2000 (see paragraphs 30 and 36), cited No 32 as a "comparable" in relation to No 24.

97. It was also possible that, whilst acting for Regent on No 32 and against it on No 24, Mr Conway would come into possession of relevant confidential information that would put him in a position of actual or potential conflict between his interest and his duty. That the potential for conflict was not merely theoretical is clear from Mr Conway's own conduct in November 2000 when he telephoned the Law Society to seek advice on the possibility of conflict inherent in being involved in tenders for and against the same clients on proximate properties at the same time, followed by his decision not to follow the advice received. Mr Conway did not deny that Mr Karmel told him of the appellants' bidding intentions in relation to No 24 and that they had made an offer of £3.75m for the site in September 2000. It was clearly a matter for the jury whether Mr Conway was entitled to disregard the inevitable conflict of interests and put himself in a position whereby he might gain an unfair advantage over Regent in relation to No 24. This is particularly so given that, on Mr Conway's own evidence, it was always contemplated that he might be instructed to act as a solicitor in relation to the acquisition by Regent of No 24.

98. As Sir Sydney observed, the facts going to a reasonable apprehension of conflict in the *Marks & Spencer* case, rehearsed by Lawrence Collins J in paragraphs 8 and 19-14 of his judgment, are an instructive comparison and support Regent's argument on this issue, namely that Mr Conway should have disclosed to Regent the full extent of his personal interest and/or intentions in respect of No 24 *and* should have advised it to take independent legal advice if he was to continue acting for it on the sale of No 32. Properly directed, it would, in my view, have been open to the jury to take the view that Mr Conway was not entitled to ignore that information and Regent's interests in that transaction, thereby enabling him, as a trusted confidant and adviser in relation to the sale of No 32 to put himself in a position where he stood to gain an unfair advantage over Regent in relation to No 24.

iii) Informed consent

99. Regent contend that the Judge wrongly left to the jury the issue of informed consent and that he should have directed them that he had put himself in a position of inevitable conflict between his interest and duty in bidding against Regent for No 24 whilst acting for them on No 32. This is a complaint that goes both to issues of breach of fiduciary duty and of a duty of confidence. Sir Sydney submitted that it was plain on the evidence that Regent had not given fully informed consent to Mr Conway acting for them in relation to No 32 and against them in relation to No 24.

100. Mr Conway's case is that Regent had known from at least September that he had a personal interest in acquiring some interest in No 24 and that if and to the extent that that he had a fiduciary duty or one of confidence to Regent in respect of No 32 and/or in respect of No 24, Regent by their conduct consented to his bidding regardless of such duty. He relied principally upon his account, which Mr Karmel denied, of having told him in a telephone conversation shortly after the weekend of 23rd/24th September 2000 that he intended to bid for No 24 and that, as he was acting for Regent on the sale of No 32, Mr Karmel should not talk to him of Regent's intentions for No 24 (see paragraph 27 above).

101. Sir Sydney referred to the absence of any attendance note of Mr Conway in respect of that conversation or of any other direct evidence to support Mr Conway's account of it. And he argued that, even if that account was true, it fell far short of information on which a jury could find that Regent, by their inaction in the matter, gave fully informed consent to Mr Conway bidding against them. He referred the Court to the words of Upjohn LJ in *Boulting v ACTAT* [1963] 2 QB 606, CA, at 636, that, to give fully informed consent, the person entitled to the benefit of the rule must:

> "fully understand … not only what he is doing but also what his legal rights are, and that he is in part surrendering them."

He mentioned, by way of example, that it was no part of Mr Conway's case that he had explained to them: 1) the impact his competing bidding on No 24 might have on the existing retainer for No 32; 2) the risk that he would come into possession of confidential information in the course of his retainer on No 32 which was or might be relevant to his own bid for No 24; 3) the risk that he might otherwise put himself in a position of actual or potential conflict between his duty and his interest; and 4) what Regent's legal rights were and whether they should seek independent legal advice. In short, Sir Sydney maintained that Mr Conway should have disclosed his personal interest in No 24 with complete frankness and should have advised Regent to take independent legal advice if he was to continue acting for them on No 32.

102. All of those comments were no doubt valid points to make to the jury, and I have no doubt that they were made. However, in the light, particularly of Mr Conway's account of his conversation with Mr Karmel in September 2000 and, if true, its undoubted significance to men of Mr Karmel's and Mr Ratiu's experience in property dealing in the area, I cannot say that the Judge was not entitled to leave this issue to the jury. Nor can I say, having considered the Judge's various directions on the issue, that they were deficient or so deficient as to amount to material misdirections. On the contrary, in my view, the Judge's directions on the law and respective cases of the parties on this issue were correct and appropriate.

Duty of confidence

iv) a) The extent of relevant confidential information imparted to Mr Conway

103. The fourth main issue is two-fold, namely whether the Judge wrongly directed the jury: (a) that Mr Conway had only minimal, if any, relevant confidential information and (b) that it was for Regent to prove that he had misused it.

104. The main thrust of Regent's case is that they imparted information to Mr Conway in the course of their solicitor-client relationship that included confidential information, and that he actually misused it. Their concern was about his response, in seeking to re-open his bidding for No 24, to Mr Karmel's information to him on 5th December of Eyre's acceptance of Regent's unconditional offer. However, they also complained that he had other confidential information that was or might have been relevant to his bidding tactics for No 24, namely: as to Mr Karmel's personal finances and those of Regent, in particular as to when and the amount in respect of which its borrowing would be redeemed and funds released on Pristbrook's sale of No 32; as to the particular characteristics and development potential of No 32 that were similar to those of No 24; as to the extent of the market interest in No 32 and of the price and profit margin on its re-sale; and as to information given by Mr Karmel in September 2000 of Regent's £3.75m offer for No 24 (see paragraph 23 above) and as to Regent's plans for it.

105. Mr Conway's case is that there was no substance in Regent's complaint about the Judge's directions, whether in relation to Regent's or Pristbrook's interests in relation to No 32 or to Regent's interests in relation to No 24. Mr Tager, on his behalf, acknowledged that there could conceivably have been a risk of his having come into possession of confidential information in the course of his retainer on No 32 that might have given him an unfair advantage in his bidding tactics for No 24, but none was apparent on the evidence. And he maintained that the Judge directed the jury correctly on the law and on its application to each piece of information alleged by Regent to have been confidential and imparted to Mr Conway in circumstances imposing a duty of confidentiality and on the issue of his alleged misuse of it.

106. The scope of the solicitor's duty not to use his client's or prospective (*Minter v Priest* [1930] AC 558, HL, per Lord Atkin at 581 and 584) or former client's, confidential information for his own benefit is included in the following proposition of Lord Millett in *Bolkiah* at 235G-236A:

> "Whether founded on contract or equity, 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. 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; ..".

107. The Judge correctly directed the jury that a duty of confidence arises when the information is confidential, as distinct from being a matter of public knowledge or record or generally accessible, and imparted in circumstances in which the recipient knows or agrees that it is confidential. He also told the jury that such a duty is only breached where the recipient of the information makes some unauthorised use or disclosure of it for the benefit of another client or for himself that either does or might harm the client. He said:

> "Information which is confidential and which a client or prospective client gives to a solicitor will almost always be given in circumstances where a duty of confidence arises. If the solicitor agrees to act for the client, that duty of confidence will be part of the agreement, even if nothing is actually said about it. …
>
> But suppose the solicitor does not agree to act for the client, what then? … Normally, it makes no difference at all if the solicitor does not agree to act for the client; the circumstances will normally still give rise to a duty of confidence on the part of the solicitor. …. I say 'normally' because I am referring to the situation when a person speaks to a solicitor in order to obtain the solicitor's assistance on a professional matter. The defendants say that that is this case. But Mr Conway says that that is not this case.
>
> Mr Conway says that when Mr Karmel rang him up, on 5th December, Mr Karmel already knew that Mr Conway could not possibly act as the defendant's solicitor because of his conflict of interest as a rival bidder …
>
> What Mr Karmel knew and what he intended are matters of fact which are strictly for you, the jury, to decide. So far as the law is concerned, I can best express it in this way: the test is what a reasonable person in the position of Mr Conway would have understood. If the circumstances on 5th December were that any reasonable person standing in the shoes of Mr Conway would have realised that Mr Karmel was giving him information in confidence, then that would suffice to impose on Mr Conway an obligation of confidence."

108. As to unauthorised mis-use of confidential information, the Judge directed the jury as follows:

> "… Mr Conway's expertise was built up by acting for many different clients over a number of years. The law permitted Mr Conway to use information from various clients to add to his general stock of knowledge and experience. …
>
> … Some confidential information remains confidential for a lifetime or more but other confidential information is only confidential for a very short period. So, what Mr Karmel told

> Mr Conway in September may perhaps have been confidential when Mr Karmel told it Mr Conway in September; it does not necessarily follow that that it was still confidential in December. …
>
> … Of course, the mere fact that other people might know of the information by December does not automatically mean that Mr Conway would be released from any obligation of confidence. A solicitor cannot use confidential information to get a head start over other members of the public but, if there was something that Mr Karmel told Mr Conway in confidence in September, but which was all over the papers in December, then, in December, it will have lost its character of confidential information.
>
> On the other hand, if some members of the public would know the information in December, the fact that Mr Conway learnt it from Mr Karmel in September could still mean that Mr Conway is or was prevented from using it the information, even though other members of the public, who were not solicitors, were free to use it.
>
> In this case, it is not just what was in the Estates Gazette, or in some other newspaper or what was used in a Valuation Tribunal, that might prevent certain information being confidential in December. As you have heard, there are official registers relating to land matters, it is also possible to get certain information from planning authorities if you ask. …
>
> … if there is any information, whether it be about compulsory purchase orders or planning or sale prices of property which is being sold, which appears in any of these official records or registers or other sources of information which solicitors normally consult when they act for a prospective buyer, then none of that information can continue to count as confidential information, for the purposes of the present case, once it becomes accessible on the public register or from the Planning Authority as the case may be."

109. As to the early passage in that direction that confidential information acquired by Mr Conway could be added to his general stock of knowledge and experience, which he was free to use, Mr Karmel and Mr Ratiu both accepted in evidence that one of the reasons for their instruction of Mr Conway on the purchase and sale of No 32 was his experience and knowledge gained of property transactions in the area.

110. Sir Sydney submitted that principles developed in cases involving employees, where there is a real interest in ensuring that there is no restraint on trade, cannot be applied in the same way in the context of information acquired during a solicitor-client relationship. He maintained that, whilst Mr Conway was entitled to add confidential information to his general stock of knowledge and experience, he was not entitled to

use specific information acquired in the course of his professional relationship with the appellants against their interests.

111. Similarly, in relation to the Judge's direction that information, which is or becomes a matter of public record would not be considered 'confidential', he submitted that the courts will not allow a person to use information given to him in confidence as a "spring-board" for activity detrimental to the person who imparted it, and then excuse his breach of confidence by simply finding other ways to discover what he has already learnt from the client in confidence, citing Lord Denning in *Seager v Copydex* [1967] 1 WLR 923, CA, at 931, and Shaw LJ in *Schering Chemicals v Falkman* [1983] QB 1, CA, at 28. However, as is apparent from the third paragraph of the Judge's direction, he made that important qualification.

112. Later in the Judge's summing-up, when dealing with the evidence going to a continuing relationship of trust and confidence after September 2000 arising from the past solicitor relationship with Regent, he repeated what he had already indicated:

> "But that does not resolve the question whether there was any confidential information because as I say information does not become confidential simply because you tell it to your solicitor. It has to be confidential in the first place.

Sir Sydney cited that remark in support of his general complaint that the Judge did not have sufficient regard to the special features of the solicitor-client relationship here. He maintained that the Judge should have directed the jury that Mr Conway was under a duty to keep confidential *all* information that he acquired in the course of his relationship of trust and confidence with Regent, which was more than merely trivial, untrue or obviously public knowledge.

113. Mr Tager submitted that Sir Sydney had cast the notion of confidentiality too widely in his submissions and that on the facts of this case there was no evidence that Mr Conway had received any relevant confidential information when acting initially for Regent and then for Pristbrook on the purchase of No 32. He noted, in particular, that the purchase price of £1.2 m for No 32 had been in the public domain from June 2000 (see paragraph 18 above). And he argued by reference to the history of the matter that there was no evidence of any information imparted by Regent to Mr Conway of a confidential nature in relation to No 32 or otherwise that could have had any bearing on his bidding tactics for No 24, certainly before Mr Karmel's telephone call to Mr Conway on 5th December 2000.

114. The critical question, which is essentially one of fact in each case, is, as Lord Denning MR put it in *Seager v Copydex*, at 931E-F, whether the information is used for the purpose of taking unfair advantage.

115. I need not detail Mr Tager's submissions as to the presence or absence of confidentiality of information imparted to Mr Conway and as to the adequacy of the Judge's directions to the jury on it. In my view, in the passages from the his directions that I have set out, he correctly and adequately identified their task. And in his treatment of the evidence going to Regent's evidential candidates for relevant confidential information that they alleged Mr Conway had misused or had been at risk

of misusing, I consider his directions to have been realistic and, where critical of Regent's case, not to have been unfair.

iv) b) Burden of proof as to misuse of confidential information

116. The Judge directed the jury that, even if Regent established that Mr Conway had been in possession of relevant confidential information, they could only succeed if they also established that he had in fact used it for his own benefit. He said:

> "There is nothing wrong in Mr Conway having confidential information if he did not, in fact, use it for his own benefit. It is the use for his own benefit without … [Regent's] consent which is the first unlawful act which he is accused of having committed."

117. Sir Sydney submitted that this direction was wrong in law for two overlapping reasons.

118. The first was that, absent informed consent, possession of relevant confidential information was an absolute bar to Mr Conway competing personally against Regent on the purchase of No 24. He maintained that proof by Regent of Mr Conway's unauthorised use of such information was not required; risk of it was sufficient to establish Regent's defence of justification. He said that Mr Conway could not assert that that there was no real risk of unauthorised use, since the information was in his personal possession, and he could not put it out of his mind. He prayed in aid the reasoning of Lord Millett in *Bolkiah,* at 235G 236A, 236F-H and 237A, that the duty encompassed the avoidance of risk or perception of risk that a former professional confidence may be abused:

> "Whether founded on contract or equity, 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. Moreover, it is not merely a duty not 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." …
>
> "It is … 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 a third party and be used to his disadvantage. …

> … the risk must be a real one, and not merely fanciful or theoretical. But it need not be substantial. …"

119. As Sir Sydney submitted, adverting to an earlier passage in Lord Millett's reasoning in *Bolkiah*, at 234 F – G, the essential issue was whether there was a real risk of the two transactions having an impact on one another and/or whether there was a real risk that Mr Conway would acquire relevant confidential information:

> "… In the course of argument, however, … [counsel for Prince Jeffri] modified his position, accepting that there was no ground on which the court could properly intervene unless two conditions were satisfied: (i) that the solicitor was in possession information which was confidential to the former client and (ii) that such information was or might be relevant to the matter on which he was instructed by the second client. This makes the possession of relevant confidential information the test of what is comprehended within the expression 'the same or a connected matter'. On this footing the court's intervention is founded not on the avoidance of any perception of possible impropriety but on the protection of confidential information.
>
> My Lords, I would affirm this as the basis of the court's jurisdiction to intervene on behalf of a former client. …"

120. Sir Sydney added that, in circumstances where the evidence showed that Mr Conway had recurring doubts as to his professional position, a conflict of interest could not be dismissed as a mere "fanciful or theoretical possibility". The duty, as Lord Millett went on to emphasise in *Bolkiah*, at 235D-236A, is strict and the burden of proof on the party complaining of breach is not heavy.

121. Sir Sydney's second criticism of the Judge's direction on this issue, which is really a corollary of the first, is the rule derived from a broader, but clearly applicable, proposition of Lord Penzance in *Erlanger v New Sombrero Phosphate* (1878) LR 3 App Cas 1218, at 1229-1230, and recently applied by Morritt LJ (as he then was) to alleged misuse of confidential information in *United Pan-Europe Communications NV v Deutsche Bank AG* [2000] 2 BCLC 461, at para 34, that, where a fiduciary relationship between parties may be the occasion of unfair advantage to one of them, the burden of proof lies on that party to show that he has not used that advantage for his own benefit. Sir Sydney espoused that approach, as affording the client protection against the unfair advantage inherent in, or derived from a former, fiduciary relationship, and because, in practice, there is no way of the client telling what may or may not have carried weight in the solicitor's mind.

122. The matter is one of perception as well as substance; per Megarry J in *Specot v Ageda* [1973] Ch 30, at 47, and per Lord Millett in *Bolkiah*, at 236. This is particularly so where the solicitor is confronted by the potential conflict between his personal interest and his duty to his client; per Lord Walker of Gestingthorpe in *Hilton v Barker Booth*, at para 41:

> "… if a solicitor puts himself in a position of having two irreconcilable duties … it is his own fault. If he has a personal

> financial interest which conflicts with his duty, he is even more obviously at fault. …"

123. Sir Sydney, on the strength of those authorities, submitted that not only had the Judge wrongly reversed the burden of proof in directing the jury that, unless Regent proved actual misuse, Mr Conway had done nothing wrong, but he had also wrongly imposed on Regent an obligation to prove actual misuse in order to succeed in their defence of substantial justification. As to the burden of proof – or lack of it - he drew from Lord Millett's observations in *Bolkiah* at 235C-236A and 237A and F-G and those of Lord Hope at 226H-227A, the proposition that where confidentiality of information obtained in a fiduciary relationship, say by a solicitor, is at risk of misuse after the termination of that relationship by the former fiduciary, it is a breach of his duty of confidentiality to put his former client at risk of the confidential information being used against him by himself or another.

124. However, it should be borne in mind that those observations of high judicial authority, however generally expressed on the duty of confidentiality, arose in the context of injunctive relief. The issue before the jury was not whether Regent needed protection against Mr Conway's misuse or possible misuse of their confidential information or a remedy, say in the form of damages or an account against his having done so; it was whether Regent's libellous defamatory allegation of misuse, could be justified.

125. Mr Tager acknowledged that, if Mr Conway had been in possession of relevant confidential information, Regent might be able to justify what would otherwise be a libel on its facts in *Bolkiah* terms as a case of breach of confidentiality by the solicitors. But, he submitted, such an avenue was not open to Regent in this case, because their letter of 6th December 2000 did not accuse Mr Conway of having had confidential information where there was a risk of misuse, but that he had misused confidential information. On that aspect, to which I return in paragraph 131 of this judgment, he maintained, it seems to me with appropriate focus on the issue arising on the appeal, that the Judge's direction was correct.

126. Secondly, and in any event, Mr Tager argued that, as Mr Conway had not been retained by Regent at the time of his bid for No 24, he owed no fiduciary duty to Regent in relation to that property, and, therefore, there could be no presumption of misuse in the absence of proof to the contrary. The rule in *Erlanger*, he submitted, was predicated on the existence of a fiduciary relationship. It was, of course, for the jury to determine whether there had been a fiduciary relationship between Mr Conway and Regent at the material time and whether he had received any confidential information in the course of that relationship.

127. In most instances litigation involving the giving and possible misuse of confidential information is likely to arise out of a fiduciary, or alleged fiduciary, relationship, whether or not continuing - and that is the context of the issue arising in this case. In the course of his directions the Judge dealt with both fiduciary and non-fiduciary confidences, not always differentiating between the two circumstances. In his directions giving rise to this complaint, he was focusing on the duty of confidence. But he had earlier given them the direction that I have set out at paragraph 76 of this judgment of what might be described as a continuing "free-standing fiduciary relationship" as a back-drop for considering the existence of a duty of a breach of confidence and its breach, so as to attract the *Erlanger* principle. Given that

direction, it may be that he should have gone on to direct the jury in the manner suggested by Sir Sydney.

128. However, as I have said the main thrust of the allegation in the letter of 6th December 2000 was that Mr Conway had "used confidential information obtained through a solicitor/client relationship", not that he put himself in a position where he might have used it or was at risk of using it, conduct which, in my view, the Judge was entitled to put to the jury as possibly more serious than putting himself at risk of misusing it.

129. Nevertheless, Sir Sydney submitted that the Judge should have directed the Jury that, on the undisputed evidence, Mr Conway was precluded from bidding on No 24 by possession of confidential information obtained in the course of his solicitor/client relationship with Regent, which was or might have been relevant to his bidding for No 24 and which: (i) he could not put out of his mind or (ii) which it was impossible for him to rebut the presumption that he had made some use of it. The information to which he referred was of: Regent's finances; characteristics of No 32 similar to those No 24; the re-sale value of No 32, in particular the price and profit margin on its re-sale and the extent of market interest in it; Regent's September 2000 offer for No 24 of £3.75m; Regent's plans for No 24 conveyed by Mr Karmel to Mr Conway in September 2000; and Mr Karmel's information to Mr Conway on 5th December 2000 of Regent's successful bid for No 24.

130. Mr Tager submitted that none of those matters was truly confidential information in the context of this case and that there was, in any event, no evidence that Mr Conway had in his bidding for No 24 misused it or, if it is the test, was at risk of misusing it. As to evidence of actual misuse, he added that, even if Mr Conway had such or other relevant confidential information, whether the jury could infer his misuse of it in the absence of evidence to the contrary was a matter of fact for them whether each item relied upon was confidential and, if so, whether Mr Conway misused it. He relied upon the Judge's reminder to the jury of each item of information relied on by Regent as confidential.

131. In my view, on the issue of misuse that Regent seeks to justify, it was not critical to the outcome that the Judge did not direct the jury in broader terms as to the risk of misuse arising from possible confidences imparted in relation to No 32 and other earlier matters. The true sting of the libel was of finer focus, namely that on 5th December 2000 Mr Conway, by seeking to outbid Regent for No 24, actually misused confidential information imparted to him by Mr Karmel on the telephone that day of Eyre's acceptance of Regent's bid.

Meaning and Justification

vi) the possible meanings of the letter of 6th December for justification

132. Regent accepted at trial that the letter of 6th December 2000 was defamatory in its allegation of breach of duty by Mr Conway to Regent, but sought to justify it. One of the important issues was the meaning or the meanings of the allegation which it sought to justify. But, regardless of the possible meanings, since they all related to breach of duty to Regent, the Judge, as I have said, effectively destroyed Regent's defence of justification to the extent that it depended on a fiduciary relationship with Regent, by directing the jury that, as a matter of law, the only fiduciary duty he had

had was to Pristbrook, not Regent. Similarly, his associated direction that Mr Conway was entitled to use Regent's relevant confidential information provided it was not likely to cause any harm to his client's, namely Pristbrook's, interests and that there had been no suggestion of any harm to Pristbrook's interests in relation to No 32, all but destroyed Regent's defence of justification insofar as it depended on breach of confidence. It follows that the considerable debate before the jury as to precisely what meaning or meanings were to be attributed to the letter for the purpose of considering Regent's defence of justification was, given those directions, largely academic.

133. However, as so much time was given to the question in the appeal, I shall, in deference to the arguments, examine it in this judgment, albeit shortly.

134. The Judge left to the Jury three possible meanings of the allegation in the letter of 6th December 2000, the first two of which Regent accepted, the third of which they did not seek to justify. They were:

i) breach of Mr Conway's legal and professional duties to Regent ("the broad meaning");

ii) misuse for his own benefit of confidential information arising out of a solicitor-client relationship with Regent in respect of No 24 ("the narrow meaning"); and

iii) misuse of confidential information arising out of a solicitor-client relationship with Regent on No 24 established on 5th December, relating to *the amount* of Regent's successful offer for No 24 ("the very narrow meaning"), pleaded by Mr Conway in his amended particulars of claim in the following terms:

> "the … words in their natural and ordinary meaning meant and were understood to mean that the Claimant had been informed by or on behalf of Regent that the Trustees had accepted an unconditional offer for the Site from Regent and of the amount of the offer, and had agreed to act for Regent in relation to Regent's purchase of the Site from the Trustees; that he had then used that information to put in a higher offer than that made by Regent and accepted by the Trustees; and that by so doing he had acted in breach of confidence and/or in breach of his professional duty as a solicitor and/or in breach of fiduciary duty in bidding for the Site …"

135. The Judge, in his guidance to the jury on the issue of meaning took his line from the analysis of Eady J, approved by this Court in *Gillick v Brook Advisory Centres* [2001] EWCA Civ 1263, at para 7. He said:

> "… The meaning you have to decide upon is the meaning that a reasonable person in the position of the person receiving the letter would have understood.
>
> The meaning of the words depends … partly on their context. You have to take the context into account whenever you try and

> understand what somebody is saying. It is not just the literal meaning of what a person says; the meaning includes what an ordinary reasonable reader would conclude as he reads the letter.
>
> Of course, the ordinary reasonable reader of this letter would be, and no doubt was, a busy person with a job to do. A man like Mr Briant, or Mr Johnson for that matter, would not spend days discussing the letter as we have. The ordinary reasonable reader might not even go through the letter sentence by sentence as you have heard both counsel doing in this case more than once. But you may think that the reasonable reader would probably read this particular letter once or twice or more. You may think that he might pay more attention to it than he might pay to other business letters because the letter makes serious accusations against a solicitor who the reader knew personally; and also because the letter might affect the sale of some very valuable property which the reader was attempting sell to the highest bidder.
>
> You are a jury, have special expertise here that we lawyers do not have. … reasonable readers … are ordinary members of society. They will use their common sense. They will not be unduly suspicious, but they will not be naïve either. They will be fair-minded, but they will not be treating the letter as an exam question. They may just absorb the gist or message of the letter in general terms. They may get the broad impression which may not be the same as the result of a line by line analysis assisted by lawyers.
>
> They will not be avid for scandal, but neither will they be looking for the most charitable interpretation they can find. ”

136. Regent maintain, that the Judge wrongly left to the jury the question whether the letter had the very narrow meaning, namely breach of confidence arising out of a solicitor-client relationship as to the *amount* of Regent’s December 2000 offer - the meaning that Regent did not seek to justify. This is how the Judge put the matter to the jury:

> “One of the main differences between the two sides in this case is: did the words complained of accuse Mr Conway of misusing information about the price which Regent …had bid on 5th December? … [Regent] say the letter does not mean that. Whether or not the letter does mean that of course is crucial to what you have to decide.
>
> It is important because … Regent accept they cannot prove, indeed have never alleged, that Mr Conway ever knew or misused information as to the amount which … [they] had bid on 5th December, communicated to him on 5th December by Mr Karmel. Mr Karmel accepts and says that on 5th December he

> did not tell Mr Conway the figure at which they had put in their bid. …
>
> … You have to ask yourselves: does the letter mean that Mr Conway had been told a figure by … [Regent] at all? What happens if you think the letter means that Mr Conway did know and misuse confidential information about the figure that … Regent had bid on 5th December? Would it help … [Regent] if they could prove that he had misused a figure given in September?
>
> What a defendant has to prove is that the gist of the libel is true. The law allows some leeway for exaggeration and inaccuracy of detail but the leeway for exaggeration and inaccuracy of detail is limited. If you think that … [Regent's] letter means something more than what … Regent can prove, it is for you to decide whether or not that difference is an unimportant detail or whether what … [Regent] cannot prove is a further allegation of much more gravity than what they can prove."

137. Regent maintain that the letter, which is in plain terms, did not state that they had told Mr Conway the amount of their successful bid, and that the imputation that the letter was to be read as having that meaning was not a reasonable interpretation of it and should not have been left to the jury. They also maintained at trial that the letter was not to be read as meaning that Mr Conway had agreed to act for Regent in relation to their purchase of No 24, but seemingly do not complain in the appeal about the Judge having left that part of the meaning to the jury.

138. Mr Conway's case on the third and very narrow meaning is that it was a reasonable meaning to leave to the jury since the making of an offer by Mr Conway could have had no effect unless it exceeded Regent's offer.

139. In support of Regent's construction, Sir Sydney referred to the well-established canons of construction in defamation that where there are a number of possible interpretations, the hypothetical reasonable reader should not be taken as seizing upon the worst one: (see *Capital & Countries Bank Ltd v George Henry* (1882) 7 App Cas 741 and *Nevill v Fine Art & General Insurance* [1897] AC 68, HL) and that such a person is a fair minded one, who resists jumping to conclusions (see *Lewis v Daily Telegraph* [1964] AC 234, HL).

140. Alternatively, Sir Sydney argued that the very narrow meaning could not have materially injured Mr Conway's reputation if he was, in fact, guilty of unprofessional conduct by bidding against his clients when he was also in possession of other relevant confidential information acquired in the course of a fiduciary relationship, information, given that relationship, which the law presumes him to have misused in the absence of proof to the contrary. On that approach, he maintained that it did not matter whether the letter was reasonably capable of meaning that Mr Conway had misused information as to the amount of Regent's offer for No 24 in December 2000, since, given their acceptance that the letter was defamatory, the primary reason why the jury was being asked to determine its meaning was to decide whether it was substantially justified. Sir Sydney observed that it would have been perverse of the

jury to find that the letter was not substantially justified if Regent established that Mr Conway had misused relevant confidential information obtained through a solicitor-client relationship, though not such particular piece of confidential information. He thus argued that the core allegation remained the same, namely misuse of confidential information arising out of a solicitor-client relationship in respect of No 32 or in the discussions about No 24 in September 2000, for the solicitor's own benefit, i.e. meanings i) and ii), a very serious breach in itself of a solicitor's legal and professional duties.

141. By contrast, Sir Sydney complained, the Judge invited the jury to treat the letter as a sort of puzzle, and adopt a lawyer's analytical approach to the letter, dissecting each phrase one by one with a view to construing it as if it were a contract. Such an approach, he maintained, was highly prejudicial to Regent, given that they had not attempted to justify the very narrow meaning of the letter.

142. Sir Sydney made a number of other mostly marginal criticisms of the Judge's directions on justification, which, he maintained, misled them as to how they should approach the issue of substantial justification. These included a direction that the jury could consider an allegation of actual misuse of confidential information as more serious than one of a risk of such misuse or of creating a conflict of interest, and a direction to consider as a possibility that the letter would not be substantially justified because of the untrue allegation in it that Regent had contacted the Law Society about Mr Conway's conduct. In my view, there is no substance in either of those criticisms.

143. An allegation of actual misuse of confidential information may, depending on the circumstances, be more serious than creating a risk of such misuse or acting in breach of fiduciary duty not involving confidential information. The Judge, in the way he put the matter to the jury, left them to consider whether that was so in this case.

144. As to the possible effect of the untrue reference in the letter about Regent having contacted the Law Society about Mr Conway, I do not read the Judge's short reference to it in his directions to the jury as an invitation to them to treat it as of such importance that it could preclude substantial justification, quite the reverse. He commented:

> . "… If you think that the bit about contacting The Law Society is an unimportant detail, then you will go on to consider whether the defendants have proved that Mr Conway did misuse any other confidential information or otherwise act in breach of his duties as a solicitor."

145. In any event, it is difficult to see how the jury, in rejecting Regent's defence of justification could have concluded that the allegation that Regent had reported to the Law Society the very conduct alleged in the letter materially added anything to the seriousness of the allegation, though it could have been relevant on the issue of malice and/or of quantum of damages. If Regent succeeded in justifying its allegation, a complaint to the Law Society would have been justified.

146. However, I have some sympathy with Regent's main complaint of what might be called "salami-slicing" by the Judge in the way in which he invited the jury to approach the variously pleaded allegations of meaning of the libel on behalf of Mr

Conway. Notwithstanding the conventions of pleading that survive in this area of the law, I agree with Sir Sydney that it would have been more realistic and helpful for the Judge to have concentrated on the core of the complaint contained in pleaded meanings i) and ii) and that recourse to the "frills" in alleged meaning iii) was likely to add little but complication on the central question whether Regent had *substantially* justified their allegation. Nevertheless, I would not on this ground alone, set aside the jury's verdict. As I have said, it contains a far more serious flaw flowing from the Judge's direction that, as a matter of law, such fiduciary duty as Mr Conway had was to Pristbrook, not Regent, which is ground enough for setting aside the verdict on justification.

Malice

147. The Judge ruled that the letter of 6th December was protected by qualified privilege, a ruling that Mr Conway has not challenged. However, the Judge went on to give directions on malice, which Regent complain wrongly removed that protection. He put two questions to the jury under this head. The first was whether Mr Ratiu and Mr Karmel, in respectively sending and authorising the letter, were "acting out of malice in the legal sense", to which the jury's answer was "yes". The second was whether Mr Ratiu sent the letter "with the motive of getting an economic or material gain in the belief that … [Regent] would be better off financially if they violated Mr Conway's rights than if they did not violate … [his] rights", to which their answer was "no". So, wherever the jury found malice it could not have been on their answer to the second question.

148. There are two parts to this head of appeal. The first is whether the Judge should have withdrawn the issue from the jury on the ground that there was insufficient evidence on which a reasonably minded jury, properly directed, could find it, an issue not raised by Regent at the trial. The second is whether he wrongly directed them on the law on their approach to the evidence going to the existence of malice.

149. Regent maintain that the Judge, having wrongly left the issue of malice with the jury, seriously misdirected them by failing to make clear that malice did not turn on the objective meaning of the letter, as found by them on the question of justification, but on the subjective meaning intended by Regent, in particular in relation to the very narrow meaning, which was in issue and which Regent had not attempted to justify.

150. As to the adequacy of evidence of malice, Mr Conway's case is that it lies ill in the mouth of Regent to complain of the Judge leaving the issue of malice to the jury when it did not seek to persuade him at trial not to do so, and that, in any event, there was substantial evidence of malice for their consideration. He also seeks to support the Judge's direction on the issue as accurate and fair, in particular as an issue only to be addressed if the jury were against Regent on justification.

151. It was for Mr Conway to prove malice. The question is whether there was sufficient evidence on which a reasonably minded Jury, properly directed, could find it proved – adopting and adapting May LJ's succinct formula in *Alexander v Arts Council of Wales* [2001] 1 WLR 1840, CA, at para 42, "whether there [is] any evidence, taken at its highest, on which a jury properly directed could properly infer that … [Regent] subjectively did not honestly believe that what … [it] intended to say in the … [letter] was true". Such a proposition, as May LJ noted in para 32 of his judgment in that

case, is of a piece with the assertion in the 8th edition of *Gatley on Libel and Slander*, (1981), para 795, cited with approval by this Court in *Telnikoff v Matusevitch* [1991] 1 QB 102, CA, at 120, that a "[p]laintiff must adduce probability of malice at least".

152. Where defences of justification and qualified privilege are both in play, the meaning of the alleged defamatory words on the issue of justification is objective and the defendant's intended meaning on the issue of malice as a counter to the defence of qualified privilege is subjective. A judge, in his directions to the jury, should make that distinction, and he should keep to it in his treatment of the evidence and inferences capable of being drawn from it. Hirst LJ emphasised the importance of this in *Loveless v Earl* [1999] EMLR 530, at 538-9, in the following terms:

> "… it is very important to contrast the test for meaning on the one hand and the test for malice on the other. Meaning is an objective test, entirely independent of the defendant's state of mind or intention. Thus, in a case where words are ultimately held objectively to bear meaning A, if the defendant subjectively not meaning A, and honestly believed meaning B to be true, then the plaintiff's case on malice would be likely to fail."

vii) a) Whether the Judge should have withdrawn the issue of malice from the jury

153. Mr Tager, in his conduct of Mr Conway's case at trial, put at the centre of his case on malice a "dirty trick" allegation, namely that Regent wrote and sent the letter of 6th December 2000 to Eyre with the intention of securing No 24 at £3.75m without having to raise their bid in response to Mr Conway's renewed bidding and, for the purpose, to blacken his name. This allegation, which Mr Tager repeated many times in his addresses to the jury, became the subject of the two questions of the Judge to the jury to which I have referred. This is how the Judge introduced the issue to the jury:

> "The real issue … was Mr Karmel genuinely ringing Mr Conway as a prospective client ringing a prospective solicitor? If he was, then the information that Mr Karmel was giving, namely that he had done a deal with …Eyre … would, you may think, be fairly classic confidential information.
>
> On the other hand if Mr Karmel was not genuinely ringing as a prospective client, but was ringing because he knew that Mr Conway was a rival bidder and he wanted to knock him out using this dirty trick, if that was what the position was then you may conclude that the information was not genuinely being given in a solicitor/client relationship at all, but was being given by one competitor trying to knock out another by unfair means.
>
> …
>
> … If there was trickery and deception … Eyre … would have been tricked out of the chance of getting more than £3.75

> million for their property at number 24. So, you will bear the context of all this in mind. The question is whether or not Mr Karmel was calling Mr Conway because he genuinely wanted Mr Conway to act as a solicitor, or because he wanted to knock him out as a competing bidder, and that is a question of fact which is for you to decide."

154. Such a formulation, suggesting dishonesty on the part of Mr Karmel in making the telephone call, in fact formed little or no part of Mr Conway's case or Mr Tager's presentation of it at trial, save as a broad suggestion from the latter that there had been "a dirty trick from beginning to end". But, the Judge, in directing the jury on the "dirty tricks" allegation, as it had been put at trial by Mr Tager on behalf of Mr Conway, characterised it as a suggestion that Mr Karmel, telephoned Mr Conway on 5th December 2000 to force confidential information on him so as to disqualify him from bidding for No 24. The Judge's version appears to have had its origin in speculation by Mr Conway, in his evidence, as to a possible alternative reason for Mr Karmel's telephone call to him, but it was an alternative that Mr Tager never put to Mr Karmel in his extensive cross-examination of him.

155. Sir Sydney submitted that there was no evidential support for either version of the "dirty trick" allegation. He suggested that the Judge's version of it was also highly improbable for a number of reasons, but in particular that Regent had already reached an oral agreement with Eyre, and were hardly likely to have contacted anyone whom they regarded as a potential competitor at that stage who might seek to gazump them.

156. The Judge, in his directions to the jury in the context of justification, had described Regent's argument that Mr Conway must be taken to have misused confidential information as being "without an explanation from Conway … a strong argument", namely that he must be taken to have misused confidential information, given that he had put in a bid of only £50,000 higher than that of Regent shortly after Mr Karmel had told him of Eyre's acceptance of Regent's offer. The only explanation since proffered by Mr Conway, Sir Sydney observed, was that he had had an incremental bidding strategy that involved continuing to raise his bids after the bidding had closed. However, he pointed out that there was no evidence that Regent knew or could have known of that strategy when they wrote the letter, so it could not possibly displace the strong argument of their honest belief in it. The Judge's comment in his directions to the jury at this point that they might find Regent's case on malice as "rather difficult to follow" was, as Sir Sydney stressed, only because he was testing Regent's case on malice by reference to a meaning that they may not have intended (see paragraphs 166-167 below).

157. Sir Sydney also referred to the fact that it was common ground on the evidence that Mr Conway contemplated up to and including the telephone call from Mr Karmel on 5th December that he might be instructed to act for Regent on the purchase of No 24 if Regent secured the site. In answer to a question in cross-examination whether he should have competed against Regent on No 24 whilst contemplating that he might ultimately accept instructions from them to act as a solicitor in respect of it, he said: "excuse me, even if I had been prepared to ride two horses, so what". If Mr Conway had contemplated (as he had done) that he might be instructed once he had lost the biding, why, Sir Sydney asked, should Regent not seek to instruct him when they had won it?

158. As to a suggestion by the Judge to the jury that they could, if they considered it important, find malice against Regent in relation to the inaccurate statement in the letter of 6th December 2000 that Regent had reported the matter to the Law Society, Sir Sydney submitted that if Regent genuinely believed that Mr Conway had acted unprofessionally so as to jeopardise their deal with Eyre, they were entitled to complain to the Law Society. The fact that a draft letter of complaint was prepared, but not sent due to pressure of time, and that Regent informed Eyre the next day that it had not sent the complaint (see paragraph 47 above) was, he said, to be put against the Judge's suggestion to the jury that they might not think very much of it as an explanation.

159. In summary, Sir Sydney submitted that, on the undisputed evidence, far from being actuated by malice, Regent were entitled to feel aggrieved at Mr Conway's conduct and to have considered that he had acted unprofessionally in attempting to outbid them.

160. Mr Tager, notwithstanding the prominence that he had given to the "dirty trick" issue in his conduct of the case before the jury, maintained that it formed only a small part of Mr Conway's case on malice. However, apart from falling back on the incorrect statement in the letter to Eyre of 6th December 2000 of having reported the matter to the Law Society, he had little more to say on the subject save that, as a result of his, Mr Tager's canvassing of the matter at trial and Mr Conway's suggestions in his evidence, the Judge correctly left it to the jury and directed them adequately and fairly on the rival contentions. He maintained that, however unlikely the suggestion, as Regent now maintains, juries often do have to determine the truth of unlikely suggestions. He also, in a short hypothetical analysis, sought to suggest a number of rational bases for the allegation or to dismiss one or more of Sir Sydney's points on this issue as irrelevant to it.

161. In my view, there is force in Sir Sydney's submissions. Consider the telephone conversation between Mr Karmel and Mr Conway on the morning of 5th December 2000. Mr Karmel told Mr Conway that Regent's bid had been accepted and asked him to act as Regent's solicitor on the purchase, information that the Judge, in his summing-up to the jury described as "pretty classic confidential information". Mr Conway did not say that he could not act, nor that Mr Karmel should not give him confidential information or speak to him, as he was a competing bidder. He simply said that he needed first to make a telephone call and then hung up abruptly. Regent subsequently learned from Eyre, not Mr Conway, that he had contacted Mr Johnson, its Chief Executive, immediately after putting the phone down on Mr Karmel, and had offered to outbid Regent by the small margin of £50,000 over their, so far, successful bid. That bid, it will be remembered was at the same level as their unsuccessful September 2000 bid, of which they knew Mr Conway was aware (see paragraphs 19, 22 and 23 above).

162. In my view, there was no sufficient evidence on which a jury properly directed on the law, could find malice either in respect of the "dirty trick" allegation (in either of its forms) or in relation to the inaccurate assertion that the matter had been reported to the Law Society. As I have already said by reference to the passage from the 8th edition of Gatley approved by this Court in *Telnikoff v Matusevitch,* pat 120 and in *Alexander v Arts Council of Wales,* at paras 32, 37-38 and 42, the law requires evidence of at least probability of malice; mere possibility is not enough. It follows

that, in my view, there was no evidence upon which the jury could, even if properly directed, have found malice so as to defeat Regent's defence of qualified privilege. I would, therefore, set aside the jury's finding of malice on this ground alone, with the result, if I am right, that Regent succeed in their appeal on this issue as well as that of justification.

Vii) b) The Judge's directions on the application of the subjective test of malice

163. If I am right in my view that there was insufficient evidence of malice to go to the jury, it does not matter whether the Judge correctly directed the jury on the issue. However, in case I am wrong in that view and in relation to justification, I should go on to consider the Judge's directions.

164. Regent maintain that the Judge erred in failing to distinguish clearly in his directions on malice that, whilst justification was to be determined solely by reference to the objective meaning of the letter, malice was to be determined solely by reference to the state of mind and intention of Regent.

165. Mr Conway's case is that the Judge, throughout his directions on malice stressed that the jury could only find it if they were satisfied that Regent knew the letter to be false or did not believe it to be true, making plain, without using the word "subjectivity" that that is what he meant.

166. Sir Sydney illustrated the scope for confusion by tracking the Judge's line of reasoning in the following sequence of his directions to the jury on the issue. First, the Judge introduced the issue of malice by telling them that "[m]ost of what you need know for this topic, as far as the facts are concerned,… overlaps with what you need to know for the purpose of deciding whether [the letter] is true or not. …" And, having previously on more than one occasion referred to the meaning of the letter as probably the most important matter they had to decide, he then made a number of references to whether Regent believed what the letter meant or stated. Finally, he directed them to decide, if they found that the letter bore the very narrow meaning and related to confidential information, "whether Mr Karmel and Mr Ratiu knew that the letter was false".

167. Such an approach, Sir Sydney submitted, amounted to a serious misdirection because it gave rise to a risk that the jury would fix upon "the very narrow meaning" and would then find malice on the sole basis that Regent had never attempted to justify that meaning. It would have been otherwise, he implied, if the Judge had framed the question as "whether Mr Karmel and Mr Ratiu *intended* that meaning and knew it to be false". And he held to that criticism notwithstanding the following potentially curative passage in the Judge's direction, maintaining that that it was so diffuse as to be incapable of curing the earlier misdirection:

> "It is for you to decide … what the letter means. And so it is for you to decide whether it bears a meaning which the defendants did not intend. You may not think it very likely that the letter bears a meaning which the defendants did not intend, but if you do think that the letter bears a meaning that the defendants did not intend, then for the purposes of malice I must direct you, and I do, to judge the defendants' belief by

> what you find they actually intended to say. If they intended to say what they did believe to be true but have managed to something else which they knew to be untrue, then you judge them by what they intended to say."

168. Sir Sydney made a number of other criticisms of the Judge's treatment of this issue that do not take Regent's case much further and with which, with respect to him, I do not consider it necessary to deal.

169. Sir Sydney also criticised the Judge's direction to the jury that it would be open to them to find malice on the sole basis that the letter contained an inaccurate reference to having reported Mr Conway to the Law Society. This is how the Judge put that matter:

> "… it is admitted that Mr Ratiu knew they had not reported Mr Conway to The Law Society, so what Mr Ratiu wrote about the Law Society was obviously false and untrue to Mr Ratiu's knowledge. You heard Mr Ratiu's explanation for those words: he said the letters were intended to be sent in a different order. Entirely a matter for you, but you may not think much of that as an explanation. The sentence about the Law Society you may think could very easily have been deleted before the letter was sent.
>
> As I said earlier, you will need to consider whether that sentence is important; whether it makes the seriousness of the alleged wrongdoing appear greater than it otherwise would have appeared, or whether those words are simply detail as Mr Price suggests. If you find the sentence is important, you may find that the defendants could not prove that the letter was substantially true for that reason, that is going back to the earlier stage [i.e. the issue of justification]. If you have found that the sentence about the Law Society is important, you may also feel able to find malice against Mr Ratiu, it is entirely a matter for you to decide how important you decide that sentence is."

170. Sir Sydney submitted that that is another example of the Judge's elision of the objective test for justification and the subjective test for malice. He added that it would have been perverse for the jury to have found malice in the light of Mr Ratiu's explanation that they had intended to send the letters in a different order but were overtaken by events and the undisputed fact that Regent informed Eyre on the following morning that the letter to the Law Society had not been sent. In any event, as Sir Sydney observed, it made no difference whether Regent had already reported Mr Conway to the Law Society or whether it was contemplating doing so. What mattered was whether Regent, in writing the letter to Eyre, honestly believed that Mr Conway had acted in breach of his legal and professional duties as a solicitor.

171. Mr Tager maintained that the Judge was justified in giving the direction he did because it is malicious to write what the writer knows to be untrue, and Regent had admitted the third possible meaning of the letter of 6th December 2000 to have been

untrue. Such untruth was also relevant to whether the jury could infer that Regent had no honest belief in other parts of the letter.

172. Given the complexity of the task for the jury in distinguishing between the objective meaning of the words for the purpose of reaching a finding on justification and their subjective meaning when considering the issue of malice, regardless of justification, it was vital that the Judge should make that distinction clearly. And it was vital to the outcome of the case if they had reached a stage in their deliberations of having opted for the very narrow meaning, which Regent had not attempted to justify, that they should have the distinction clearly in mind. In my view, there is a grave danger, in the light of the Judge's directions, that the jury did not have it in mind. Moreover, it does not seem to have been canvassed in that sort of focus at the trial. In particular, it does not appear to have been put to Mr Ratiu or Mr Karmel in cross-examination that they maliciously intended to convey in the letter the very narrow meaning, which they had never at any stage suggested to be true.

173. Accordingly, I would also set aside the finding of malice by the jury on the ground of misdirection.

174. I should add that Regent also maintained that the Judge presented a prejudicial and one-sided account of the parties' respective submissions in his summing-up, including an alleged emphasis on Regent's admission that the letter was defamatory and in a few instances where he had referred to Regent's case on particular issues as "technical" or "difficult" or unspecific. In my view, there is little in this complaint; the Judge went to great trouble to sum up this case comprehensively, comprehensibly and fairly. This case was nothing if not detailed, technical and difficult, combining as it did the mysteries of defamation, breach of fiduciary duty and of confidence. There were inevitably difficulties and technicalities in the arguments on both sides, and the comments of which Regent complains were, in my view, justified or at the very least permissible.

Damages

viii) Whether the Judge misdirected the jury on damages or whether their award was perverse

175. If I am right in my views on the issues of justification and malice, this issue is now academic. But in case I am wrong and also out of deference to counsel's submissions on damages, I hope that it may be helpful for me to say something on the subject.

176. The Judge, in directing the jury on this issue, directed them comprehensively and carefully, summarising the salient points for and against Mr Conway, including the manner in which the parties had conducted their respective cases. He gave general guidance by way of comparison about sums that might be awarded for very serious personal injuries and on aggravation. The Jury awarded £96,000 in general damages, which is very close to the conventional award for the total loss of both hands.

177. Regent maintain that this was substantially in excess of what a reasonable jury could have thought necessary to compensate Mr Conway and to re-establish his reputation, and that, in any event, any such loss resulted from a single letter, allegedly published only to three people; two of them, the addressee, Mr Briant, and Mr Eyre (the

Chairman of Eyre) were not called to give evidence; and the third, Mr Johnson, who gave evidence for Mr Conway, said that it had had no effect on his opinion of him.

178. Regent also maintain that the Judge erred in directing the Jury that:

i) Mr Johnson, who was Mr Conway's own witness, was not giving a truthful account of his reaction to the letter;

ii) if they found that the words complained of were circulated to other people in Mr Conway's business circle (which was unpleaded and unsupported by evidence), they might consider raising the damages from a possible £65,000 to up to £100,000;

iii) they should bear in mind, in assessing compensatory damages, that the parties and the persons who read the letter were people who think in rather large sums of money;

iv) they should assess the appropriate compensation for libel and aggravation separately rather than together.

179. As to those matters:

i) I consider that the Judge's remark about Mr Johnson's stated lack of reaction to the letter was in the following and, in my view, acceptable terms:

> "You have heard two different statements from Mr Johnson: one as reported by Mr Ratiu at the initial telephone call [namely that the reported conduct was outrageous] and his evidence from the witness box. It is for you to decide what you make of Mr Johnson's evidence if you think fit. I simply say that it is very rare for witnesses to come to court and say that they thought the worse of a claimant as a result of a libel and you may understand why that might be."

ii) As to the Judge's reference to a possibly wider circulation justifying a possible rise in the level of damages from a possible £65,000 to £100,000, it is true there was some evidence suggesting a little wider circulation, certainly among the Eyre Trustees and those working for them and professional firms, such as Cluttons and solicitors instructed on behalf of Eyre. However, I am uneasy about the Judge's invitation to the jury consider so substantial a rise on the basis of such unpleaded and nebulous a suggestion.

iii) As to the Judge's remark about the people involved being persons who think in large sums of money, such a factor considered on its own would normally be irrelevant to the fixing on a sum sufficient in the circumstances of any particular case to vindicate reputation. But this is how he put the point, after properly directing jury on the need for a sum of damages to be sufficient for that purpose:

> "In this connection, you will bear in mind that both parties in this case, and those by whom the letter complained of was read, were and are people who think rather large sums of

> money. A sum that might be large for most of the population of the country might appear to be not quite so much for them. On the other hand, you will not be dazzled by the millions you have heard spoken of and you will confine yourselves to what is reasonable and proportionate in the circumstances."

Such a direction, it seems to me, just about passes muster as putting in context the direction he had just given on the function of damages as vindication – in this case a context of impugning the reputation of a successful and highly paid solicitor in the property field. In any event, as Mr Tager commented, if the Judge in this reference introduced an irrelevant consideration, he did so in a qualified way and it should be seen in the context of his directions as a whole.

iv) As to the calculation of the award taking into account aggravation if the jury considered it appropriate, the Judge directed the jury in the following terms:

> "If you decide to award any compensatory damages and if you do decide that they should be aggravated damages then you should award one total sum. If you get to that stage, you decide amongst yourselves: first the appropriate compensation for the libel you find and, second, the appropriate sum for any aggravation. You then add them together and produce a single sum. You will not be asked to state what sum, if any, you have awarded as aggravated damages."

That direction does not accord with the guidance given by this Court in *Thompson v Commissioner of Police of the Metropolis* [1998] QB 498, CA, at 516E, albeit in claims for wrongful arrest and false imprisonment. However, if a defamation jury take a two stage approach to calculating a global figure as the Judge directed here, it seems to me to be just as desirable as in the sort of claims considered in *Thompson* for them to indicate the make-up of that figure as between the "basic" award and that for aggravated damages. But, I do not suggest that the award is necessarily vitiated by the Judge's direction to them not to do that in this case. As the learned editor of the 17th edition of McGregor on Damages notes at paragraph 39-036 of that work, it has been unclear whether the *Thompson* guidance applies to defamation.

180. Mr Kenneth MacLean QC, for Regent, submitted that the Judge should have directed the jury that the letter was at least partially justified such that damages could only be minimal. In so submitting, he had in mind Neill LJ's observation in *Pamplin v Express Newspapers* [1988] 1 WLR 116, at 120, that damages may be reduced, possibly almost to a vanishing point if a jury consider that defamatory words were partially justified. It is plain that the jury, whatever their individual conclusions on the many issues of fact and judgment presented to them, in particular as to what was and was not justified, ended up well above the level of considering damages as minimal or close to vanishing point. However, given my criticisms of the Judge's direction of law as to fiduciary relationship and its effect on Regent's defence of justification and its knock-on complications for his directions on malice, and my view

that there was no evidence of malice fit for the jury, it is pointless for me to attempt a reasoned conclusion on this aspect of Mr MacLean's submissions on damages.

181. Mr Tager, in detailed oral submissions, sought to defend the Judge against Mr MacLean's various criticisms of his directions. And he rightly emphasised that, provided a jury is directed properly, there is a heavy burden on a party attacking an award as excessive. As this Court held in *Rantzen v Mirror Group Newspapers* [1994] QB 670, at 692H, it can only intervene if it can give a negative answer to the question "Could a reasonable jury have thought that this award was necessary to compensate the plaintiff and to re-establish his reputation?"

182. Mr Tager also drew attention in support of the jury's award to a number of elements contributing to the inclusion of a sum for aggravated damages, including: the seriousness of the allegation to a professional man with such local involvement and contacts; the absence of an apology; allegations of impropriety in the course of the trial going beyond the allegation in the letter; Regent's initial attempts to deny Mr Conway access to the 6th December letter; and claimed untruthfulness in the witness box.

183. Save for the Judge's direction as to the possible consequence of suggested wider circulation, I could not say, taking his directions overall, that he misdirected them so as to vitiate their award. However, I am, concerned about that suggestion and as to its possible effect, namely an increase of about a third in the damages that the jury might otherwise have awarded. Independently of that concern, I also feel unease that the total sum awarded by the jury, £96,000 is, as Mr MacLean pointed out, close to the conventional award for the total loss of both hands. That is probably quite enough comment from me in an area which is peculiarly within the province of the jury and whose award in this case, if I am right in my conclusions as to liability, is now academic.

184. For the reasons I have given, I would set aside the jury's findings on the issues of justification and malice and would therefore allow Regent's appeal.

185. Before leaving the case, I should express my sympathy to the Judge and to the jury on the enormous burdens imposed on both of them in this case, given the unhappy divide of responsibility between them on supposedly self-contained issues of law and fact. In fact, the critical issues, particularly as to fiduciary relationship and matters of confidence and the ingredients of malice as distinct from justification were in truth more matters of mixed law and fact. It is, in my view, no advertisement for our system of jury trial in civil cases - where it applies - for such complex issues to be tried in this way. A Martian, on learning of it, would be amazed, as would the ordinary person in the street.

Lord Justice Laws:

186. I agree that this appeal should be allowed for the reasons given by Auld LJ. I would only wish to emphasise my emphatic agreement with two aspects of my Lord's judgment. First, there is his observation at paragraph 78 that there is a "powerful argument of principle for lifting the corporate veil where the facts require it to include those in or behind the company who are in reality the persons whose trust in and reliance upon the fiduciary may be confounded". Secondly I wish in particularly to

support my Lord's presentation as to the means of trial, in defamation cases, of complex issues such as arose here.

Lord Justice Sedley:

187. I agree that this appeal succeeds for the reasons given by Lord Justice Auld. While the want of a suitable direction on justification would by itself have indicated a retrial, the want of sufficient evidence of malice makes a retrial otiose.

188. This was in the end a case in which a solicitor, who had set about competing with a client, could not legitimately complain if in the circumstances the client accused him of behaving unethically. I recognise that there is an asymmetry between the law's longstanding insistence on the discrete legal personality of limited liability companies and its willingness to lift the veil, as the expression is, in a case like the present. But it is the latter, not the former, which accords with common sense and justice when the issue is who a solicitor owes his professional duties to.

189. I too would have been concerned, had the appeal on liability failed, at the magnitude of an award of general damages of almost £100,000. It is worth recalling that the special damage, which the judge had adjourned to a separate inquiry, was said to be the profit Mr Conway had lost by being prevented from buying No.24. This could be readily gauged by the seven-figure profit that the defendants themselves had made on the transaction. There could be little pain that the recovery of such a sum – with costs - would not assuage. As to Mr Conway's standing in the eyes of others, what mattered was not what Mr Johnson said about it (if indeed it was admissible) but how few people had seen or learnt of the letter, and what would be left of its sting once it was known to those few individuals that a jury had cleared Mr Conway of wrongdoing. For my part, even had the verdicts for the claimant stood, I doubt whether the jury's munificent award of general damages could have survived.

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