

IN THE MATTER OF:**SKAT
(the Danish Customs and Tax Administration)****- and -**

OPINION ON PINSENT MASONS LLP'S REPRESENTATION OF SKAT

Introduction.

1. I have been asked to consider the form of, and conclusions reached by, the Independent Review undertaken by Pinsent Masons LLP of the previous work carried out by that firm for [REDACTED] ("the Review"). The Review was carried out in the context of Pinsent Masons LLP's ongoing representation of SKAT in litigation against [REDACTED] (among others) ("the Litigation").
2. The summary of the Review, and the conclusions reached by Pinsent Masons LLP, are set out in a document prepared by Pinsent Masons LLP ("the Summary").

General Principles.

3. In English law, the fiduciary duty of loyalty owed by a lawyer to a client ends with the termination of the retainer. Therefore, there is no rule that a lawyer may not act for party A in litigation against party B, even if party B is a former client of the lawyer (see *Prince Jefri Bolkiah v KPMG* [1999] 2 A.C. 222 at 234).
4. Consequently, the fact that Pinsent Masons LLP has previously acted for [REDACTED] does not mean that the firm cannot now act for SKAT in the Litigation.

5. However, it is well established that a lawyer's duty of confidentiality to his client survives the end of the retainer (see Confidentiality, Toulson & Phipps, 3rd edition, at 16-005). Even after the termination of the retainer, a solicitor has a continuing duty to preserve the confidentiality of information obtained during the retainer.
6. Consequently, Pinsent Masons LLP is not entitled to disclose to any third party information which is confidential to [REDACTED]. Thus Pinsent Masons LLP cannot disclose to SKAT (or me) such confidential information. This means that Pinsent Masons LLP cannot share with SKAT (or me) details of the work that it has previously done for [REDACTED] where that information remains confidential.
7. A lawyer may be restrained from acting for party A in proceedings against party B if (i) party B is a former client of the lawyer, (ii) the solicitor is in possession of confidential information which is relevant to those proceedings and (iii) such a restraint is necessary to avoid a significant risk of the disclosure or misuse of confidential information belonging to B (see *Prince Jefri Bolkiah v KPMG* [1999] 2 A.C. 222 at 234).
8. The creation of an effective information barrier to address the risk of disclosure or misuse can be a defence to any action to restrain a lawyer.

The SRA's Code of Conduct.

9. These common law principles are reflected in the Code of Conduct issued by the Solicitors Regulation Authority, which regulates Pinsent Masons LLP.
10. Chapter 3 of the Code of Conduct deals with conflicts of interest, and reflects the duty of loyalty owed by a solicitor to its current (but not former) clients. The conflicts of interest may be conflicts between the firm and a current client, or between two or more current clients of the firm. Pinsent Masons LLP no longer acts for [REDACTED] [REDACTED] so there is no risk of there being any conflict of interest between the firm and [REDACTED].
11. Chapter 4 of the Code of Conduct deals with the issues of confidentiality and disclosure. It reflects that fact that a solicitor owes a duty of confidentiality to both current and

former clients. Of particular relevance is outcome O(4.4) which Pinsent Masons LLP is obliged to achieve, which is in the following terms:

you do not act for A in a matter where A has an interest adverse to B, and B is a client for whom you hold confidential information which is material to A in that matter, unless the confidential information can be protected by the use of safeguards, and:

- (a) you reasonably believe that A is aware of, and understands, the relevant issues and gives informed consent;
- (b) either:
 - (i) B gives informed consent and you agree with B the safeguards to protect B's information; or
 - (ii) where this is not possible, you put in place effective safeguards including information barriers which comply with the common law; and
- (c) it is reasonable in all the circumstances to act for A with such safeguards in place.

The Methodology of the Review.

12. The key issue, from the point of view of the common law and the Code of Conduct, is whether Pinsent Masons LLP holds information which is both confidential to [REDACTED] and is relevant / material to the Litigation.
13. Pinsent Masons LLP has rightly acknowledged that it is not able to provide the confidential information that it holds to any third party to allow such third party to review that information for relevance and materiality. To do so would be a breach of the ongoing duty of confidence that it owes to its former clients.
14. Therefore Pinsent Masons LLP has reviewed the work that it has previously done for [REDACTED] to see whether it holds any confidential information that is relevant or material to the Litigation. The Review was carried out by members of the internal Risk & Compliance team, who have had no involvement in the SKAT litigation. The methodology adopted by Pinsent Masons LLP is set out in section 3 of the Summary. In my view that methodology was entirely reasonable and appropriate.

15. Having carried out that review, Pinsent Masons LLP has formed the view that it does not hold any confidential information which is material or relevant to the Litigation. While I am not in a position to express a view on the accuracy of that assessment (having not seen the material), it is my opinion that Pinsent Masons LLP has taken all the steps that I would expect it to take in order to reach an informed view of whether or not it holds any confidential information which is material or relevant to the Litigation.
16. If (as it has concluded) Pinsent Masons LLP does not hold any confidential information which is material or relevant to the litigation, then there is no basis on which it could be restrained from acting for SKAT in the Litigation, and no risk of it being in breach of outcome O(4.4) in the Code of Conduct.
17. However, it must be acknowledged that whether or not information is relevant or material to litigation can be open to argument, and the strengths of the argument can change as the litigation progresses and different issues arise and develop. Information that may seem immaterial today may potentially look material in 12 months' time.
18. Pinsent Masons LLP has guarded against this risk by putting in place strict 'information barriers' as described in paragraph 4.1.2 of the Summary. In my view those safeguards are entirely reasonable and appropriate. They will mean that Pinsent Masons LLP will be able to comply with O(4.4) even if it does hold confidential information belonging to [REDACTED] [REDACTED] which proves to be relevant to the Litigation. It will also mean that there is no significant risk of the disclosure or misuse of confidential information, as would be required to be shown before the firm could be restrained from acting for SKAT.

Conclusion.

19. Having carefully scrutinised the methodology adopted by Pinsent Masons LLP in the Review, I am satisfied that the methodology was entirely reasonable and appropriate. I am also of the opinion the Pinsent Masons LLP's proposals for its ongoing conduct of the Litigation are reasonable and appropriate.

4 New Square,
Lincoln's Inn

BEN ELKINGTON QC
21st November 2018

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