



Conflicts and Confidence: *BOLG v Simmons & Simmons*



INTRODUCTION

In the recent case of *Bank of London Group v Simmons & Simmons* [2022] EWHC 2617 (Ch), the court had to consider whether an injunction should be granted against a solicitor to restrain it from revealing confidential information received from a former client to a current client.

The judgment is an interesting insight into the court's approach to conflict-related issues.

[This note provides a review of it](#)

THE FACTS

The Bank of London Group Limited ('the Bank') is a start-up bank. It sought regulatory advice from Simmons & Simmons ('Simmons') which was given between March and July 2022. In August 2022, a different team at Simmons brought a passing off claim against the Bank on behalf of a longstanding client named Bank of London and the Middle East Plc ('BLME'). The Bank brought proceedings to restrain it. It made a flurry of six applications.

The first, for the hearing to be held in private, was unopposed. The second, to exclude some of Simmons' witness statements as being served out of time, was briskly rejected due to, "*the complete absence of prejudice to the Claimant*". The third, to consolidate the principal application for an injunction with the substantive claim in the proceedings was dealt with by consent. Two more relating to procedural matters were left until the end and effectively became questions of costs.

There were originally two limbs to the application for injunctive relief. The first was to restrain Simmons from acting for BLME, the second to restrain it from divulging confidential information. But the Bank abandoned the first.

On the remaining limb, the Bank relied on a document called the Bank of London Proposition and drafts of a service agreement, service order form and outsourcing agreement which came into Simmons' possession during the course of the retainer and which, the Bank said, were "*confidential and commercially sensitive*".

THE JUDGMENT

The first question for the Judge was whether the information was indeed confidential. He directed himself by reference to the authorities that communications between a solicitor and client will ordinarily be confidential. Simmons maintained that the information contained in the relevant documents was *substantially* in the public domain but was unable to say that it all was. Applying a test outlined in *Toulson & Phipps on Confidentiality*, the Judge concluded that it was entirely just to require Simmons to treat the information in question as confidential.

That led him to the second question as to whether the information was relevant to the passing off claim. The Judge drew on Lightman J's judgment in *Re a Firm of Solicitors* [1997] Ch 1 for the proposition that it is not enough for the client to make a general allegation that the solicitor is in possession of relevant confidential information: some particularity is needed. The degree of particularity depends on all the circumstances. This will include the nature of the matter on which the solicitor was previously instructed, the length of the retainer and the date and nature of the new retainer.

The Bank contended that the passing-off claim would necessarily involve a close examination of its business and that of BMLE. It followed, it said, that the detailed information in Simmons' possession about the Bank's business and operations would plainly be relevant. Simmons accepted that the nature of the Bank's business *in the broad sense* was relevant to the passing-off claim but suggested that it was far-fetched to say that details of the Bank's internal operations and the technology it uses were relevant.

The Judge agreed with Simmons. He also concluded that two points which came out of the Bank's own evidence were against it. First, it was apparent that it would need, itself, to adduce detailed evidence of its business in the passing-off claim. Consequently, it was hard to see a basis for restraining Simmons from divulging information which the Bank would positively wish to bring to BMLE's attention. Secondly, it was clear that the Bank's real concern was not with the passing-off claim but with the confidential information falling into the hands of its competitors.

He then turned to consider whether there was a real risk of disclosure. He accepted the Bank's submission that the burden was on Simmons to demonstrate that there were sufficient information barriers to eliminate the risk but found that it had discharged the burden.

DISCUSSION

The judgment does not make new law but illustrates the nuances in questions relating to conflicts of interest.

Given the nature of the solicitor-client relationship and the duty of confidentiality arising from it, it seems unlikely that there will be many cases where the court will conclude that it is not just for the solicitor to be expected to keep information provided by a client confidential.

That presupposes that the information is confidential in the first place. But even if, in the present case, Simmons had been able to show that *all* of the information supplied to it by the Bank was public knowledge, it would not necessarily follow that it would have been free to disclose the information as it wished.

This is well illustrated by *Hilton v Barker Booth & Eastwood* [2005] 1 WLR 567. In that case, the solicitor acted for the client in a transactional matter which ultimately proved disastrous for him. The solicitor knew that the counterparty was a convicted fraudster, as they had acted for him in the criminal proceedings, but it did not reveal this to the client.

The point was taken that the conviction was in the public domain, but the House of Lords found that confidentiality was not the issue. The problem was that the solicitor had got itself into a position where it owed a duty to one client to reveal information which it owed another to withhold.

As the present case demonstrates, there is no blanket ban on acting against an existing or former client. A solicitor who acts for a commercial client will often - perhaps almost always - learn *something* about its business. But for the client to be able to secure injunctive relief against the solicitor, it will need to show that it is in possession of confidential information which is relevant to the matter at hand. General relevance is not enough. Some particularity is needed. The level of particularity will depend on all the circumstances.

Further Information

Given the generality of the note it should not be treated as specific advice in relation to a matter as other considerations may apply.

Therefore, no liability is accepted for reliance on this note. If specific advice is required, please contact one of the Partners at Caytons who will be happy to help.

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