



THE LAW SOCIETY
OF NEW SOUTH WALES

ETHICS AND CONFLICT OF INTEREST AND DUTIES

- AN OVERVIEW
- HOW THE LAW SOCIETY ASSISTS PRACTITIONERS

CONFLICT OF INTEREST:

What it is
How it arises
How to avoid it
What to do about an asserted conflict of interest

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[1] Introduction

One of the objects for which the Law Society was established was the suppression of dishonourable conduct. With that object in mind the Society provides guidance to practitioners on ethical issues through the Ethics Section of the Professional Standards Department. Many of those enquiries come from practitioners who feel they or another practitioner may be faced with a conflict of interest. Situations which might be more accurately be described as involving a conflict of duties are often described as involving a conflict of interest.

Conflict of interest has increasingly become a problem because of:

- the increasing size of the profession
- the increasing mobility of solicitors between legal practices
- the greater likelihood of clients changing solicitors during the course of matters.

Many cases are taken to the court to consider whether an injunction should be granted to restrain a solicitor from acting. These enquiries and actions do not arise because practitioners are ignorant of their ethical duties but because the position can often be unclear and difficult.

[2] Restatement of some general concepts – ethical duties – the fiduciary duty

Ethical principles affecting the practice of solicitors in New South Wales have been well established over many years. They are commented upon in Riley's Solicitors' Manual and are encapsulated in the Statement of Ethics proclaimed by the Law Society Council on 11 December 2003 (revising the original Statement of Ethics proclaimed on 20 November 1994) and reproduced at the end of this paper.

In ***Incorporated Law Institute of New South Wales v R D Meagher***¹ Isaacs J made the following statement which is important in reflecting the role of the lawyer in society:-

"... There is therefore a serious responsibility on the Court - a duty to itself, to the rest of the profession, to its suitors, and to the whole of the community to be careful not to accredit any person as worthy of public confidence who cannot satisfactorily establish his right to that credential."

Most ethical dilemmas will involve conflict between the various duties solicitors owe which can be described as being to the Court, of which we are officers, to the client, to the administration of justice, to the profession and to the public. The logical way to solve an ethical dilemma is to analyse it in terms of the various duties. A good rule of thumb is that if you cannot carry out one duty without breaching another then your proposed course of action cannot properly be taken.

It is often said that the duty to the client is paramount. As practising as a solicitor involves working for clients, the focus of your concern will primarily be your client's best interests. This, however, does not mean that you can serve those interests at all costs.

[3] Conflict of interest - some general comments – potential and actual breaches of duty

You have a conflict of interest when you are serving or attempting to serve two or more interests which aren't compatible. It may be described in the following way

A practitioner (which includes a law practice) has a conflict of interest when the practitioner serves or attempts to serve two or more interests which are not able to be served consistently or honours or attempts to honour two or more duties which cannot be honoured compatibly and thereby fails to observe the fiduciary duty owed to clients and to former clients

A commentator speaking on conflict of interest in 1991 referred to an apparent lack of major legal cases in Australia in this area. Since then fortunately there has been a large number of important decisions particularly dealing with the issue of "Chinese Walls" (now being described as "information barriers") referred to below and there is a wealth of judicial commentary, commentary by professional

¹ (1909) 9 CLR 655 at 681

bodies and academic commentary on the many facets of this most important and interesting area. In terms of the problems facing legal practitioners it is really one of the most prevalent ethical problems.

Conflict of interest can arise broadly where:

- you act for both parties in a matter: such as for two or more parties to a conveyancing or commercial transaction; for two parties on the same side of the record in litigation; or for insured and insurer;
- you act against a former client having previously acted for that party in a related matter (in which you may also have acted for your present client) (although the description of this as a conflict of interest has been said to be inaccurate when essentially it should be described as involving only the duty of confidentiality owed to a former client);
- your own interest is involved, for example where you act in a transaction in which you or a company in which you or an associate is involved or has an interest; or where for some other reason your own interests or an associate's may conflict with your client's, such as where you may be a material witness in your client's matter.

A conflict of interest may be described also as a conflict of duties or a conflict between interests or as a conflict between interest and duty. All these ways of describing what is essentially the same thing pick up different aspects of the three main ways in which the problem can arise.

To act when you have a conflict of interest involves breaching your fiduciary duty to your client or former client. This is the basis of the conflict of interest problem and is stressed in many of the cases dealing with conflict of interest. The four elements of the fiduciary duty are:-

- The duty of loyalty to the client.
- The duty of confidentiality.
- The duty to disclose to the client or put at the client's disposal all information within your knowledge that is relevant in order to act in the client's best interests.
- The duty not to put your own or anyone else's interests before those of the client.

The Courts have also added two other reasons why a solicitor should not act where there is a conflict of interest:

- The old adage that justice must not only be done but be seen to be done. This often makes it easier to decide whether there is or is not a conflict.
- The public perception of the profession and the damage that might be done to that important perception if a solicitor acts having a conflict of interest.

There have been attempts to categorise conflicts of interest as actual, potential or perceived. It seems that this is inappropriate for the following reasons:

- both "actual" and "potential" conflicts can be perceived. A conflict of interest is such whether or not it actually involves a breach of the fiduciary duty of confidentiality or the duty of loyalty;
- there is an implied suggestion that all "perceived" conflicts of interest should lead to a solicitor withdrawing which is fraught with problems because many assertions of conflict of interest are misguided and many are made for tactical reasons and have no basis.

[4] What to do About a Possible Conflict of Interest

[4.1] A solicitor who thinks he or she might have a conflict of interest (and is therefore, theoretically, in the best position to decide in terms of the facts because of his or her familiarity with the matter), should consider the relevant authorities, a useful starting point being the analysis contained in Riley's

Solicitor's Manual. Consideration should also be given to Rules 3, 9, 10, 11, 12, 19 and 38 of the Revised Professional Conduct and Practice Rules 1995 which are accessible on the Law Society's website.

A solicitor remaining unsure may approach the Law Society and ask for the matter to be considered either by the Ethics Section or the Ethics Committee. The Committee takes the view that it will only deal with such matters if the parties agree to it doing so and to abide by its opinion. It is also now possible to obtain a President's Ruling about your own conduct (but not that of another practitioner). See [5.2 below] and the Law Society website.

A solicitor believing the solicitor on the other side of a matter has a conflict of interest should firstly bring that issue to the attention of the other solicitor and diplomatically offer the opinion that there is a conflict of interest. If that solicitor then will not cease acting then, again, the matter may be referred to the Society but if that fails, the solicitor might consider applying for an injunction to restrain that other solicitor from acting. That might be an appropriate course in the first place. There is ample judicial support for that course of action. Another course would be to make a formal complaint to the Office of the Legal Services Commissioner which will be dealt with by the OLSC or forwarded to the Society. This may result in disciplinary action and may or may not achieve the desired result - the withdrawal of the solicitor.

[4.2] Requirement for Sufficient Particulars

It is important that the person asserting the conflict of interest provides sufficient particulars to the solicitor said to have a conflict of interest to enable that solicitor to assess his or her position properly. This was stressed by Bryson J in **Mancini v Mancini**²:

"It is not possible to address in any clear way and come to a decision on protection of any confidential information without identifying what the confidential information is in a sufficiently specific way to enable it to be identified. Without doing that it is not possible to come to a conclusion on whether the information truly is confidential, to consider and appraise the circumstances in which it came into existence and was communicated, to come to any conclusion about whether protection is appropriate, or to make any enforceable order. A case about confidential information cannot be nebulous. Confidential information which once existed may no longer be confidential; it may no longer be available although it was communicated in the past; it may not be material to any use which might now be proposed to be made of information. Without specificity a claim to protection cannot be defended or decided on a fair procedural basis, and a general allegation of the kind put forward here to the effect that from the nature of the past legal business confidential information must have been communicated should not in my opinion be upheld."

In **The Law Society of New South Wales v Holt**³ delivered on 9 July 2003 Grove J dismissed a motion by the investigator and receiver of the solicitor's practice that the solicitor who was the defendant in proceedings brought by the investigator and receiver be restrained on the basis of an alleged "real and sensible possibility" that his "*interest in advancing the case of the defendant might conflict with his duty to keep confidential, information obtained whilst there was a fiduciary duty owed by him as a solicitor to his employer/client*".

His Honour was "*not satisfied that, given the essentially general circumstances which are evidenced, and without more, a reasonable person would anticipate a real and sensible possibility of the misuse of confidential information*" and, in saying "*The identification of any definable relevant information or risk is left to conjecture*" clearly did not believe the alleged confidential information had been sufficiently particularized..

[5.1] The Court's Role - The Law Society's Role

The Court has inherent jurisdiction over solicitors who are its officers and there is ample authority for the proposition that the Court can restrain a solicitor from acting for a party in litigation before it while the Law Society's role is to "suppress dishonourable conduct".

²

[1999] NSWSC 800 (6 August 1999)

³

[2003] NSWSC 629

On the issue of acting against a former client in related matters where you might be able to use confidential information to the former client's detriment, Burchett J said in ***Wan v McDonald***⁴ at page 496:

"Not every rule of professional conduct adopted by a law society will be reflected in a rule of law. However, I think the wide acceptance of this particular rule supports the view... that this is not merely a matter of a code of professional ethics."

One of the earliest cases of the competence of the Court to entertain a motion to restrain solicitors from acting for a co-respondent was quoted in ***Murray v Macquarie Bank***⁵. In ***Davies v Clough***, Viscount Shadwell VC said at 174:

"... all Courts may exercise authority over their own officers as to the propriety of their behaviour: for applications have been repeatedly made to restrain solicitors who have acted on one side, from acting on the other, and those applications have failed or succeeded upon their own particular grounds, but never because the Court had no jurisdiction."

This power of the Court is also referred to in ***Rakusen v Ellis, Munday & Clarke***⁶ a landmark English case decided in 1912 referred to more fully below.

In ***National Mutual v Sentry***⁷ Gummow J, referring to the Federal Court Rules states:

"No specific provision is made whereby on the application of one party, the Court may enjoin his former solicitor from continuing to act as solicitor for the other party to current proceedings on the footing of breach of contract or fiduciary obligations. However, such proceedings, which founded in contract or apprehended breach of fiduciary duty, no doubt would arise in the course of and form part of the matter which attracted the jurisdiction of the Court."

In ***Magro v Magro***⁸ Rourke J stated in terms of the Law Society's role that:

"In the present case, of course, the Law Society of New South Wales has expressly acceded to a suggestion that it should defer its consideration of the ethical question pending this Court's determination of the present application, for the express reason that the present proceedings may well render the Law Society's consideration "redundant". It seems to me that I cannot, so to speak, wash my hands of the ethical considerations involved, secure in the knowledge that the Law Society will continue to exercise a supervisory function."

The Law Society has no power to direct a solicitor to cease acting but can only express an opinion and may take disciplinary action where a solicitor continues to act despite a clear conflict of interest.

It is relevant to note Rourke J's initial view that it was a matter for the relevant Law Society but as the solicitor argued that the Court lacked power to restrain a solicitor from acting on behalf of a client commented that:

*"Every Court has control of its own procedure and it is apparent from the decision in ***Mills***' ***case*** to which I have referred, and from other cases arising in somewhat different circumstances, that the Court has power to restrain."*

It is important to note that his Honour stressed that the decision on the injunction question was not to be regarded as necessarily resolving the ethical issues arising when he said:

"By so holding, I do not wish to be seen as departing, in any respect, from the requirement that a high standard of behaviour is required of officers of the Court. I decide the present question with those principles firmly in mind but also by reference to the practical necessities of life in this piece of litigation. Similarly, I do not express any view in relation to the ethical considerations affecting [the solicitors]. That is a matter which is better decided by the Law Society on the basis of the information placed before it and by reference to questions of practice which members of the Society are able to judge. I would regard it as improper for me

⁴ (1991) 105 ALR 473

⁵ (1991) 105 ALR 612

⁶ [1912] 1 Ch 831

⁷ (1989) 22 FCR 209

⁸ [1989] FLC 92 - 005

to embark into that area on the basis of the limited evidence presently before me. Clearly, the questions should be considered fully and properly by the Law Society and an opportunity given to the parties to place submissions before it as to the proper way for the questions to be decided."

His Honour found that on the basis of agency the solicitor was imputed as having all knowledge of the parties and their transactions which may have been held by the former partner of the former firm.

The majority judgment in the New Zealand case of **Russell McVeagh McKenzie Bartleet & Co v Tower Corporation**⁹ notes the following in relation to the Court's role:-

"It is important to keep in mind that moral and ethical obligations do not necessarily equate legal, including fiduciary, duties which are enforceable by the Courts. Professional bodies properly undertake supervisory functions over their members, and lay down codes of conduct which can be enforced under their own jurisdiction. The Court has a separate and independent function, and will provide a remedy when there has been a breach of duty recognised by law."

The judgment of Blanchard J notes:-

"The Court is not of course acting as an arbiter of ethics or morals. Ethical questions are for the Law Society. Nevertheless they may inform the judgment of the Court and on my analysis the relevant ethical rules are broadly the same as the legal obligations which the Court will enforce against lawyers by ordering a disqualification."

In **Mancini v Mancini**¹⁰ Bryson J noted that in recent years control by courts of the retainer of lawyers and others concerned in conducting litigation on grounds relating to protection of confidential information has received much attention (see paragraph 5 of the judgment).

In particular Bryson J refers to an article by Chris Edmonds, "**Trusting Lawyers with Confidences**"¹¹, "**Lawyers' Duties to the Court**"¹².

In paragraph 6 Bryson J further notes:

*"In **Watson v Watson** (25 May 1998) Santow J referred to Bar Rules 87 and 107 which relate to acting against a former client and acting while in possession of information confidential to another party or another person. Although the Bar Rules are not directly enforceable at the suit of the litigation they do illustrate appropriate professional conduct such as the Court may enforce in its supervisory power. The question of jurisdiction is not a difficulty where the Court is asked to exercise its supervisory power over professional conduct. Otherwise it is necessary that it should be shown that restraint is required to protect confidential information."*

It is also discussed in **Prince Jefri Bolkiah v KPMG (A Firm)**¹³ (referred to more fully below).

Two of the most recent New South Wales cases dealing with the jurisdiction of the Court are **Kallinicos & Anor v Hunt & Ors**¹⁴ and **Asia Pacific Telecommunications Limited v Optus Networks Pty Limited**¹⁵

In **Asia Pacific Telecommunications**, Bergin J referred to a number of earlier judicial comments about the role of the Court in ensuring that there is no risk to the perception that justice must be done and appear to be done.

⁹ [1998] 3 NZLR 641

¹⁰ [1999] NSWSC 800 (6 August 1999)

¹¹ (1998) 16 (3) Australian Bar Review 222 and Mr Justice Ipp

¹² (1998) 114 Law Course Review 63

¹³ [1999] 2 W.L.R. 215

¹⁴ [2005] NSWSC 1181 (22 November 2005)

¹⁵ [2005] NSWSC 550 (20 June 2005).

In **Kallinicos** Brereton J referred at some length to the Court's jurisdiction to restrain lawyers from acting and concluded "*the foundation of the Court's jurisdiction is the fiduciary obligation of a solicitor, and the inescapable conflict of duty which is inherent in the situation of acting for clients or competing interests [Prince Jefri]*". (at paragraph 76).

[5.2] President's Rulings

As mentioned above, you can now obtain a President's Ruling about your preferred course of action where you are unsure of your ethical position including where you feel you may have a conflict of interest. The following appears on the Society's website in 2003 upon the introduction of the new process:

President's Rulings to help with ethics and conflicts of interest

THE LAW SOCIETY CAN NOW offer members a President's Ruling in matters relating to ethics, in much the same way as the Bar Council offers its protective ethics rulings.

President's Rulings will be based upon opinions from the Society's Ethics Committee or, in appropriate circumstances, upon advice from the Ethics Section. The rulings will not involve giving advice on conduct which has already occurred, rather on a proposed course of action or on a problem which remains the subject of a dispute.

To obtain a President's Ruling, members should approach the Ethics Section and provide a detailed written submission containing all the relevant information. Any Ruling given will state that it is based upon the information provided.

In the context of disciplinary proceedings a ruling may benefit a solicitor who has acted in accordance with the ruling, and a positive, but erroneous, advice from the Law Society may constitute a defence to a charge of misconduct (see Law Society of NSW v Moulton [1981] 2NSWOR 736 at 757B-C). For the ruling to operate as a defence, it must be based on all material facts and, of course, the solicitor must have acted in accordance with it.

Practitioners can continue to make enquiries of the Ethics Section and receive assistance in the current way; these services will not be reduced by the development of the President's Ruling procedure.

The Law Society hopes that legal practitioners will particularly consider the use of President's Rulings where questions of conflict of interest are raised, as the procedure ensures a speedy determination of issues which may otherwise cost solicitors and their clients considerably, both in money and anguish.

Conflict of interest can be real or perceived, actual or presumptive and can

arise in any circumstance in which a solicitor acts on behalf of a client where the interests of either party can be affected. More often than not, questions of conflict of interests are raised by or on behalf of an opposing interest as a defensive mechanism, or as a tactic which may be properly, or sometimes improperly, raised in an attempt to obtain an advantage.

Experience has indicated that it is not unusual for complainants to raise issues of conflict of interest when making a complaint regarding the conduct of an opposing solicitor under Part 10 of the Legal Profession Act 1987.

For practical and confidential advice to resolve ethical dilemmas and help avoid complaints from clients and colleagues contact the Ethics Section at the Law Society, 170 Phillip Street, Sydney 2000, DX 362 Sydney, phone 9926 0390, fax 9221 5804, email ethics@lawsociety.com.au

See also September 2003 Ethics column in the Law Society Journal “*New process of President’s Rulings intend to reassure and comfort*”.

[6] Revised Professional Conduct and Practice Rules

The Revised Professional Conduct and Practice Rules^•

which came into operation on 1 July 1994 as part of substantial amendments to the Legal Profession Act, 1987 were revised in December 1995 and continue to be binding on solicitors pursuant to Section 711 of the Legal Profession Act 2004. They reflect these well established ethical principles as well as containing guidance for conduct and practice. Failure to comply does not of itself amount to a breach of the Act but is capable of being professional misconduct or unsatisfactory professional conduct pursuant to Section 498(1)(a).

By virtue of Section 38H of the 1987 Act, any previous rulings made by the Council are not binding on solicitors after 1 July 1994 unless reproduced in the Rules. Any codes of best practice or guidelines previously, or subsequently, published by the Council take effect only as giving guidance to accepted standards of competence in the areas of practice to which they relate.

Ethics in the true sense, of course, cannot be regulated being essentially a state of mind but the Rules give excellent guidance. In some instances such as Rules 2, 3, 9 and 10 which relate respectively to confidentiality and conflict of interest they also reflect the common law. However, the rules provide minimum standards only and often a decision as to whether to act in the face of a possible conflict of interest may involve considerations beyond the scope of the Rules.

[7] Fundamental Duties and the Fiduciary Duty to the Client

[7.1] The relationship between solicitor and client in which the solicitor undertakes the provision of legal services to the client is fiduciary in nature. The fiduciary duty involves the following duties to the client:

- loyalty
- confidentiality
- to disclose to the client or put at the client's disposal all information within the solicitor's knowledge that is relevant in order to act in the client's best interests
- not to put the solicitor's own or anyone else's interests before those of the client.

Forceful commentaries on the fiduciary duty are found in

- **Tyrrell v Bank of London**¹⁶ at pages 39-40 in the judgment of Lord Westbury who said:
“... there is no relation known to Society, of the duties of which it is more incumbent upon a Court of justice strictly to require a faithful and honourable observance, than the relation between solicitor and client.”
- **Law Society of New South Wales v Harvey**¹⁷ an important case involving the fiduciary nature of solicitors' duties to clients in which Street CJ, quoting **Tyrrell**, said of the fiduciary duty:
“An appreciation of that duty depends not upon some technical construction but upon applying the ordinary concepts of fair dealing between honourable men.”
- **Griffis v Griffis**¹⁸: where Mullane J said:
“Generally the object of the law as to fiduciary duties is to protect and advance the interests of the beneficiary in a fiduciary relationship. In addition to the solicitor/client relationship there are public policy objects including maintaining the credibility and public acceptance of the courts and the solicitor/client relationship.”
- In **Beach Petroleum NL v Abbott Tout Russell Kennedy & Ors**¹⁹ the judgment of Spigelman CJ, Sheller JA and Stein JA deals with retainers, the scope of the retainer, the existence of the fiduciary duty where there is no retainer, alleged breach of fiduciary duty, the solicitors alleged to have been knowingly involved where former directors defrauded a company, objective dishonesty and causation of loss.

The following findings are summarised in the headnote under the heading “Fiduciary Duty”.

- (1) In a solicitor client relationship, which was a status based fiduciary relationship, the fiduciary duty was not derived from the status. The duty was derived from what the solicitor undertook, or was deemed to have undertaken, in the particular circumstances. Not every aspect of the relationship of solicitor and client was fiduciary. **Maguire v Makaronis** (1997)²⁰ applied. **Clark Boyce v Mouat**²¹; **SFC v Cheney Corp**²² referred to.
- (2) Whether or not there was a duty to advise on the wisdom of a particular transaction depends on circumstances of the case. **Haira v Burberry Mortgage Finance and Savings Ltd**²³ referred to.
- (3) A person may have taken upon herself or himself the role of a fiduciary by a less formal arrangement than a contract or by self appointment. A fiduciary responsibility was an imposed not an accepted responsibility, one concerned with an imposed standard of behaviour. **Lyell v Kennedy**²⁴, **Boardman v Phipps**²⁵; **Walden Properties v Beaver Properties Ltd**²⁶ referred to.

16 (1862) 10 HLC 26

17 [1976] 2 NSWLR 154

18 (1991) 14 Fam LR 782; [1991] FLC 92-233

19 [1999] NSW CA 408

20 188 CLR 449

21 [1994] 1 AC 428

22 (1942) 318 US 80

23 [1995] 3 NZLR 396

24 [1889] 14 App Case 437

25 [1967] 2 AC 46

26 [1973] 2 NSWLR 815

(4) The existence and scope of a duty may be derived from a course of dealing. A role which was limited when originally assumed may, by reason of conduct in the performance of the role, be expanded so as to extend the duty. ***Birtchnell v The Equity Trustees, Executors and Agency Co Limited***²⁷ applied. ***Australian Breeders Cooperative Society Ltd v Jones***²⁸ referred to.

(5) Conflict may arise between a fiduciary duty and a duty owed to another and it may also arise between a fiduciary duty and self interest. Both involve a breach of the same overriding duty of a fiduciary of undivided loyalty. There is no relevant difference between a duty and interest conflict and a duty and duty conflict. ***Maguire v Makaronis; Breen v Williams***²⁹; ***Haywood v Roadnight***³⁰; ***Moody v Cox & Hatt***³¹ referred to.

(6) There was a distinction between a case in which a fiduciary acts for more than one client in one matter (same matter conflicts) and a case where a fiduciary has previously acquired information which is relevant to another matter when he or she acts for a different client (separate matter conflicts). The former involved questions of fiduciary duty while the latter may be best considered under the law of negligence, breach of contract and confidentiality of information. A number of the matters which the appellant urged on the Court as involving a conflict of duty and duty were separate matter conflicts. In these respects the appellant had available to it the pleading of an alternative case in negligence. ***Prince Jefri Bolkiah v KPMG (A Firm)***³² considered.

As to what constitutes a fully informed consent to a conflict of interest the Court found as summarised in at paragraphs (28) to (30) inclusive of the headnote as follows:

(28) What constitutes a fully informed consent to double employment resulting in potentially conflicting engagements was a question of fact to be determined in all the circumstances of each case. ***Maguire v Makaronis*** applied.

(29) In the present case, while there was no express informed consent, such informed consent could be inferred from the undisputed facts. ***Bristol and West Building Society v Mothew***³³ applied.

The Court quoted Mason J in ***Hospital Products Limited v United States Surgical Corporation*** (1984)³⁴:

"The critical feature of these [fiduciary] relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position."

Also quoted is the following passage from ***Birtchnell v The Equity Trustees, Executors and Agency Co Limited***³⁵ per Dixon J at 408:

"The subject matter over which the fiduciary obligation extends is determined by the character of the venture or undertaking for which partnership exists; and this is to be ascertained, not merely from the express agreement of the parties, whether embodied in written instruments or not, but also from the cause of dealing actually pursued by the firm."

27 (1929) 42 CLR 384

28 (1997) 150 ALR 488

29 (1996) 186 CLR 71

30 [1927] VLR 512

31 [1917] 2 Ch 71

32 [1999] 2 WLR 215

33 [1998] Ch 1

34 156 CLR 41 96-97

35 (1929) 42 CLR 384

- In **Breen v Williams**³⁶, Gaudron and McHugh JJ stated:

“Duty and self interest, like God and Mammon, make inconsistent calls on the faithful”.

The court in **Beach Petroleum** notes “conflicts of duty and duty also make such inconsistent calls”. It draws a distinction between the conflict of duty and duty rule and the conflict of duty and interest rule but says although they “may impact differently … both are manifestations of the overriding duty of undivided loyalty” and found no substantive difference between a duty and interest conflict and a duty and duty conflict.

[7.2] Loyalty

In **Wan v McDonald**³⁷ Burchett J at page 496 noted that “an aspect of the fiduciary’s duty of loyalty would seem to have some part to play where a solicitor discharges himself from his retainer and then acts against his former client”.

And further:

“If the focus of attention is shifted… to the case of a solicitor who has acted for both parties continuing to act for one of them after a conflict has arisen, the issues of loyalty and propriety seem to me to loom more largely.”

Dr Paul Finn (now Justice Finn) in an article in the Sydney Law Review entitled “*Professionals and Confidentiality*” discussed the concept of the loyalty of a fiduciary in the following terms:

“… The concerns of fiduciary law - and in particular that dimension of its liability were rules relating to misuse of positions of trust - colour the perceptions we have of the propriety of some information uses made by at least some professionals. There is reason in this. Within the confines of their secrecy obligation, professionals are “trustees” of client information and, as with fiduciaries generally, they should not be allowed to misuse such knowledge, acquired by virtue of their position to their own or another’s advantage or to their client’s detriment.”

The comments of the NZ Court of Appeal in **Russell McVeagh McKenzie Bartleet & Co v Tower Corporation**³⁸ (at page 8 of the judgment delivered by Henry J) are relevant:-

“The very basis of the claim [i.e. breach of fiduciary duty of loyalty] is the existence of concurrent retainers from separate clients in a matter, or possibly in different matters, where the interests of the respective clients may be in conflict, either actual or potential. That is the underlying basis or foundation for giving relief, which is sought here in the form of an injunction restraining future conduct. But the very conduct which it is now sought to restrain has ceased, and there is of course in the circumstances no suggestion it is likely to re-occur. The alleged fiduciary duty of loyalty while acting for one client not to act for another client whose interests under that instruction are or may be adverse to the first client is no longer in danger of being breached. Even on the assumption earlier noted, on the admitted facts what is on analysis the cause of action relied upon, simply does not exist.”

The New South Wales Court of Appeal in **Beach Petroleum NL v Abbott Tout Russell Kennedy & Ors** (discussed above) makes a number of important comments about the duty of loyalty.

Firstly, the Court notes the comment of Richardson J in **Farrington v Rowe McBride & Partners**³⁹ referred to with approval in **Maguire v Makaronis**⁴⁰ in the following terms:-

“A solicitor’s loyalty to his client must be undivided. He cannot properly discharge his duties to one whose interests are in opposition to those of another client. If there is a conflict in his responsibilities to one or both he must ensure that he fully discloses the material facts to both clients and obtains their informed consent to his so acting … And there will be some

³⁶ (1996) 186 CLR 71 at 108

³⁷ (1991) 105 ALR 473

³⁸ [1998] 3 NZLR 641

³⁹ [1985] 1 NZLR 83 at 90

⁴⁰ (1997) 188 CLR 449

circumstances in which it is impossible, notwithstanding such disclosure for any solicitor to act fairly and adequately for both.

But the acceptance of multiple engagements is not necessarily fatal. There may be an identity of interests or the separate clients may have unrelated interests. Such cases seem straightforward so long as it is apparent that there is no actual conflict between duties owed each relationship".

At paragraphs 204 and 205 the Court makes the following important comments:

(204} There is a distinction between a case in which a fiduciary acts for separate clients in the one matter and a case in which a fiduciary has, on an earlier occasion, acquired information which is relevant to another matter when he acts for a different client. This distinction has been described as one between "*simultaneous*" representation and "*successive*" representation; **Developments in the Law; Conflict of Interest in the Legal Profession** (1980-1981) 94 **Harvard Law Review** 1244 at 1292 and 1315. Professor Finn, as his Honour then was, has described the two situations as respectively, "*same matter conflicts*" and "*separate matter conflicts*". The former is "*the very heartland of fiduciary law*". The latter, "*in Anglo-Australian law is not seen as involving any question of fiduciary law*". Rather, Professor Finn has suggested that such a case falls to be determined under the law of negligence, breach of contract, confidential information, etc. (See Finn "**Fiduciary Law and the Modern Commercial World**" in McKendrick (ed) **Commercial Aspects of Trust and Fiduciary Obligations** 1992, 7 at 22 and 31).

(205) The distinction has recently been affirmed by Lord Millett in **Prince Jefri Bolkiah v KPMG (A Firm)**⁴¹ in a judgment with which the other members of the House of Lords agreed:

... a fiduciary cannot act at the same time both for and against the same client and his firm is in no better position ... His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation.

...

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 the information imparted during its subsistence."

(Compare **National Mutual Holdings v Sentry Corporation**⁴²). See below under "Acting against a former client" ([9]) for a further discussion about the extent to which the duty of loyalty may continue after the termination of retainer and prevent a solicitor from acting against a former client.

[7.3] Confidentiality, Legal Professional Privilege & Confidentiality and Competence and Diligence

Rules 1 and 2 set out some of the elements of the solicitor's fiduciary duty to the client.

Rule 1.1 - Acceptance of Retainer - Competence and Diligence

1.1 *A practitioner must act honestly, fairly, and with competence and diligence in the service of a client, and should accept instructions, and a retainer to act for a client,*

41 [1999] 2 WLR 215 at 224-225
42 (1989) 22 FCR 209

only when the practitioner can reasonably expect to serve the client in that manner and attend to the work required with reasonable promptness.

Rule2 - Confidentiality

- 2.1 A practitioner must not, during, or after termination of, a retainer, disclose to any person, who is not a partner or employee of the practitioner's firm (or, in the case of a multi-disciplinary partnership, a person who is not engaged in the legal practice or delivery of legal services), any information, which is confidential to a client of the practitioner, and acquired by the practitioner during the currency of the retainer, unless -
 - 2.1.1 the client authorises disclosure;
 - 2.1.2 the practitioner is permitted or compelled by law to disclose; or
 - 2.1.3 the practitioner discloses information in circumstances in which the law would compel its disclosure, despite a client's claim of legal professional privilege, and for the sole purpose of avoiding the probable commission of a felony.
- 2.2 A practitioner's obligation to maintain the confidentiality of a client's affairs is not limited to information which might be protected by legal professional privilege, and is a duty inherent in the fiduciary relationship of practitioner and client.

Rule 2.2 is important in stressing that the duty of confidentiality applies not only to information to which legal professional privilege attaches but is much more far reaching, being an essential facet of the fiduciary duty and also that the duty of confidentiality survives the termination of the retainer.

In **Baker v Campbell** ⁴³ Deane J made a number of important comments on legal professional privilege, including:

"The principle underlying professional privilege is that a person should be entitled to seek and obtain legal advice without the apprehension of being prejudiced by subsequent disclosure of confidential information."

Bryson J noted in **Mancini v Mancini** ⁴⁴ at paragraph 7 that "*It is of importance to observe that information generally is not protected; the protection available relates to confidential information, and is available to the person entitled to the confidence*".

In **Grant v Downs** ⁴⁵ it is stated of legal professional privilege:

"The rationale of this head of privilege according to traditional doctrine is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, in encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor."

The Statement of Ethics set out later in this paper also reinforces the duty of confidentiality with the declaration that "*We act confidentially and in the protection of all client information*".

It is relevant to consider various provisions of the Evidence Act 1995 (NSW) and the Commonwealth Evidence Act 1995. Further, an important judgment was delivered by the High Court of Australia on 21 December 1999 in **Esso Australia Resources Limited v The Commissioner of Taxation** ⁴⁶ in which the Court displaced the **Grant v Downs** test of sole purpose with the "dominant purpose" test.

43 (1983) 153 CLR 52 at 115 - 116

44 [1999] NSWSC 800 (6 August 1999)

45 (1976) 51 ALJR 198

46 [1990] HCA 67

[7.4] Disclosure

A 1973 English case is very important in putting the problem of conflict of interest in terms not only of the inability to discharge properly the duty owed to two clients whose interests are different, or in terms of the duty of confidentiality owed to each client but also in terms of the duty of disclosure.

In **Spector v Ageda**⁴⁷ the solicitor, Mrs Spector acted for the lender on a mortgage loan to two other clients. The memorandum of loan was unenforceable. The solicitor accepted instructions to act for the borrowers when the lender commenced proceedings for default and herself lent money to the borrowers, secured by a mortgage to her, to discharge the original loan but did not disclose the problems with the enforcement of the original mortgage. It is a rather complicated set of facts. The Court in the following passages was quite critical of the solicitor's involvement.

Megarry J stated:

"A solicitor must put at his client's disposal not only his skill but also his knowledge, so far as is relevant; and if he is unwilling to reveal his knowledge to his client, he should not act for him. What he cannot do is act for the client and at the same time withhold from him any relevant knowledge that he has. The relevance of the alterations in this case is obvious and inescapable. In my judgment, Mrs Spector was here guilty of a plain breach of duty towards her clients."

And further:

"The Courts have often pointed out the undesirability of a solicitor acting for both parties in a conveyancing transaction, as by acting for both vendor and purchaser; yet the practice remains widespread, sustained, it seems, by beliefs such as those of economy, efficiency and speed, and, no doubt, others. In such cases, the solicitor, of course, has a double duty to perform: he must safeguard the adverse interests of each of his clients."

Megarry J also directed that a copy of the judgment in this matter be placed before the English Law Society to consider whether disciplinary action should follow. This has also occurred in a number of recent New South Wales matters to which I will refer below when dealing with the ramifications of a conflict of interest.

The result of this duty of disclosure is that if you have obtained confidential information on behalf of one party which is relevant to furthering the interests of the other party for whom you also act either in the same transaction, or, in a different matter, in which that information would be relevant to the other client, you cannot carry out both your duty of confidentiality to the first client and your duty of disclosure to the second client consistently.

In the New Zealand Court of Appeal case of **Russell McVeagh McKenzie Bartleet & Co v Tower Corporation**⁴⁸ at page 10 of the judgment of Thomas J said of the duty of disclosure:-

"RMMB failed to inform Tower that it was proposing to accept instructions from GPG. The obligation for RMMB to inform Tower of their intention arises out of the duty of loyalty, trust and confidence which is integral to the fiduciary relationship between solicitor and client. The firm was under a recognised duty to disclose all material information in its possession to its client, and it failed to do so. If RMMB could not advise Tower of its intention (and it is accepted that it could not do so without imparting confidential information relating to GPG's proposal to Tower), it could not accept instructions from GPG."

In **In Re a Firm of Solicitors**⁴⁹, a decision of the English Court of Appeal concerning a large firm with a number of offices Staughton LJ, dissenting, commented as follows in relation to the obligation of disclosure:

47 [1973] 1 Ch 30

48 [1998] 3 NZLR 641

49 [1992] 1 QB 959

"I cannot detect in that case any authority for the proposition that a large firm of many partners is obliged to disclose to each client any knowledge relevant to his affairs that may be possessed by any of its partners or staff... There has no doubt been a change in the way that many solicitors practice since 1912... There are, of course, still many sole practitioners or small firms today. But there are also giants with a hundred partners and more, employing large numbers of assistant solicitors and articled clerks, as I shall still call them. The solicitors in the present case comprised 107 partners at the last count. It seems to me impracticable and even absurd to say that they are under a duty to reveal to each client, and use for his benefit, any knowledge possessed by anyone of their partners or staff. I would not hold that to be the law."

[7.5] Justice Being Seen to be Done/Consumer Protection

In **Sogellease Aust. Ltd v MacDougall**⁵⁰ Wood J in the Supreme Court of New South Wales said:

"The matter is one of very great importance for the parties and for the proper administration of justice. It is essential that litigants in this Court be satisfied that justice is not only done but seen to be done."

In **Griffis v Griffis**,⁵¹ one of the leading family law cases the Court quoted with approval the following comment from Bryson J in **D&J Constructions Pty Limited v Head** ⁵²:

"... The spectacle or the appearance that a lawyer can readily change sides is very subversive of the appearance that justice is being done. The appearance which matters is the appearance presented to a reasonable observer who knows and is prepared to understand the facts."

Of course the general principle works not only to prevent a conflict of interest/duties but also an undue restraint of a solicitor from acting for a particular client.

[7.6] The perception: the perception of conflict of interest or breach of duty/ the public perception of the profession / the reasonable bystander

This issue is also raised in a number of cases.

Firstly see **Wan v McDonald** (see above) - secondly, in **Murray v Macquarie Bank** ⁵³ Spender J said:

"The integrity of the legal profession and the perception of that integrity by the public is in large measure a consequence of the fidelity which a legal practitioner owes to his client, and conduct which has a tendency to jeopardise that perception of faithful commitment to the interests of the client should be prevented."

In **Gugiatti v City Of Stirling**⁵⁴ it is interesting to note that the duty of loyalty, measured in terms of the perception of the reasonable bystander, turns on the possession and use of confidential information against the former client.

Mr Gugiatti had a long-running dispute with the Council of the City of Stirling in relation to the use of land on which he had run a service station business. He retained the firm of McLeods to represent him between January 1990 and December 1994 and had extensive meetings with the principal of the firm.

⁵⁰ Commercial Division, 17 July 1986, unreported
⁵¹ (1991) 14 Fam LR 782; [1991] FLC 92-233

⁵² (1991) 14 Fam LR 782; [1991] FLC 92 - 233

⁵³ (1987) 9 NSWLR 118 at 123
⁵⁴ (1991) 105 ALR 612

⁵⁴ [2002] WASC 33

In September 2001, a Mr Skinner joined the firm as a partner. One of the clients he brought with him was the City of Stirling, and he had acted for it for some time defending the proceedings brought by Mr Gugiatti.

Templeman J looked at the conflict of interest on the basis of the following points:

*"5 It has been settled law for nearly a century that the mere fact that a solicitor has acted for a client in a particular matter does not of itself entitle the client to restrain the solicitor from acting against him in the same matter: **Rakusen v Ellis Munday & Clarke** [1912] 1 Ch 831. However, if a solicitor is possessed of information which is confidential to his client, the solicitor cannot be permitted to act against his client unless there is no risk of disclosure. The risk must be real, and not merely fanciful or theoretical: but it need not be substantial. That is the test established by the House of Lords in **Prince Jefri Bolkiah v KPMG (a firm)** [1999] 2 AC 222 (at 236-7) per Lord Millett. The test was adopted by Steytler J in **Newman v Phillips Fox (a firm)** (1999) 21 WAR 309 at 322."*

*6 There is a further principle, which extends beyond the need to safeguard confidential information. As Burchett J said in **Wan v McDonald** (1991) 33 FCR 491 at 513, it arises from: "a solicitor's duty of loyalty, which cannot be treated as extinguished by the mere termination of the period of his retainer, and the important consideration of public policy which gives special quality to the relationship of solicitor and client that the law will not generally permit to be stained by the appearance of disloyalty."*

...

10 In other words, if a solicitor adopts a hostile position against a former client in the same or a related matter he should be restrained from acting because that of itself is a breach of professional duty. That of itself is likely to undermine the trust and confidence of the community in the legal profession.

*11 There are, however, two qualifications to this principle. First, that the case is not "rare and very special" as Burchett J put it in **Wan v McDonald** (*supra*) at p 513.*

*12 Secondly, as Malcolm CJ said in **Fordham** (*supra*), a solicitor may assume a hostile relationship against a former client if such conduct would not give rise to an apprehension of impropriety in the mind of a reasonable bystander."*

(See below re Loyalty [9.5.3])

Templeman J found that Mr Gugiatti had given confidential information to McLeods in the period. In fact, McLeods took the extraordinary step of exhibiting the entire contents of Mr Gugiatti's files, including privileged material, without Mr Gugiatti's permission, to show that they did not hold any relevant information. While His Honour disapproved of this course of action, McLeods do not appear to have suffered any penalty for a flagrant breach of the duty of confidentiality.

His Honour then went on to analyse the situation in terms of the perception of a reasonable bystander, and said:

"56 In all the circumstances, while I have considerable sympathy for Mr Gugiatti's position, I am not persuaded that a reasonable bystander would consider that his claim against the City arising from damages he suffered in 1996, could be prejudiced by the City's knowledge of confidential information given to Mr McLeod between 1991 and 1994, even if Mr McLeod could remember it."

McLeods were not restrained from acting. His Honour took the precaution of ordering Mr McLeod to undertake not to disclose to any other member of his firm any further information in his possession which he might later recall.

[8] Acting for More than One Party

[8.1] Rule 9

There is much judicial comment on this point and in the past there has been some debate within the profession, particularly arising from the introduction in May 1995 of Rule 9 which is in the following terms:

9. *Acting for more than one party*

9.1 *For the purposes of Rules 9.2 and 9.3-*

- “proceedings or transaction” mean any action or claim at law or in equity, or any dealing between parties, which may affect, create, or be related to, any legal or equitable right or entitlement or interest in property of any kind.
- “party” includes each one of the persons or corporations who, or which, is jointly a party to any proceedings or transaction.
- “practitioner” includes a practitioner’s partner or employee and a practitioner’s firm.

9.2 *A practitioner who intends to accept instructions from more than one party to any proceedings or transaction must be satisfied, before accepting a retainer to act, that each of the parties is aware that the practitioner is intending to act for the others and consents to the practitioner so acting in the knowledge that the practitioner:*

- (a) *may be, thereby, prevented from-*
 - (i) *disclosing to each party all information, relevant to the proceedings or transaction, within the practitioner’s knowledge, or,*
 - (ii) *giving advice to one party which is contrary to the interests of another; and*
 - (b) *will cease to act for all parties if the practitioner would, otherwise, be obliged to act in a manner contrary to the interests of one or more of them.*
- 9.3 *If a practitioner, who is acting for more than one party to any proceedings or transaction, determines that the practitioner cannot continue to act for all of the parties without acting in a manner contrary to the interests of one or more of them, the practitioner must thereupon cease to act for all parties.*

[8.2] The case law in this area generally deals with cases where the solicitor has not avoided a conflict of interest and detriment has already been done. Some cases involve one party suing another for breach of contract where the solicitor acted for both. Many of them involve actions in negligence against a solicitor and are critical of the solicitor. Most involve conveyancing or commercial matters but the same principles apply to litigation matters. The analysis of the problem in those cases is equally relevant for example, to the situation where you are acting for co-plaintiffs or co-defendants, for a plaintiff or a defendant on the one hand and a third party on the other hand or for co-defendants in criminal proceedings. Conflict of interest might be more obvious to a solicitor in litigation matters, hence the lower proportion of litigation matters attracting judicial comment in the area of solicitor acting for more than one party.

For many years solicitors have been cautioned about the risks of acting for more than one party. The “**Loxton Memorandum**” sent to all members of the Society in 1975 stated:

“It must be acknowledged that, in any conveyancing transaction, there is, from the outset, an inherent conflict of interest in regard to the making of the bargain and in the various procedural steps thereafter.... Council says that the integrity of the solicitor will give him the answer and the onus lies very heavily on him to come to the right answer.”

In **Commonwealth Bank of Australia v Smith**⁵⁵ the Full Court of the Federal Court said that the practice of one solicitor acting for both vendor and purchaser “*is an undesirable practice and it ought not to be permitted*”.

In **Thompson v Mikkelsen**⁵⁶ Wootten J said: “*It seems to me that the practice of a solicitor acting for both parties cannot be too strongly deprecated*” and that the client “*is entitled to assume that [the solicitor] will be in a position to approach the matter concerned with nothing [in mind] but the protection of his client's interests against [those] of the other party. He should not have to depend on a person who has conflicting allegiances and who may be tempted either consciously or unconsciously to favour the client or simply to seek a resolution of the matter in a way which is least embarrassing to himself*”.

The possibility of favouring one client may arise even if the parties appear to have the same result in mind. While Rule 9 does not prohibit acting for more than one party per se, there are obviously circumstances where it should not occur or is undesirable.

In **Council of the Law Institute of Victoria v A Solicitor**⁵⁷ in the Supreme Court of Victoria, Tadgell J considered the issue of a solicitor acting for more than one party to a conveyancing transaction giving rise to a present and a potential conflict of interest. His Honour noted the following historical aspect of conflict of interest:

“The law has long frowned upon a solicitor's double dealing as between one client and another. In 1673 an attorney was committed and removed from the Roll after it was proved that he had been an ambidexter, viz after he was retained by one side he was retained on the other side.”

His Honour also noted that as early as 1866 Sir John Stuart VC conceded perhaps more adventurously in **Minton v Kirkwood**⁵⁸ that “*it would be too much to say that the same firm of solicitors may not, in some cases, properly attend to the interests of both clients*”.

Tadgell J's comment on this is:

“This, however, is a generalisation. Although a solicitor may without impropriety act for clients on either side of a transaction, he always runs the risk if he does so that he may be required to stand up for one side against the other. That he cannot faithfully do for either of them, or for himself, so long as he continues to act for both.”

In this case Tadgell J also dealt with the issue of two parties with potentially opposing interests consenting to the one solicitor acting. He says:

“The notion that there should be agreement by the parties to a transaction “for which of them the solicitor may continue to act means, I think, “for which one of them” he may continue to act; and that he may not fairly continue to act for both. At least that must be so unless both parties take the unlikely step of agreeing that the solicitor should be entitled to act for each notwithstanding that there is a present or potential conflict of interest between them and (perhaps) between the solicitor and one of them. If there were apparently such an agreement the solicitor might do well to scrutinise it lest it had been made by the clients, or one of them, without a proper appreciation of the facts.”

The Privy Council dealt with the issue of continuing to act for both parties with informed consent in **Clark Boyce v Mouat**⁵⁹. Rule 9 basically follows that decision although there has been controversy over whether it allows a client to consent to a conflict of interest. The case is authority for the proposition that a solicitor may act for two parties in a matter having obtained from each informed consent to the solicitor acting which must be truly informed consent.

55 (1991) 42 FCR 390

56 Supreme Court of New South Wales, 3 October 1974, unreported

57 [1993] 1 VR 361

58 (1866) LR IEQ 449 at p454

59 [1993] 3 WLR 1021

The applicants before the Privy Council were a firm of solicitors and the respondent was a former client who agreed to mortgage her house as security for a loan from a third party to her son of \$NZ100,000. The son's usual solicitors refused to act in the transaction and the solicitors in these proceedings agreed to act for both.

The respondent was advised to seek independent advice but declined to do so and signed authority to that effect. The Privy Council found that she was told of the ramifications if the son defaulted, which he did when his business failed and he became bankrupt. The respondent alleged the solicitors:

- acted negligently and in breach of contract by failing to ensure she received independent advice and by refusing to act for her when also acting for her son
- breached their fiduciary duty in
 - failing to decline to act
 - failing to disclose that the son's usual solicitors had refused to act, that they had no knowledge of the son's ability to service the mortgage and it was not in her interest to sign the mortgage
- failed adequately to advise her of the need for independent advice.

Lord Jauncey stated:

"There is no general rule of law to the effect that a solicitor should never act for both parties in a transaction where their interests may conflict. Rather is the position that he may act provided that he has obtained the informed consent of both to his acting. Informed consent means consent given in the knowledge that there is a conflict between the parties and that as a result the solicitor may be disabled from disclosing to each party the full knowledge which he possesses as to the transaction or may be disabled from giving advice to one party which conflicts with the interests of the other. If the parties are content to proceed upon this basis the solicitor may properly act."

This particular comment has been interpreted by some to allow a solicitor or firm to act for two parties whose interests are at present in conflict although it seems to me that the more appropriate interpretation is that "may conflict" means that the conflict is prospective not present and that the informed consent is to a situation which may result in the parties having to obtain other representation.

One wonders who would consent in such a situation and would think there would be a natural reluctance on the part of any independent solicitor to advise in favour of that course of action, bearing in mind that solicitor's own possible liability to the client as a result of the advice.

Lord Jauncey quoted Upjohn LJ in ***Boulting v Association of Cinematographic TV & Allied Technicians***:

"The client is entitled to the services of his solicitor who may not charge more than he is legally entitled to and must not put himself into a position where he may owe conflicting duties to conflicting clients... the person entitled to the benefit of the rule may relax it, provided he is of full age and sui juris and totally understands not only what he is doing but also what his legal rights are and that he is in part surrendering them... In determining whether a solicitor has obtained informed consent to acting for parties with conflicting interests it is essential to determine precisely what services are required of him by the parties,"

and noted that in this case the client who commenced proceedings against the solicitor was not concerned about the wisdom of the transaction but merely wanted the solicitor to ensure the transaction was given full and proper effect by ascertaining questions of title and ensuring that the parties achieved what they had contracted for, that the client required of the solicitor *"no more than that he should carry out the necessary conveyance on her behalf and explain to her the legal implications of the transaction"*.

Although it was found that that was what the client instructed the solicitor to do at the time, later when she suffered a loss she changed her mind about the extent of her instructions to the solicitor, ultimately unsuccessfully.

What amounts to appropriate disclosure is also dealt with in ***Harvey's case*** (above at [7]) re conflict of interest between the solicitor and the client:

"Where there is any conflict between the interest of the client and that of the solicitor, the duty of the solicitor is to act in perfect good faith and to make full disclosure of his interest. It must be a conscientious disclosure of all material circumstances, and everything known to him relating to the proposed transaction which might influence the conduct of the client or anybody from whom he might seek advice. To disclose less than all that is material, may positively mislead. Thus for a solicitor merely to disclose that he has an interest, without identifying the interest, may serve only to mislead the client into an enhanced confidence that the solicitor will be in a position better to protect the client's interest."

Blackwell v Barroile ⁶⁰ makes some important statements concerning conflict of interest where a firm acts for more than one party and in relation to the involvement of the solicitors' own interests. At page 25 in the joint judgment of Davies and Lee JJ, their Honours stated (emphasis added):

"A firm is in no better position than a sole practitioner if it purports to act for separate clients whose interests are in contention. If it purports to continue to act for both clients by imposing a qualification on the duties of partnership it thereby denies the respective clients the services the clients have sought from the firm, namely the delivery of such professional skill and advice as the partnership is able to provide. In such a circumstance the appearance provided to the public is that the interests of the solicitors as partners are in conflict with, and may be preferred to, the interests of one or both clients."

In essence, the facts are that the solicitors acted for C who controlled a company which was a controlling shareholder in another company (KAP) which instructed the solicitors in relation to obtaining urgently required funds. The firm also acted for a syndicate regarding investment in KAP and set up a shelf company ("Barroile") to be used by the syndicate to loan money to, and acquire shares in, KAP.

The syndicate instructed the firm through a partner S and an employed solicitor L. KAP instructed the firm through another partner W.

Ultimately all the investors except one (Simmersall) decided to withdraw from the syndicate and that lone investor advanced a considerable sum to the company.

A short time later Simmersall sought advice from W (ie the partner who had advised the company) as to the effect of his expected bankruptcy upon his assets. Ultimately his trustee in bankruptcy brought two claims in negligence against the firm:

- firstly that it breached its duties of care to Simmersall to procure effective security in respect of his loan to the company and failed to provide proper advice to him in respect of that transaction
- secondly, to the trustee in failing to inform him of facts relevant to the loan made by the investor, as to the existence or otherwise of security for the loan and as to the existence and disposition of the proceeds obtained from the sale of some shipping containers.

The majority judgment found that from the outset "*the conflict between the [parties'] interests should have been clear*" to the solicitors and that "*it is an ethical rule of long standing which goes to the core of the solicitor/client relationship, the maintenance and protection of which is a matter of public interest reflected in the doctrine of professional privilege. It is central to the preservation of public confidence in the administration of justice*".

The House of Lords in ***Prince Jefri Bolkiah v KPMG (A Firm)*** ⁶¹ also comments about the position of firms. At page 224, Lord Millett noted:-

"... a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position". (emphasis added)

An unreported decision of Solomon DCJ in the District Court on 3 March 1994 also shows the invidious position in which a solicitor places himself as well as the client in acting for more than one party.

The solicitor B acted for both the vendors and the purchasers in two related conveyancing transactions: the sale of land to Mr & Mrs D and the sale of a house to be moved onto the land. Following a conversation with one of the purchasers one month after they had negotiated with each of the vendors, the solicitor commenced acting for all parties, having initially acted only for the two separate vendors.

About two weeks after commencing to act for them the solicitor presented the purchasers with a proposed agreement in respect of the purchase of a house following notification to them of a higher offer from a competing purchaser. The agreement provided that the purchasers would, on exchange, give a bank cheque to the vendor for \$16,000 (\$4,000 more than the price originally negotiated) and that there would be a penalty of \$2,000 per week for every week after 16 May 1994 before the house was moved onto the land. The Court found that the purchasers were given no advice about the ramifications of breach of contract or about the ramifications in respect of that contract if they could not secure the land.

It appears that on the same date the purchasers executed a contract in respect of the purchase and were told the vendor would do so the next day. However it was clear from a letter from the solicitor to the vendor of 3 May 1988 that he knew the vendor did not agree to certain terms in the contract and further that between that date and 24 May he did not tell them that contracts were not exchanged although, to his knowledge, they were spending money in order to have the house moved onto the land.

His Honour found that there was a conflict of interest in acting for all parties and that the purchaser would not have taken steps if they had known that their rights in respect of the land were not secured. They should have been advised not to take any such steps.

One questions what advice the solicitor would have given had he not also been acting for the vendor of the house.

In a scathing attack on the solicitor, the judge found that he had acted with "absolute disregard" for the purchasers' interests and "*that disregard advanced the interests of his [other] clients*".

The result of the solicitors' actions, in respect of which the purchasers sought relief was that they expended nearly \$50,000 without acquiring either the land or the house but the vendor of the house received \$20,000 of their money and retained the house and the vendor of the land retained the land upon which the purchasers had built a road at their expense.

A further result of the solicitor's negligence was found to be that both purchaser clients suffered severely from anxiety as a result of the solicitor's breach of duty to them. They were awarded the sum of \$107,285 against the solicitor.

Government Insurance Office of New South Wales v Manettas & Ors ⁶² resulted in proceedings in the Disciplinary Tribunal against the solicitor who was found guilty of professional misconduct and fined \$2,000.

The solicitor acted for two companies which bought properties for development, for the finance provider and for the three guarantors of the loan, one of whom was a long-standing client of the firm who, unlike the other two guarantors, offered his own property as security for the loans. A partner of the firm gave a false certificate to the lender wrongly stating that he had explained the loan documents to the guarantors and that he was not the solicitor for the lender.

61 [1999] 2 W.L.R. 215

62 Supreme Court of New South Wales, Commercial Division, 5 June 1992 unreported

The Court found the solicitor's firm negligent in failing to advise properly as to the nature of the guarantees and in not explaining the loan documents.

In the first instance Cole J found that the firm's liability was caused by dishonest or fraudulent act or omission, stating:

"It was brought about by the solicitors' negligence but it was also brought about by their dishonesty in falsely attesting the guarantors' signatures and signing the Dylcu certificate. Without those dishonest acts there would have been no completed transaction. Had the certificate been true, in that the Dylcu Loan Agreement had been explained to the guarantors, the divergence between the GIO's requirements of the joint and several guarantee and Mr Manettas' willingness to give only a one-third several guarantee would become starkly apparent and the transaction would have terminated."

The Legal Professional Disciplinary Tribunal noted:

"Of course, when things go bad those who have commercially lost look around for someone that they can blame for their misfortune. Mr Manettas found the solicitor and, when sued by the GIO, he joined the solicitor."

In ***Stewart v Layton***⁶³ the Full Court of the Federal Court of Australia considered the position of a solicitor who acted for two parties in a conveyancing transaction where the purchaser was a developer who experienced financial difficulties and where the vendor had contracted to purchase another property for which she would need the proceeds of sale to complete, being unwilling to obtain bridging finance.

Jenkinson J referred with approval to ***Spector v Ageda*** and ***Wan v McDonald*** (above) and held that the solicitor was under a duty "*to communicate to [the vendor client] knowledge which he had which she required to enable her to play her part in the effective and successful consummation of the transactions in which he was acting as her solicitor*" and that the information which he received as to the purchaser's financial difficulty was "*plainly of a kind which his duty to [the vendor] obliged him forthwith to communicate to her*".

His Honour rejected the submission that the possibility of a successful resolution justified the solicitor's delay in telling the vendor and that his obligation "*was not to determine what alteration of the agreed method of financing the transactions should be made, but to notify the client that an alteration might have to be made and to furnish her with all the information he had which was relevant to the making of decisions about the alteration*".

Jenkinson J found:

"Despite the fact that [the solicitor] acted at all stages with the best of intention towards [the vendor] he, nevertheless, committed a breach of his fiduciary duty towards her as her solicitor, which breach was rooted in the fact that he continued to act for both parties in the conveyancing transaction after a conflict of duties arose. In his strenuous endeavour to fulfil both duties, he failed properly to fulfil his duty to the applicant."

An analysis of the cases suggests that an important question should be asked by any solicitor acting for more than one party in a transaction: can I honestly say in relation to the advice I am giving each party that I would give that same advice were I not acting for the other party and that I would be satisfied that my client's interests would be properly protected?

[8.3] Consent and Independent Advice

Complementing the comments outlined above in ***Clark Boyce v Mouat*** are a number of other judicial comments on this point, most recently and importantly those of the New South Wales Court of Appeal in ***Beach Petroleum*** (see above at [7.1]).

At paragraphs 465 and 466 the Court noted:-

465 In **Maguire v Makaronis** at 466 it was stated that what constitutes a fully informed consent is a question of fact to be determined in all the circumstances of each case. The court said that there is no precise formula which will determine in all cases whether a fully informed consent has been given. ATRK's submission on informed consent is straightforward. Clearly there was no express informed consent in the sense that ATRK told Beach that there would be a potential conflict of interest in acting for it in the transactions while acting for other companies within the group and Beach consented to ATRK so acting. However such fully informed consent is to be inferred from the undisputed facts. The three directors of Beach, Mr Fuller, Mr Cummings and Mr Main, were the directing minds and will of Beach. When they instructed ATRK, on behalf of Beach, they did so with full knowledge of the circumstances that ATRK were acting for the other companies in the transactions. They knew exactly what was going on and what ATRK were asked to do.

466 Reliance was placed on an analogous situation in **Bristol and West Building Society v Mothew**⁶⁴. At 18-19 Millett LJ said:

*"A fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of the obligation of undivided loyalty; he puts himself in a position where his duty to one principal may conflict with his duty to the other: see **Clark Boyce v Mouat**⁶⁵ and the cases there cited. This is sometimes described as 'the double employment rule'. Breach of the rule automatically constitutes a breach of fiduciary duty. But this is not something of which the society can complain. It knew that the defendant was acting for the purchasers when it instructed him. Indeed, that was the very reason why it chose the defendant to act for it. The potential conflict was of the society's own making: see **Finn, Fiduciary Obligations**, p254 and **Kelly v Cooper**⁶⁶.*

It was submitted on behalf of the society that this is irrelevant because the defendant misled the society. It did not know of the arrangements which the purchasers had made with their bank, and so could not be said to be 'fully informed' for the purpose of absolving the defendant from the operation of the double employment rule. The submission is misconceived. The society knew all the facts relevant to its choice of solicitor. Its decision to forward the cheque for the mortgage advance to the defendant and to instruct him to proceed was based on false information, but its earlier decision to employ the defendant despite the potentially conflicting interest of his other clients was a fully informed decision."

At paragraph 478 the Court expressed the following opinion:-

"... ATRK, even if they were liable for breach of fiduciary duty under the double employment rule, have established that they did so with Beach's fully informed consent and are absolved from any liability. Absent knowledge of the fraud and of the "blocked out" accounts there was nothing to be disclosed by ATRK to Beach."

BurchettJ in **Wan v McDonald** at page 500, quotes DeaneJ in **Palmisano v Hyman**⁶⁷ (a matter in which the defendant acted as solicitor for the plaintiffs and also for a company in which he had shares as a trustee) as saying:

"The defendant did not, at any time, suggest to any of the plaintiffs the desirability of seeking independent legal advice... in a situation where he was acting as the plaintiffs' solicitor, his failure to advert to the existence of the conflicts both of interest and duty or even to raise the possibility of the plaintiffs seeking independent advice not only constituted a flagrant breach of his fiduciary duty to the plaintiffs, it tainted whatever advice he gave them..."

64 [1998] Ch 1

65 [1994] 1 AC 428

66 [1993] AC 205

67 Supreme Court of New South Wales, 30 March 1977 unreported

Burchett J referred to:

“... the clear recognition by the Courts that such a conflict of interest or duty should simply not be permitted to exist without the client being fully apprised of it.”

And said further:

“The solicitor had a responsibility at the least, to explain to Mrs Wan the nature of his dual responsibilities in order to obtain her informed consent to his continuing to act for both clients. And she should have been advised that because of his professional commitment to his other client, and his close personal association with it, and because too of the demonstrated reality that her interests and its interests would not necessarily coincide in this particular transaction, she should consider taking independent advice.”

What amounts to appropriate disclosure is also dealt with in ***Harvey's case*** (see [7.1]) re conflict of interest between the solicitor and the client:

“Where there is any conflict between the interest of the client and that of the solicitor, the duty of the solicitor is to act in perfect good faith and to make full disclosure of his interest. It must be a conscientious disclosure of all material circumstances, and everything known to him relating to the proposed transaction which might influence the conduct of the client or anybody from whom he might seek advice. To disclose less than all that is material, may positively mislead. Thus for a solicitor merely to disclose that he has an interest, without identifying the interest, may serve only to mislead the client into an enhanced confidence that the solicitor will be in a position better to protect the client's interest.”

Lord Millett in ***Prince Jefri*** appears to suggest at page 224 that there will be circumstances where consent can be obtained from a client to act for an opposing party. His Lordship said:-

“A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation.”

In ***Council of the Law Institute of Victoria v A Solicitor***⁶⁸ Tadgell J also dealt with the issue of two parties with potentially opposing interests consenting to the one solicitor acting. He says:

“The notion that there should be agreement by the parties to a transaction “for which of them” the solicitor may continue to act means, I think, “for which one of them” he may continue to act; and that he may not fairly continue to act for both. At least that must be so unless both parties take the unlikely step of agreeing that the solicitor should be entitled to act for each notwithstanding that there is a present or potential conflict of interest between them and (perhaps) between the solicitor and one of them. If there were apparently such an agreement the solicitor might do well to scrutinise it lest it had been made by the clients, or one of them, without a proper appreciation of the facts.”

[8.4] Arguing Contrary Substantive Legal Issues - Conflict between duty to court and duty to client - arguing different positions for one client

An interesting issue is where you may be asked to take a stance or argue a substantive legal issue on behalf of one client which is directly contrary to the position you are arguing for another client in a completely unrelated matter.

This was raised some time ago in the ***American Bar Association Journal*** which quoted a formal opinion summary in these terms:

“While it is not improper for a lawyer to advocate a position for a client that may be adverse to a position argued on behalf of a prior client... serious concerns are raised when the lawyer is representing current clients.

Accordingly... if both matters are being litigated in the same jurisdiction and there is a substantial risk that the lawyer's representation of one client will create a legal precedent that is likely to materially undercut the position being urged on behalf of the other client, the lawyer should either refuse to accept the second representation or withdraw from the first. Both clients may, however, after full disclosure by the lawyer of potential ramifications, consent to the lawyer continuing to handle both matters.

If the two matters will not be litigated in the same jurisdiction, the lawyer should nevertheless determine fairly and objectively whether the effective representation of one client will be materially affected by continuing to represent the other client. If so, the lawyer should not proceed with both representations."

The summary concludes by saying "*these conflicts are unlikely to arise in handling issues of procedure, discovery or evidence*".

A classic example of the conflict between the duty to the court and the duty to the client is found in **Vernon v Bosley** (No 2) [1999] QB 18; [1997] 1 All ER 614 summarised at paragraph [22,055.5] of Riley's Solicitors Manual. There the solicitor was found to have misled the court hearing one of two matters in which a client had instructed the solicitor in respect of the client's medical condition.

[8.5] When Dispute Arises - Cease Acting for Both

As noted above, Rule 9.3 provides that where a conflict of interest arises when a solicitor is acting for more than one party, the solicitor must cease acting for both.

In **Wan v McDonald**,⁶⁹ Burchett J says:

*"My own impression of the approach generally adopted in Australia is reflected in the comment of WoottenJ in **Thompson v Mikkelsen** which was a case where a solicitor acting for both vendor and purchaser in a conveyancing transaction discovered that the vendor wished to withdraw from the contract."*

Wootten J said:

"(O)ne might have thought that at this stage a solicitor, faced with an obvious conflict of interest between the parties, would have felt it proper to cease to act for both parties."

And noted that:

- in England the Law Society has made a specific rule that where a conflict arises in these circumstances the solicitor must cease to act for both parties
- in Canada, some of the Law Societies have adopted a code, cited in **MacDonald Estate v Martin**⁷⁰ that:
"A lawyer who has acted for a client in a matter should not thereafter act against him"
- in the United States the same rule was laid down in **Gesellschaft** where the Court referred to *"the well established rule of public policy that where an attorney has acted for a client he cannot thereafter assume a position hostile to the client concerning the same matter, or... use against the client knowledge obtained from him while the relation existed"*.

In **Murray v Macquarie Bank**⁷¹ SpenderJ said:

"Notwithstanding that both may consent to his doing so, a practitioner should not continue to act for only one of those clients after he has ceased to act for the other and must direct them both to seek other advice."

⁶⁹ (1991) 105 ALR 473

⁷⁰ (1991) 77DLR (Fourth) 249 SCC

⁷¹ (1991) 105ALR 612

A firm recently sought the Ethics Committee's view as to whether it would be proper to commence acting for two parties in the same matter and to seek agreement that should a conflict of interest arise the firm could terminate the retainer of one but cease acting for the other. The Committee stated it did not regard this as proper and emphasized that this would be in breach of Rule 9.

[9] Acting Against a Former Client

This type of conflict of interest/duties has probably received more judicial comment than the other categories of conflict of interest.

[9.1] Rule 3 of the Professional Conduct & Practice Rules states:

3. ***Acting against a former client***

Consistently with the duty which a practitioner has to preserve the confidentiality of a client's affairs, a practitioner must not accept a retainer to act for another person in any action or proceedings against, or in opposition to, the interest of a person -

- (a) *for whom the practitioner or the firm, of which the practitioner was a partner, has acted previously;*
- (b) *from whom the practitioner or the practitioner's firm has thereby acquired information confidential to that person and material to the action or proceedings; and*

that person might reasonably conclude that there is a real possibility the information will be used to the person's detriment.

The Rule contains five criteria for deciding whether a solicitor should or should not act for a former client (you basically reflecting the case law):

- The solicitor or the firm of which the solicitor was a partner has acted previously for that client.
- The solicitor or the firm has acquired confidential information in respect of the client.
- The confidential information is material to the action or proceedings (presently on foot).
- The former client might reasonably conclude that there is a likelihood the information might be used in the present proceedings.
- Its use would be to the detriment of that person.

The rule also reflects the fundamental principle that confidentiality survives the termination of the retainer, that is a solicitor has a duty to keep the former client's affairs confidential. As stated earlier, Rule 2.1 of the Professional Conduct & Practice Rules commences with the following:

"A practitioner must not, during, or after termination of, a retainer, disclose to any person, who is not a partner or employee of the solicitor's firm... any information which is confidential to the client of the practitioner and acquired by the practitioner during the currency of the retainer."

[9.2] The cases described below deal with what information is confidential and how the circumstances in which information is imparted to a solicitor on behalf of a client or other person may result in that information being protected by the duty of confidentiality. It is not necessarily the case that a particular item of information will be inherently confidential because there may be circumstances where its disclosure to the other party at an earlier stage may remove its confidential character.

In the 1882 case of **Mills v Day Dawn Block Gold Mining Co Limited**⁷² the Queensland Full Court held that if a former client swore that he had made confidential communications to a solicitor the Court would restrain the solicitor from acting for the other party in any proceedings relative to the same

circumstances and the Court would not weigh conflicting testimony as to the existence of their confidence.

This was described by GummowJ in **National Mutual Holdings Pty Limited v Sentry Corporation**⁷³ as a somewhat stricter approach than some of the other Australian cases although I think it fair to say that some of the cases following GummowJ's decision, particularly the family law matters, have adopted a pretty strict approach.

[9.3] English Cases

[9.3.1] It is relevant to start this exploration of conflict of interest in acting for a former client by referring to the landmark 1912 English case of **Rakusen v Ellis Munday & Clarke**⁷⁴. This case contains four main points, one of which, the test to be applied in deciding whether a solicitor should cease acting for a party, has caused much discussion over the years. The four main points are:

1. There is no rule that a solicitor cannot act against a former client,
2. The Court can restrain a solicitor by way of injunction from acting against a former client,
3. The Court may accept undertakings from solicitors that they will not communicate confidential information,
4. The test to be applied.

While each of the judges formulated a slightly different test the leading judgment of Cozens-Hardy MR said:

"... We must treat each of these cases, not as a matter of form, not as a matter to be decided on the mere proof of a former acting for a client, but as a matter of substance, before we allow the special jurisdiction over solicitors to be invoked, we must be satisfied that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act."

In the same case, Buckley LJ said of the application to restrain the solicitors from acting:

"... The whole basis of the jurisdiction to grant the injunction is that there exists, or I will add, may exist, or may be reasonably anticipated to exist, a danger of breach of that which is a duty, an enforceable duty namely the duty not to communicate confidential information; but directly the existence or possible existence of any such danger is negated, the whole basis and sub-structure of the possibility of injunction is gone."

Fletcher Moulton LJ expressed it differently again:

"As a general rule the Court will not interfere unless there be a case where mischief is rightly anticipated. I do not say that it is necessary to prove that there will be mischief, because that is a thing which you cannot prove, but where there is such a probability of mischief that the Court feels that, in its duty of holding the balance between the high standard of behaviour which it requires of its officers and the practical necessities of life, it ought to interfere and say that a solicitor shall not act."

There has been an absolute wealth of commentary on the various tests and few subsequent cases have followed the strict test of Cozens-Hardy MR in practice even if adhering to it in theory which has basically been the English approach over the years.

The facts

The firm sought to be restrained was a two partner firm in which the partners in effect ran separate practices. One of the partners had acted for the plaintiff in an unfair dismissal action and had received confidential information relating to the matter. The plaintiff then changed solicitors and during the course of the proceedings the other partner was appointed to act for the employer company. The plaintiff then sought an injunction restraining the firm from appearing against him. The

73 (1989) 87 ALR 539

74 [1912] 1 Ch 831

solicitor who had acted for the plaintiff undertook not to disclose any information concerning the former client to his partner and the name of his individual partner was substituted for the name of the firm as the solicitor on the record.

Cozens-Hardy MR stated of the suggestion that a solicitor could never act for a client against a former client that “*many busy solicitors in this country would find it impossible to carry on their businesses at all if that was the true rule*”.

[9.3.2] However, in a 1987 English case, *In Re A Solicitor*⁷⁵, the Court adopted a similar approach to *Rakusen* and refused to grant an injunction restraining the solicitor from acting. The firm had acted for the applicant for a number of years and it also acted for the director of a large public company in which the applicant was formerly a managing director whose affairs were being investigated by a Government Department. The director gave evidence that the enquiry was hostile to the applicant who had a different firm acting for him in that matter. The Court considered that the solicitors had no confidential information relating to the applicant which would be relevant to the enquiry and it would have caused the director great hardship for the firm to have to cease acting for him because of the amount of time they had spent on the matter.

[9.3.3] It was held in another English case which was a decision of the English Court of Appeal in 1991, *Supasave Retail Limited v Coward Chance; David Lee & Co (Lincoln) Limited v Coward Chance*⁷⁶ discussed later in relation to information barriers that the inconvenience to the solicitor’s present client will not outweigh the conflict.

[9.3.4] The judgment of the English Court of Appeal in *In Re A Firm of Solicitors*⁷⁷ could be said to have paid lip service to *Rakusen* but provided an outcome which in practical terms is quite different from that case. The Court restrained a very large firm of solicitors (with 107 partners) from acting for a defendant in proceedings having, a number of years earlier, advised companies associated with that company in matters related to the present action. Further comment on this case appears below in relation to information barriers, the imputation of knowledge etc.

[9.3.5] More recent cases have approached the issue more restrictively than the approach adopted in *Rakusen* culminating in the recent landmark decision recently handed down by the House of Lords in the *Prince Jefri Bolkiah v KPMG (A Firm)*⁷⁸. The decision puts the issue of acting against a former client in terms not of a conflict of interest but rather a misuse of confidential information. In discussing the basis of the jurisdiction, Lord Millett stated:-

“In Rakusen’s case the Court of Appeal founded the jurisdiction on the right of the former client to the protection of his confidential information. This was challenged by counsel for Prince Jefri, who contended for an absolute rule, such as that adopted in the United States, which precludes a solicitor or his firm altogether from acting for a client with an interest adverse to that of the former client in the same or a connected matter. In the course of argument, however, he 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 of 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 with 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 ... I would affirm this is the basis of the Court’s jurisdiction to intervene on behalf of a former client.”

[9.4] Australian Cases

[9.4.1] One of the most frequently quoted judgments in Australia is that of Ipp J in *Mallesons v KPMG Peat Marwick & Carter*⁷⁹ in relation to the test to be applied in deciding whether a solicitor

75 (1987) 131 SJ 103

76 [1990] 3 WLR 1278

77 [1992] 1 QB 959

78 [1999] 2 W.L.R. 215

79 (1991) 4 WAR 357

should cease acting because of the acquisition of confidential information which could be used to the detriment of the former client.

His Honour held that the Court “*would restrain a solicitor from acting where there is a real and sensible possibility of confidential information being disclosed or used to the detriment of the former client*”.

This test of real and sensible possibility has been adopted in a number of recent cases.

The facts

In September 1988 the Perth office of Hungerfords sought the solicitors’ advice in relation to the manner in which they had conducted audits of Rothwells Limited. During the course of consulting the solicitors’ various partners of Hungerfords, including Carter, gave confidential information to them concerning the advice sought. Later, in August 1990 the solicitors were retained by the Commissioner for Corporate Affairs in connection with the prosecution of certain criminal charges against Carter and three others. Carter and Hungerfords brought the present proceedings before Ipp J contending that the information the solicitors originally obtained in the course of advising Hungerfords was the subject of legal professional privilege and there was a serious risk that in acting for the Commissioner would disclose or use the information to their prejudice and that there was a conflict between the duty owed to them by Mallesons as their former solicitors and the interest which Mallesons had in advancing the case of the Commissioner against Carter.

His Honour noted that the test to be applied in determining whether a solicitor would be restrained from acting against his former client where he is in possession of information subject to legal professional privilege may not settled and referred to **Mills** and **Rakusen**, noting the different approaches.

As to the potential prejudice to Carter and Hungerfords by disclosure of the information IppJ held:

“... In my view, the information that was given to Mallesons by Carter and the other Hungerfords partners as to their concerns in regard to and involvement in the various matters which I have set out above, is likely to be valuable to the prosecution. That value lies in what witnesses should be called, and deciding how witnesses for the prosecution should be led, and in cross-examination.”

His Honour rejected the suggestion that the retainer could be varied to release Mallesons from the obligation to disclose any of the information obtained from Hungerfords to the Commissioner but said:

“It is difficult to see, however, when preparing the briefs for counsel, in preparing proofs of evidence, in suggesting what witnesses should be called by the prosecution, in commenting on particular areas in which cross-examination should take place and in the many other areas in which competent solicitors are able to assist counsel in the preparation of a long and complex case, how the solicitors concerned could divorce from their minds relevant confidential information obtained from the accused himself. There is, in my view, the real prospect that, even with the best will in the world, that information would colour, at least subconsciously, the approach of the solicitors and influence them in the performance of the tasks I have mentioned.”

As to the comments by the individual solicitors involved on the extent of their recollection of details discussed in 1988 he said:

“In my view the details of which they have admittedly learned are sufficient to provide prosecution counsel, if those details were communicated to counsel, with a significant advantage that in my view would be seriously inimical to what in our society is ordinarily regarded as a fair trial... It is obvious that if the memories of [the solicitors] were refreshed they might well remember additional important details. The criminal proceedings against Carter are likely to last many months and to be attended by widespread publicity. In such circumstances there is every prospect of memories being reawakened.”

This is a very important point because the issue is what information was imparted to the solicitors, not what information they might be able to recollect at any one point in time, because they might later recollect it at a crucial time.

A further significant point is that his Honour found that “*not only would the prosecution be significantly assisted by the information disclosed to Mallesons in the way I have mentioned, but it would receive a very great psychological benefit*”. This brings into play the question of justice being seen to be done.

The detriment that IppJ found would be suffered to Carter “*would be of a most serious kind*”. The detriment to be suffered by Hungerfords would be that the firm would be prejudiced by the possible use of any information used to prosecute Carter in any future negligence action against it.

[9.4.2] In ***Unioil International Pty Limited and Others v Deloitte Touche Tohmatsu and Anor***⁸⁰, a case involving Corrs Chambers Westgarth, Ipp J qualified the comment he had earlier made in relation to the serious risk of misuse of confidential information in terms of the imputation of knowledge. His Honour said at page 108:-

*“In the light of the foregoing, remarks I made in ***Mallesons Stephen Jaques v KPMG Peat Marwick*** as to imputation of knowledge were too broadly stated and I consider that the approach enunciated by Sopinka J on behalf of the majority in ***MacDonald Estate v Martin*** should be followed”* (ie there should be a *rebuttable presumption* that the knowledge of one partner is to be regarded as the knowledge of his or her partner).

Ipp J found that the presumption that all partners of the firm knew of what one partner was told was rebutted.

[9.4.3] In ***Sogellease Aust. Limited v MacDougal***⁸¹ Wood J refused an application for an injunction restraining a firm of solicitors from continuing to act for a plaintiff in an action on a guarantee. One partner of the firm had previously taken instructions from the defendants in relation to another guarantee involving the same principal debtor and in the course of those instructions the defendants had disclosed details of other potential claims on guarantees including the one ultimately brought by the plaintiff company. His Honour found that there was likely to be very little in the way of cross-examination of the defendants and that there was no intention to put matters to the defendants derived in conference which could tend to contradict their evidence.

His Honour went on to make two further points, relating to “Chinese walls” and consent.

“Before parting from the questions of substance I propose to refer to two submissions raised by counsel for the plaintiff. The first was to the effect that it was permissible for solicitors to continue acting in a situation of conflict where the clients dealt with different partners of the firm, and there had been no communication between those partners.”

His Honour said that this would depend on the circumstances of the case although he found this proposition and the one referred to below as being stated far too broadly and stated further:

“... that solicitors could continue to act in a situation of conflict where one client was informed of the existence of the potential conflict at the time he gave instructions and was cautioned that the firm intended to continue acting for the other client but not for him if the conflict came into being... [this] proposition seems to me to be quite untapped.”

His Honour did, however, make some warning comments that:

“... I observed that the Court will have to maintain a continued watch over the matter and should it emerge during the course of the hearing that in some fashion information is being used which was previously confided to [the solicitors] in a confidential manner, the Court may yet have to intervene.”

[9.4.4] In ***Murray v Macquarie Bank***⁸² the Court was asked by one respondent, C, in Federal Court proceedings commenced by M to restrain the other respondent’s solicitors from acting for it. That other respondent was a bank and C was an associate director. He was said to have aided and

80 (1997) 17 WAR 98

81 Commercial Division, 17 July 1986, unreported

82 (1991) 105ALR 612

abetted a breach by the bank of Section 52 of the Trade Practices Act. The solicitors had acted for both respondents in the proceedings until C became disenchanted with their representation.

At the bank's request, C had furnished to the solicitors a statement concerning the claims made by M before they commenced acting for him. While acting for him C had delivered to them diaries containing certain notices of appointments.

C sought an injunction restraining the solicitors from acting and from communicating any information obtained from him or on his behalf while acting as his solicitor.

The bank did not intend to make a cross-claim against C in the proceedings.

Apparently, although it is not entirely clear, the solicitors offered to act for C on the basis the bank would pay for his representation ie the representation was to be a joint one. From then on, it seems, C "was in a sense treated as an appendage to the case with the bank".

On the same day as the solicitors filed a Notice of Appearance, during the course of discovery C produced some diaries to them which to quote SpenderJ "apparently contain only notes of appointments and do not contain any narrative or other notes in relation to any matters in question in proceedings brought by MsM".

It was alleged that C had not sufficiently complied with an order for discovery and he sought the advice of another firm. The solicitors offered to withdraw but the bank wished them to continue to act on its behalf.

His Honour said "*there is much to be said for the view that MrC's solicitors have not treated his interests in the litigation with the attention to which he is entitled*" but, on the question of conflict "*it seems to me that there is no conflict in any relevant sense between his case and the case of the bank that has been indicated, nor is there any real likelihood of an abuse of confidence of the material supplied by him to [the solicitors] at a time when they were not his solicitors*" and "*my opinion is that in the circumstances of this case the representation of the Bank by [the solicitors] is not of an interest which is adverse to [C]*" and further "*I am not able to see any real possibility of a breach of confidentiality either in the production of or use of the statement or in the disclosure of diary entries*".

This decision was made in the context of the confidentiality rule applying to solicitors in Queensland at that time which said:

"Where a practitioner has represented a client or where because of his association with a law firm he has had access to a client's confidence, the practitioner shall not thereafter use such information against that client's interest nor act for any other client in circumstances where the fact of having had access to the previous client's confidence may result in advantage to that other client."

As to conflict of interest, the then applicable rule was:

"A practitioner shall not represent or continue to represent conflicting interests in litigation and should only represent both parties in other matters where to do so is not likely to prejudice the interests of either client and both clients are fully informed of the nature and implications of such conflict and voluntarily assent to the practitioner so acting or continuing to act."

The essential question to be considered in this matter was stated to be whether the solicitors would be "acting against" C in continuing to act for the bank.

Spender J quoted MacKenzieJ in **Australian Commercial Research and Development Limited v Hampson**⁸³ extracting a number of principles from the cases. One of those points was that:

"The Court should take a cautious approach to allowing a legal practitioner to act where:

- (i) *confidential information is communicated;*
- (ii) *that information is relevant to present litigation; and*

⁸³ [1991] 1 Qd R 508 at 515-16

(iii) the information is still available to the solicitor."

and one could add "and mischief could be done to the former client".

The application was dismissed with no order for costs.

The main points from the decision in ***Murray v Macquarie Bank*** are:

- If there is a conflict between the parties for whom you are acting, you cannot act.
- You cannot use relevant confidential information against a former client.
- It is a question of fact in each case.
- Here, there was no conflict between the parties' cases and no real possibility of breach of confidentiality ie confidential information being used to the detriment of C.
- Dissatisfaction with one's solicitor does not in itself lead to a conflict of interest.

[9.4.5] ***Gordon v Minter Ellison Morris Fletcher***⁸⁴ concerns an application by Mr & Mrs Gordon for an order restraining Minter Ellison Morris Fletcher (MEMF) from acting on behalf of BMW Australia Limited and BMW Australia Finance Limited in proceedings in which BMW Finance sued the Gordons who counterclaimed against BMW Finance and BMW.

The initial proceedings arose out of a franchise agreement between BMW and the Gordons for the sale of motor vehicles in Geelong and associated districts. BMW Finance alleged the Gordons defaulted on a number of loan agreements entered into in 1989 and that the Gordons sold certain vehicles in breach of a bailment agreement with BMW.

The basis of the alleged conflict of interest was that the firm formerly acted for the Gordons as well as on behalf of BMW Finance in a matter related to the main proceedings and that in the course of doing so received confidential information making it inappropriate for them to continue to act for the two BMW companies.

The relevant details are:

- The Gordons had a solicitor (Knox) acting for them in relation to their affairs generally.
- They had a business trading overdraft style account with the ill-fated Pyramid Building Society secured by a fixed term deposit of \$70,000 advanced by BMW Finance which was lodged as security for the overdraft at G's direction and request.
- The Gordons also had credit accounts with the building society which were at the time of the building society crash about \$121,000.
- In the meantime, however, the Gordons had assigned to BMW Finance all of their right title and interest in the credit account.
- BMW wanted the firm to seek to recover the amount of the credit account of which the Gordons appeared to be the legal owners and BMW Finance the beneficial owner and wanted to have their solicitors act for both the legal and beneficial owner of the funds with BMW agreeing to pay any costs of Gordon involved with the negotiations or any necessary proceedings.

HediganJ concluded, analysing the options open to BMW Finance, that "*Gordon was well aware that BMW was acting in its own interests, the pursuit of which necessitated that they should appear to act for the Gordons as well*".

There was some correspondence from MEMF stating that they acted on behalf of both the Gordons and BMW Finance.

Mr Gordon and Mr Knox put on evidence that they gave MEMF unrestricted access to the Gordons' financial affairs and personal banking information.

However his Honour noted that neither MrKnox nor MrGordon identified "*any specific personal or business detail, or any specific confidential information, allegedly disclosed*" and that "*it would seem likely that information concerning Gordons' business affairs with BMW would already be known to BMW*". The evidence advanced by MEMF suggested that in reality MrKnox was acting in Gordons' interests, that he had few communications with MEMF and conveyed nothing of a confidential nature which they did not already know, most of the information coming to them via BMW Finance and nothing of a confidential nature coming via MrKnox.

The thread through the cases is, as HediganJ quotes of SpenderJ in ***Murray v Macquarie Bank***

"His Honour there emphasising, and rightly emphasising, that it is a question of fact in each case to determine what really is the possibility of any asserted breach of confidence of legal professional privilege or what really is the position in relation to a conflict of interest."

[9.4.6] In ***Macquarie Bank Limited v Myer & Ors***⁸⁵, the parties seeking to restrain the solicitors were former directors of a company who were being sued for having aided and abetted in the alleged misrepresentation of the company's financial position thereby allegedly causing Macquarie Bank to allow the company to continue to draw down funds and increase its indebtedness when it was already insolvent and for having continued to incur debts without any reasonable prospect of seeing them paid contrary to section 556 of the Companies Code. The company itself also sued the former directors for having continued to trade the company when it was insolvent. There were four sets of proceedings in all of which the solicitors had acted and the former directors complained about the solicitors continuing to act in the current proceedings because they had interviewed the former directors after obtaining permission from their own solicitors. There was apparently dispute as to whether or not any confidential information was imparted. The Court took the view that there was no solicitor/client relationship between the solicitors and the former directors at the time because they were at that stage no longer directors of the company. The application to restrain was initially upheld but refused by the Appeal Division. PhillipsJ considered that no case was made out of disclosure of any particular confidence and no appropriate relationship established generally to disqualify the firm.

The comments of MarksJ are important. He said "*there must be something in the communication between a solicitor and the person seeking restraint which gives rise to trust or to stamp it with confidentiality*" and he went on to say:

*"The principal task of the Court is to ensure that information given on trust in that way is not used in breach of that trust. What is at stake is the administration of justice. As a general rule, it might be expected that this kind of communication will occur where there exists a relationship of solicitor and client. It is not necessary here to say that it cannot otherwise occur and that it cannot otherwise occur when a solicitor has a communication with the person who is not strictly the client of that solicitor. But it is necessary, in my opinion, that there be something in the relationship or nature of the communication or something which arises in the course of either which attracts that element of trust which requires protection. And the Court will be slow to interfere with the *prima facie* right of a litigant to choose his, her or its solicitors. If the Court is to interfere, it is only to protect the undue risk of unfairness of disadvantage which the circumstances might reveal to exist."*

[9.5] Acting in dispute having previously acted for all parties now in dispute and the ongoing duty of loyalty

[9.5.1] In ***Holdsworth and Others v M R Anderson and Associates Pty Limited and Ors***⁸⁶ a firm acted for joint venturers refinancing a development project. In a subsequent dispute over the effect of the refinancing on the developer's own arrangements the solicitors were restrained from acting in the dispute for some of the joint venturers against the others.

85 Supreme Court of Victoria, Appeal Division, 26 February 1993 unreported
86 (Unreported) Phillips J, Supreme Court of Victoria, 26 August 1994.

Phillips J, referring to the long line of authority about acting against a former client commented:-

"But so far as I have been able to see, none of these cases concerned a solicitor who, having once been engaged for a client to effect some transaction was then retained by another to act against the former client in litigation involving that very same transaction. In such a situation, I am strongly disposed to the view that the solicitor ought not to act, and I do not think that that depends upon the existence or not of confidences imparted on the earlier occasion that now merit protection. It seems to me to depend rather upon the existence of the contract of retainer that was made in the first place, than upon the existence of confidences disclosed and meriting protection of misuse... I do not see the existence of confidences meriting protection as always a necessary precondition to the court's intervention" and further *"I CANNOT CONSIDER ANYTHING TO BE A GREATER BREACH OF PROFESSIONAL DUTY THAN FOR A SOLICITOR, FIRST OF ALL, AS THE SOLICITOR OF ONE PARTY, TO CARRY ON NEGOTIATION FOR THE BENEFIT OF THAT PARTY AND HAVE IT COMPLETED, AND, AFTERWARDS, TO ACT AS THE SOLICITOR FOR OTHER PARTIES IN ORDER, BY HIS OWN PERSONAL KNOWLEDGE OF THE TRANSACTION TO DESTROY THAT WHICH HE HAD DONE FOR HIS FORMER CLIENT."* (emphasis included in the judgment).

[9.5.2] More recently a line of authority has developed particularly in the Supreme Court of Victoria which puts this view in the terms of an ongoing duty of loyalty commencing with *Spincode Pty Ltd v Look Software Pty Ltd & Ors.*

Spincode Pty Ltd v Look Software Pty Ltd & Ors⁸⁷

Look Software Pty Ltd ("the Company") was set up in 1995, initially with two shareholders (one of which was Spincode), then a third, and finally in early 1997, an agreement was made to bring in two other shareholders. A dispute between the shareholders developed in September 2000.

Since the inception of the Company, solicitors McPherson + Kelley acted for it in all legal matters. The solicitors opened a file for the company in the matter of 'shareholder advice' in October 2000, and billed the company four times, the last being at the end of January, after which the retainer was terminated. McPherson + Kelley then immediately commenced acting for Spincode and its principal director, Moore. The evidence indicated that the work ostensibly performed for the Company by the solicitors during the matter was overwhelmingly on Moore's instructions and promoting Moore's desired outcome. However, all the other parties were under the impression that the solicitors were acting for the Company. As such, the solicitors acted for the Company in a particular dispute, then ceased to act in order to act for another party to the dispute. The conduct of the solicitor is described by his Honour Justice Brooking as 'remarkable and reprehensible'.

His Honour initially discussed the question of whether the solicitors were in possession of confidential information. He found that this was the case, notwithstanding the fact that Moore had been present at all the relevant discussions. He said, at para 22:

The fact that Moore is said by Kirton [the solicitor] to have been always present during these discussions does not mean that the information imparted was not confidential in the necessary sense; this fallacy underlay a submission repeatedly put to us by the appellant.

The main section of his Honour's judgment is a detailed discussion of the question "When may a solicitor change sides?" His Honour started with the 1814 case of *Cholmondeley v Clinton*, where it was held *"that a solicitor, not having been discharged by the party for whom he was acting in a cause but having discharged himself from the relationship of solicitor and client with that party, was not at liberty to become solicitor for the opposite party in the same cause."* Tracing the progress of that doctrine through subsequent cases, his Honour examines whether the basis of the doctrine is restraint of a possible breach of the duty of confidentiality or, alternatively or in addition, a duty of loyalty to the client that survives termination of the retainer, or the jurisdiction of the court to restrain its officers from improper conduct.

His Honour discussed the work of Professor Finn (now Justice Finn) on fiduciary obligations in considerable detail.

34. "According to Finn, *Fiduciary Obligations*, p.139:

"The courts will restrain a solicitor if he discharges himself for the purpose of acting for the opponent. But otherwise the courts will only restrain a solicitor from acting for the opponent or against a former client if he actually discloses the secrets of his former client of (sic) if in the circumstances of a particular case that 'mischief is rightly anticipated'." (Footnotes omitted.)

*The authorities cited for the first proposition include **Cholmondeley v. Clinton**. The passage treats **Cholmondeley v. Clinton** as not dependent upon the danger of the communication of confidential information."*

His Honour

- discussed the **Prince Jefri** case, observing that "*In 1999 the House of Lords rejected the suggestion that a former client could prevent a solicitor from acting for another by invoking something other than the need to protect confidential information*" and that "*the House of Lords disposed of the question whether a basis could be found for restraining a solicitor from acting against a former client other than the protection of confidential information without discussing it at any length.*"
- commented that "*There is a good deal of authority for the view that a solicitor, as an officer of the court, may be prevented from acting against a former client even though a likelihood of danger of misuse of confidential information is not shown.*" He discussed a large number of cases from New Zealand, Canada and Australia, as well as the work of Professor Finn on fiduciaries, all of which, in his view, supported the above contention. He concluded (at 52):

"I think it must be accepted that Australian law has diverged from that of England and that the danger of misuse of confidential information is not the sole touchstone for intervention where a solicitor acts against a former client."

- found that there are indeed "*three independent bases: first, the danger of misuse of confidential information; secondly, breach of the fiduciary's duty of loyalty; thirdly, the desirability of restraining the solicitors as officers of the Court.*" (at 60).

It is worth noting that the case is a gross example of disloyalty on the part of the solicitors involved. His Honour said, at 58:

*"If I thought that the solicitors in this case were subject neither to a negative equitable nor to a negative contractual obligation, I would say that what has been done by them - and I would have regard to the whole of their conduct here - is so offensive to common notions of fairness and justice that they should, as officers of the Court, be brought to heel notwithstanding that they have not (on this hypothesis) infringed any legal or equitable right. The authorities supporting this approach need not be mentioned again. It may be that one should refer to this head, rather than that of misuse of confidential information, the advantage that McPherson + Kelly would have by reason of their knowledge of such things as the personalities and reactions of the participants and what changes may have taken place in the past as regards what Kirton in his diary note called "allegiance"[\[65\]](#). I am not deterred by the suggestion that, once infringement of legal or equitable rights ceases to mark off what may be proscribed, solicitors and their would-be clients will be subject to a great and unfair uncertainty, being unable to say in advance what view the Court will take. No experienced solicitor of sound judgment would have done what has been done in this case. And in my view the nature and objectives of the jurisdiction which the Court exercises over its officers, and the breadth of the discretion, permit regard to be had, not only to the nature of the dispute before litigation ensued, and the former retainer, and the new one, but also to the conduct of the solicitors at all stages. This includes the partisan approach of Kirton when he acted for the company and his undisclosed attempts to serve Moore's interests, the peremptory and unseemly way in which the solicitors changed sides, their denials that it was the company which had been their client and the uncandid affidavit of Kirton in which he tried to give the impression that the company had not been the client. It would, as they used to say, be *pessimi exempli* if McPherson + Kelly were not called to account."*

There is no doubt that this is a just result and that the conduct of the solicitors in all the circumstances was reprehensible. This case has become the leading authority for the broader view in restraining a solicitor from acting against a former client. It is arguable, and indeed, there are a number of later cases that state that the same result would have been achieved by application of the **Bolkiah** doctrine. His Honour's judgment is however most persuasive and it will be interesting to see its long-term influence.

[9.5.3] Village Roadshow Limited v Blake Dawson Waldron⁸⁸

The facts

Blake Dawson Waldron had acted for Permanent Trustee Company Limited, the trustee of a trust deed prepared in respect of Village Roadshow's intention to propose to buy back all of its A Class Preference Shares pursuant to an arrangement to be made under Part V.1 of the Corporations Act. The consideration for the buyback was to be 25 cents per share in cash and the balance by the issue of an unsecured note of face value \$1. The issuing of the notes required Village Roadshow to enter into a trust deed which was prepared by its solicitors Minter Ellison. The evidence appeared to show that BDW spent a total of about 28 hours on the matter over a short period in September 2003 "for the most part it involved reviewing the draft trust deed and the scheme booklet, and advising Permanent Trustee on these matters".

A short time after commencing to act for Permanent Trustee BDW also commenced acting for the holder of 1,000 ordinary and 1,000 preference shares ("Boswell") which opposed the preference share buyback and "pursued its objective with considerable energy and with some success". The work for the respective clients was conducted under the supervision of different solicitors but both within the Corporate Advisory Group.

The solicitor acting for Permanent Trustee did not become aware until 22 November 2003 that the firm was also acting for Boswell. By that stage it appears that the documentation was almost complete but "BDW saw itself as having some ongoing involvement in the trust deed". The solicitor supervising the Boswell work had given evidence that she was unaware BDW had been acting for Permanent Trustee but no corresponding evidence was given as to the knowledge of the solicitor supervising work for Permanent Trustee.

Confidentiality and burden of proof

As to the burden of proof, quoting the Prince Jefri case Byrne J said "once it appears that a solicitor is in receipt of information imparted in confidence, the burden shifts to the solicitor to satisfy the Court on the basis of clear and convincing evidence that all effective measures have been taken to ensure that no disclosures will occur" and "in applying the principle it may not be possible for the client to point to a specific item of confidential information. It may be that such a requirement would defeat the very purpose of the duty of confidentiality by disclosing to the Court and to the other party the information in question and its significance ... it may be that this information comprises no more than the knowledge of the client's thinking, its attitudes and of the personalities involved ... given the relationship between solicitor and client in the ambit of professional confidence of which professional privilege is a manifestation, the Court should, in my view, not be slow to accept the existence of such confidential information".

His Honour in this case rejected the submission based on the apprehension of leakage of confidential information - "even accepting that I should approach this aspect of the case generously, I am unable to see or imagine that such confidential information was given to BDW".

Continuing duty of loyalty

However, his Honour was "more troubled by the alternative submission based on the practitioner's duty of loyalty to its client and its former clients and to uphold the special relationship between a solicitor and client" and referred to the analysis of that submission by Brooking JA in Spincode.

⁸⁸ [2003] VSC 505 (Supreme Court of Victoria 23 December 2003)

Village Roadshow submitted that BDW in acting for Boswell “*in its efforts to overturn the second arrangement and to maintain its judgment to the same effect with respect to the first arrangement was in breach of its duty of loyalty to Permanent Trustee which had retained it to act in the preparation of the same argument*”.

Byrne J said “*I was pressed with the unsavoury spectacle of a solicitor acting now for a client whose objective was to strike down an arrangement which another client or former client had an interest in upholding*”.

A spokesperson for BDW was quoted on 20 February 2004 in the Australian Financial Review as commenting on the judgment, “*Importantly, the judge found no misuse of confidential information and the case identified a number of weaknesses in our internal systems which we are addressing*”.

Comments about large firms

Byrne J made some strong comments about large firms:

“*I was pressed with the difficulties which are faced by large firms of solicitors in identifying the similarity of a matter in order to decide whether to accept instructions. It is a notorious fact that a good deal of commercial litigation in this State is conducted by a handful of very large firms.*

How is a client to obtain the services of one of them if the conflict were always applied too strictly. To my mind, this is the price which the clients and the firm must pay.

The firms have found it convenient to become large. This is but one disadvantage of this trend. It is no reason for the Courts to weaken the traditionally high standards of loyalty to the extent which have characterised the practice of law in this State.

Consent to qualified retainer?

When the possible conflict was raised on 12 December 2003, BDW contacted Boswell which instructed the firm to continue to act “and it instructed the solicitors that they were under no obligation to disclose to it information received in the course of their retainer by Permanent Trustee” whereas re Permanent Trustee BDW “*did nothing to clarify its client’s attitude*” and “*it was the client who contacted Ms Owen at BDW on 15 December, having been alerted to the difficulty by Village Roadshow*”.

The objective view of the reasonable person

Byrne J emphasised that it is not simply the arrangements set in place internally which must be looked at but an objective view must be considered – “*I am satisfied that the work of BDW in the preparation of the trust deed sufficiently related to its work in opposing the arrangement of which the deed is part to attract the principle presently under consideration ... the focus then turns to the reaction of the supposed well informed reasonable bystander. Such a person is presumed to know that the duty of a solicitor to its client is to bring to the interests of the client all of its skill and knowledge. It is difficult to reconcile this obligation with the reservation of a compartment of this knowledge ... the supposititious person would doubtless know that the law protects his or her confidential communications with the solicitor in various ways. An apprehension that a solicitor might in a related transaction or a person with an adverse interest, would be likely to erode this confidence (sic)... finally, the person is likely to find it distasteful that a solicitor, having accepted a client’s coin for its labours, can on its client’s behalf, go over to the other side and accept a fee for striving to disadvantage the client in the same or a similar matter*”.

Past judgments have suggested that it is not only necessary to consider the fiduciary duty but also the reputation of the profession and the perception that justice is seen to be done.

Who can object?

An officer of Village Roadshow, on ascertaining the firm’s dual retainers, asked “*How can a firm act for a trustee of a scheme, review the scheme booklet, and then act for another party against the interests of the trustee and challenge the scheme!*”

Counsel for BDW argued that it was for Village Roadshow as applicant to show that Permanent Trustee objected but Byrne J did not agree.

Byrne J's conclusion was "*I have been gravely troubled by this case, but in the end I have formed a clear view that the work of BDW for Permanent Trustee is so closely related to the interests of Village Roadshow that it would be unacceptable that the firm continue to act for Boswell, at least without the clear approval of its earlier client.*"

[9.5.4] British American Tobacco Australia Services Limited v Blanch⁸⁹

Young CJ in Equity made an order restraining a firm of solicitors from acting against a former client on the hearing of a cross claim for contribution before the Dust Diseases Tribunal of NSW.

In doing so his Honour considered submissions based on the duty of loyalty argument in Spincode and also considered his earlier comments in ***Belan v Casey*** and also considered Prince Jefri, rejecting the loyalty argument and saying "*it may be that there are some exceptional cases where equity will give relief in favour of a former client where there is no confidential information present. However, almost every judge who has recently given a judgement on the matter has recognised that there is still no rule forbidding a lawyer acting against former client. As Chernov JA points out in Spincode, such a rule would come into play if one adopted a too liberal view as to the basis of the jurisdiction*".

However, his Honour went on to quote Kirby J in a special leave application from a decision of the Western Australian Full Supreme Court in ***Fordham v the Legal Practitioners' Complaints Committee***, a disciplinary matter where a solicitor has acted for a party P and then, later, when she was acting for another party T who had allegedly kidnapped P cross examined P on his character from information P had given her. Kirby J said that whilst counsel was approaching the problem in the context of confidential information "*the heart of the professional wrong is the act of disloyalty*".

[9.5.5] Sent and Primelife Corporation Ltd v John Fairfax Publication Pty Ltd & Hill⁹⁰

This was a defamation case in the Supreme Court of Victoria, decided in late 2002. The plaintiffs alleged that the defendants defamed them in publishing comments in relation to Mr Sent's alleged involvement in a tax-avoidance scheme involving a company known as Allied Fisheries Ltd. The plaintiffs sought orders to restrain the defendants from retaining Mr Jeffrey Sher QC as counsel for the remainder of the action.

The alleged conflict arose from a conference between Mr Sent, his co-accused Mr Forshaw, their solicitor and Mr Sher in late 1988. Mr Sent's solicitor deposed to Mr Sent's recollection that the conference was about charges laid by the National Crime Authority in relation to the Allied Fisheries matter. Mr Sher professed no recollection of the matter at all but deposed that he found an entry in his fees book that confirmed he had met in conference Mr Sent, Mr Forshaw and their solicitor for approximately one hour. No reference to the subject matter of the conference was made.

His Honour Justice Nettle found that on balance, the subject matter of the conference was likely to have been Allied Fisheries. He found that the nature of the legal work itself bespoke the likely confidentiality of the subject matter of the conference and that as such, the alleged confidential information did not need to be specified with a high degree of precision. He found that there was a real and sensible possibility that matters upon which Mr Sher advised in 1988 would be in issue and that, notwithstanding Mr Sher's then current lack of recollection, there was a real and sensible possibility that it would be revived in the course of close study of materials required to prepare the matter for trial. As such His Honour found that Mr Sher had a conflict of interest which required that he be restrained.

Although the outcome of the matter was already determined by the finding that there was a real and sensible possibility of a breach of the duty of confidentiality, His Honour went on to make comments in relation to the arguments on the duty of loyalty and public policy.

In relation to the duty of loyalty, his Honour said:

⁸⁹

[2004] NSWSC 70 (20 February 2004)

⁹⁰

[2002] VSC 429

98. In **Spincode Pty Ltd v Look Software Pty Ltd**[\[15\]](#), Brooking JA observed that the law in Australia had diverged from that in England to the extent that the danger of misuse of confidential information is no longer the sole touchstone for curial intervention where a solicitor acts against a former client. His Honour held that there is also an independent equitable obligation of loyalty which forbids a solicitor acting against a former client in the same matter or in a closely related matter.

101 It must be accepted that Brooking JA's observations appear to take the law further than it has thus far been held to go in England or New South Wales[\[16\]](#).

However, without discussion of the comments in **Belan v Casey**, **PhotoCure** and **Bureau Interprofessionnel Des Vins De Bourgogne**, his Honour said:

- 104. *If it were necessary to make a choice about the matter, I would respectfully choose to follow Brooking JA's*
- 105. *analysis in Spincode*[\[17\]](#).
- 107. *The trust which a party to litigation reposes in their counsel is more often than not complete. It is and must remain beyond question that the trust is never abused, and accordingly the trust must not only be preserved but must be seen to be preserved. To sanction the prospect of counsel acting against a former client in a matter upon which there is a commonality of issue or inquiry would not be preservative of either.*
....
- 110. *In the result, if I had not been satisfied of the existence of a real and sensible possibility of misuse of confidential information, I would have been prepared to hold that the defendants' continued retention of Mr Sher in this proceeding would give rise to a breach of an equitable obligation of loyalty owed by Mr Sher to Sent.*

As such, Mr Sher was restrained from acting. The case demonstrates some divergence in approach between the Victorian Supreme Court and recent decisions in the NSW Supreme Court and the Federal Court.

[9.5.6] **Belan v Casey**⁹¹

The plaintiff and defendant were co-defendants in defamation proceedings in which awards were made against them. The plaintiff sought a contribution as a joint tort-feasor from the defendant. The parties had been represented in the defamation proceedings by Maurice May & Co, who continued to represent the plaintiff in the contribution proceedings. The defendant filed a notice of motion in those proceedings, seeking to restrain the solicitors from continuing to act for the plaintiff.

In his judgment, Young J found that there was jurisdiction to seek the orders within the current proceedings, ie that there is no need to commence separate injunctive proceedings against the solicitor. His Honour discussed **Prince Jefri Bolkiah v KPMG** and approved it as settling much of the confusion that has existed around the question of restraining a solicitor from acting against the former client. His Honour said:

"17. Prince Jefri decided two basic points: (a) the basis of the claim is the fiduciary duty to maintain information as confidential; and (b) that it is sufficient if the plaintiff demonstrates that there is a real and not fanciful risk of disclosure of confidential information, though it is not necessary to show that the risk is substantial."

His Honour commented that, until the **Prince Jefri** case, the Courts had held that there were three bases on which to restrain a solicitor from acting against a former client, namely:

1. breach of a duty to hold information confidential;
2. breach of a duty of loyalty; and
3. the Court's inherent jurisdiction over solicitors.

⁹¹ [2002] NSWSC 58

However, following the ***Prince Jefri*** case, the sole deciding factor was the protection of confidentiality. His Honour followed this approach, stating:

"21. In my view, the overwhelming weight of authority is to the effect that where the applicant to restrain a solicitor is a former client, the sole consideration is whether there is a real risk of disclosure of confidential information and one does not delve into matters of conflict of interest or conflict of duty. In other situations this delving may well be material."

No evidence of confidential information held by the solicitors was produced and so the solicitors were not restrained from acting.

[9.5.7] In ***Waiviata Pty Ltd v New Millennium Publications Pty Ltd***⁹² the approach of Justice Sundberg is interesting in that he approves ***Prince Jefri*** as being the correct approach, then seeks to distinguish ***Spincode*** on its facts. He also sees the case as having been decided on the combination of factors, rather than each separate head standing alone (at 10):

*"***Spincode*** was a very clear case, where the injunction granted at first instance was sustained on appeal, at least by Brooking JA, on three independent grounds: misuse of confidential information, breach of the duty of loyalty and in reliance on the Court's control over its officers. In ***Spincode***, the foundation for relief based on the Court's control over its officers consisted of the threatened misuse of confidential information and breach of the solicitors' duty of loyalty. What is striking about the present case is that no misuse of confidential information is asserted, and no serious case is propounded of a breach of the solicitors' duty of loyalty. Rather reliance is placed on the Court's control over its officers. It may be that an unusual case could arise when there is no threatened misuse of confidential information and no breach of the solicitor's duty of loyalty, yet it is appropriate to grant relief, but this is not such a case. The motion must be dismissed."*

Waiviata was a well-known and respected publisher of travel guides. The first respondent was a company formed by the second to fourth respondents, who were previously employed by the applicant. The applicant sought relief in relation to contraventions of the Trade Practices Act, passing off, defamation and other related matters arising out of the respondents representing to the applicant's customers that the applicant had gone out of business and that the first respondent was publishing travel guides that succeeded the applicant's publications.

Waivata had been represented for some time by the solicitor Mr Seyfort, who now represented the respondents. Mr Seyfort had advised Waivata on a wide range of matters over a period of about three years. Waivata sought restraint of Mr Seyfort mainly on the basis of the Court's jurisdiction to restrain solicitors from acting improperly. It was unable to point to any confidential information that was relevant to the current proceedings, and did not make more than a 'passing reference' to the loyalty basis.

[9.5.8] *Asia Pacific Telecommunications Limited The Optus Networks Pty Limited*⁹³

Bergin J dealt with the recent authority on the duty of loyalty and concluded "*The delivery of legal services in this modern environment permits a firm of solicitors to act against a former client so long as confidential information that "might be relevant" to a subsequent client in proceedings against the former client can be quarantined from access by solicitors who act against the former client, and there is no real risk of access to or misuse of it. If that is not possible then there are good grounds to restrain the solicitors from acting against the former client. There are no such good grounds in this case.*"

[9.5.8] *Kallinicos & Anor v Hunt & Ors*⁹⁴

Brereton J also dealt with the recent authority on the duty of loyalty and said:

"[23] The power of this Court to restrain a solicitor from acting in an action or other cause because of an alleged conflict of interest is not limited to those instances in which the future action of the

⁹²[2002] FCA 98 (15 February 2002)

⁹³ [2005] NSWSC 550 (20 June 2005)

⁹⁴ [2005] NSWSC 1181 (22 November 2005)

solicitor concerned may imperil confidences of the client for whom the solicitor previously acted. It is an ample power to supervise the conduct of legal practitioners, as officers of the Court, to ensure that they do not act in any way contrary to their obligations to their former client. The broader scope of this power has frequently been referred to as ensuring "that the solicitor's duty of loyalty to the former client is respected, notwithstanding termination of the retainer, and to uphold as a matter of public policy the special relationship of solicitor and client" - McVeigh v Linen House Pty Ltd [1993] 3 VR 394 per Batt JA at 398 and Wan v McDonald (1992) 33 FCR 491 per Burchett J at 513. Examples of this are to be found in Clay v Karlson (1997) 17 WAR 493; Afkos Industries Pty Ltd v Pullinger Stewart [2001] WASCA 372 and Re LPO Transact Pty Ltd (In Liq); Williamson v Nilant [2002] WASC 225. In those cases legal practitioners were restrained from acting in various instances where: there was a potential that the legal practitioner might be a witness in the case; where the subject matter of the litigation was likely to involve an evaluation of the conduct of the solicitor concerned and the efficacy of documents prepared by his firm; and where a solicitor was acting for a liquidator in connection with the liquidator's investigations into the prior activities of an insolvent company where the solicitor had, prior to the insolvency, been acting for the company. In some of these cases it is obviously apposite to speak of the solicitor's duty of loyalty to the client which continues even after the termination of the period of his retainer. This seems to be a broad general recognition of the scope of the duties which a solicitor owes to a client, even a former client, arising from the fiduciary relationship between them.

...

[26] Consequently, when an application is made to restrain a legal practitioner from acting in a cause for reasons other than the risk of disclosure or misuse of information provided to the practitioner in confidence by the former client, it is of importance to identify precisely what obligation towards the former client or to the court may be breached or imperilled by the practitioner acting in the cause or against the former client. This approach is important because, otherwise, there may imperceptibly develop an expectation that the freedom of a client to engage a legal practitioner of his or her own preference, and the freedom of a legal practitioner to act even against a former client, where such a course does not involve any breach of his fiduciary obligations arising from the earlier retainer, is open to adventitious challenge as a means of harassing an opponent in a cause."

[9.5.9] Conclusion

The concept of the continuing duty of loyalty preventing a solicitor from acting against a former client might seem an extreme approach but not so when one considers it as a "retainer based" rather than a purely "client based" issue.

[9.6] Family Law Cases

[9.6.1] The test of "real and sensible possibility" has been approved in a number of family law cases which can have general application. This is notwithstanding the perhaps more sensitive nature of family law matters although one might consider that family law matters while being intensely personal, may be no more sensitive than matters involving confidential commercial information or criminal matters which can also be said to hold a special place. The principles are discussed most thoroughly in the leading cases which are therefore really very worthwhile reading as they have generally application to other sorts of matters.

These cases stress the importance of justice being seen to be done.

[9.6.2] The first of these leading cases is a judgment of FredericoJ in *In the Marriage of Thevenaz* 95.

The husband applied for orders to prevent the wife's solicitor acting for her in property proceedings. The solicitor had been a partner in a firm which had acted for the husband and wife in respect of several conveyancing transactions, including the purchase and sale of the final matrimonial home. The solicitor himself did not handle the transactions and the firm was subsequently dissolved. However, the solicitor retained within his possession or power files and records relating to the earlier conveyancing transactions conducted by his former partner. The husband argued that materials in

the files related to the previous dealings with the firm and related to confidences exchanged between him and the firm which would embarrass him.

His Honour stated of those circumstances that:

"Whilst the husband has not asserted any specific confidence which might have been exchanged during the course of the previous dealings, I am informed that the files relevant to those previous dealings disclose information differing from the instructions given by the husband to his present solicitors and that the husband could be embarrassed by the disclosure thereof."

And further, in referring to **Spector v Ageda** (above at [7.4]):

"The problem, however, is that it is the practitioner's duty to put at his client's disposal, not only his skill but also his relevant knowledge and if he is not prepared to make that knowledge available, he should not act."

His Honour concluded the solicitor should not continue to act on behalf of Mrs Thevenaz as:

"It may well be that the risks were he to do so are more theoretical than practical. However, it is asserted and not contradicted that material in the files does relate to confidences exchanged in the course of the former firm previously acting on behalf of both parties and would embarrass the husband. It is of the utmost importance that justice should not only be done but should appear to be done. In the circumstances of the present case, there is a risk which may well be merely theoretical but still exists, that justice might not appear to be done."

[9.6.3] In **In the Marriage of A & B**⁹⁶ SmithersJ considered an application by a wife to restrain solicitors from continuing to act for the husband in family law proceedings on the ground that the solicitors, and a junior counsel whom they had briefed, had previously acted for the man with whom the wife was then cohabiting in a de facto relationship. The solicitors had not previously acted for the wife and it could not be claimed that they had any confidential information of hers which might be used to her disadvantage in the proceedings. SmithersJ held that the knowledge which the solicitors had in respect of the de facto husband's suitability as a stepfather and his financial circumstances would allow them a unique advantage which would unfairly prejudice the wife. His Honour concluded that there was "*a real risk of injustice to the wife... if their present solicitors and junior counsel continue to act for the husband*".

It has been submitted that the decision goes beyond the protection of confidential information gained by a solicitor from a former client and appears to have been based more broadly on the principle central to the reasoning in **Thevenaz** that justice must not only be done but also must be seen to be done, and the Court's concern to ensure that a real risk of injustice is avoided in proceedings before it.

[9.6.4] In **Magro v Magro**⁹⁷ RourkeJ stated, concerning the artificialities of "building walls around information" that it was relevant to consider "the peculiar qualities of family law litigation". In this case the Court restrained the husband's solicitor from acting in relation to contested property proceedings in the Family Court on the basis that a solicitor formerly acting for the wife became employed in the firm acting for the husband.

The matter was first raised with the Law Society. The husband's solicitor requested the Society to defer any ruling as proceedings were pending.

The husband argued that the wife had demonstrated no breach of confidence but it was held that it was reasonable to infer that the wife's former solicitor, now in the employ of the husband's solicitor, was in possession of at least some privileged material belonging to the wife which could be used to the husband's advantage and in such circumstances the appearance of justice would not long "survive any general impression that lawyers can readily change sides".

96 (1989) 13 Fam LR 798
97 [1989] FLC 92-005

As a matter of probability there was in fact a real risk of injustice being done to the wife if the present situation were allowed to persist.

His Honour dealt in some detail with the involvement of the wife's former solicitor in the matter and it was clear it was significant:

"Mr B was retained by the wife in relation to the property dispute from about the middle of May 1987 until 10 December 1987. Mr B Was at all material times an employed solicitor. It was during Mr B's retainer that the property proceedings pending in the Court were initiated..."

No doubt because of the complexity of the issues involved, Mr B had numerous attendances upon the wife in the course of preparing affidavits and taking her instructions. The wife asserts that there were 35 hours of conferences and numerous telephone attendances, and that she produced 75 pages of written instructions. I see no reason to doubt this evidence, particularly in the light of the detailed memorandum of costs which Mr B produced upon the termination of his services by the wife... The total charge came to \$7,680.75. The quality of Mr B's work and the depth of preparation involved in the case during his 7 months' retainer are not in dispute; indeed, I can and do infer from the account... that the case, from the wife's point of view was most adequately and thoroughly prepared by dint of many hours of conference. The wife asserts that Mr B: "He knows my whole life and my past history" (or words to that effect)."

Rourke J noted that the husband's solicitor had undertaken not to discuss the matter with his wife's former solicitor. While saying that *"there is no evidence before me of any breach of these undertakings, and I am prepared to assume in favour of both Mr M and Mr B that each is an honourable and respected legal practitioner whose integrity is not in question"*, he went on further to say:

*"Even on these assumptions, if I follow the reasoning of Frederico J in **Thevenaz** it is the appearance of justice not being done which is the determinant, and not the probability. If this be the correct principle the injunctive relief sought in the present proceedings is prima facie irresistible."*

His Honour did go on to point out however, *"the question... is not quite as simple as it appears at first glance"* and analysed the line of authority including **Rakusen, D & J Constructions** and **Sogellease Aust. Pty Limited v MacDougal & Ors.** He also quoted the following from the 7th edition of **Cordery on Solicitors** which states at page 71:

*"Each case turns on its own facts, and while the Court may require from solicitors a higher standard of conduct than from persons who are not its officers, yet the principle upon which it restrains a solicitor from acting against a former client is the prevention of the confidence reposed in the solicitor by his former client; accordingly, before an injunction can be obtained, the Court must be convinced of the existence of such confidence and of the probability of it being abused: **Rakusen v Ellis Munday & Clarke** (supra). Whether the solicitor was discharged by the former client or withdrew is material only in so far as it throws light on the question whether confidence is likely to be abused. The principle applies both where one partner in a firm of solicitors is acting for a client and another partner proposes to act against the former client, and where a clerk formerly in the service of a solicitor sets up business on his own account and proposes to act against a client of his former master."*

[9.6.5] **Gagliano v Gagliano** 98, a decision of Renaud J contains a very helpful analysis of the authorities including the abovementioned family law matters.

There were three bases on which the wife sought to have the husband's solicitor restrained from acting:

- He had acted for both parties when they purchased a home unit in their joint names, when they subsequently sold it and also drafted the wife's will.

Her Honour found no evidence that were the solicitors to continue to act for the husband there would be "real mischief and real prejudice" or the appearance of possible injustice.

- The second ground was that as the solicitor acting for the husband was his brother, his personal involvement in the parties' marital affairs put her at a disadvantage as the brother could place at the disposal of the husband or counsel his own knowledge of the wife's behaviour and personality.

Her Honour held that:

"Although the solicitor's involvement and the distinct possibility that the solicitor might lack professional objectivity, however, his observations, and possibly his impressions of the wife formed during the parties' marriage, would not necessarily be any more prejudicial to her than those of witnesses called by the husband, and there is no general prohibition on a party retaining a solicitor/relative to act for him."

- Thirdly, that there was a breach of fiduciary duty.

Her Honour found that there was a breach of fiduciary duty on the part of the husband's solicitors and that they should cease acting because of the circumstances that a trust fund had been set up in the wife's name apparently for taxation purposes, the brother/solicitor being a signatory for the trustee, the husband's solicitors. There were various transactions on the account, none authorised by the wife, and a week after the parties separated the remaining balance was withdrawn by the brother on the husband's instructions.

Her Honour stated:

*"In all the circumstances I am of the view that there are sufficient analogies with **Rakusen** and its descendants, to enable me to hold that this case has the same 'base and sub-structure' namely, the breach of fiduciary duty. There would be a 'real mischief and real prejudice' resulting to the wife from [the solicitors'] apparent breach of their duty as her trustees so long as they continue to act as the husband's solicitors. Justice could not appear to be done to the wife while that situation continues."*

[9.6.6] In **Griffis & Griffis** ⁹⁹ Mullane J granted an injunction restraining the wife's solicitor from acting for her further in property proceedings where the husband and wife had previously consulted the solicitor about their income tax. This leading case contains an excellent analysis of the issues.

His Honour reached the following conclusions:

- It is doubtful that the solicitor/client duty of confidentiality applies to disclosure to the wife of information which the husband gave the solicitor orally in her presence.
- The husband's evidence is that the contents of the business records and other documents he gave to the solicitor were confidential and may be used to his prejudice in these property proceedings. While the documents were not in evidence, His Honour contemplated that they would include profit figures, expense figures, wages paid etc and that "*it is easy to recognise ways in which such information could, even without disclosure to the wife, be used by the solicitor to the prejudice of the husband. It could give rise to the issues of subpoenae to the husband or others for production of records, or to recruitment of particular witnesses. It would be the basis of some cross-examination of the husband. It could be used to attack his case or his credit.*"
- In terms of the test in **Mills' case**, the solicitor placed himself in a position where his interest and his duty conflict. It is a situation which might lead to an unwitting breach of the duty.
- The injunction to restrain the solicitor from acting for the wife was granted.

As to the solicitor/client fiduciary relationship His Honour said:

"Generally the object of the law as to fiduciary duties is to protect and advance the interests of the beneficiary in a fiduciary relationship. In addition to the solicitor/client relationship there

are public policy objects including maintaining the credibility and public acceptance of the Courts and the solicitor/client relationship.”

A contentious point is the proving of the confidential material. His Honour referred to the public policy so often declared by the Courts that justice must be seen to be done, and the fact that the duty of confidentiality is based in part on the need for public confidence in legal representation in the legal system.

His Honour therefore advocated following the approach in **Mills**, quoting the following from that case, noting that their Honours took the view that where there was a conflict between the solicitor and former client as to whether a confidence had been imparted, if the judges:

“... were to insist upon actual proof of the existence of such confidence and to insist upon knowing what it was and whether it was likely to prejudice a client’s interest, they would compel him to strip himself of the protection which the Court usually afforded and the whole mischief he wished to avoid might arise. ... in cases of this kind less mischief would accrue through granting the protection sought than in accepting the oath of the attorney against the client. The client’s interests should prevail, and the judge should refuse to determine the matter on the conflicting testimony of the affidavits.”

His Honour noted firstly that in **Rakusen** there was no issue that there was a confidence which had been given to the solicitor’s partner by the client which could be used to the prejudice of the client in proceedings to which the solicitor was acting for the client’s former employer and that generally Australian Courts have not followed this aspect of the **Mills** decision noting Bryson J in **D & J Constructions** expressed reservations about such an approach because of the danger that “*the injunction proceeding thus in any case has been a venue for the solicitor to disclose confidential information of the confider without his consent by way of establishing that such information is not, despite the general damage of its disclosure, such as would cause particular damage by use for, or disclosure*”.

[9.6.7] **Rothschild v Mullins & Anor**¹⁰⁰

This was a case involving a client who was represented by a solicitor employed by the Legal Aid Commission, Ms Harris, first in arson charges and again in a Social Security fraud prosecution. During the fraud matter, she commenced employment with the body prosecuting the client, the Commonwealth Director of Public Prosecutions. It was accepted that she was in possession of relevant confidential information. Her contract of employment was for six months, after which she left the DPP. She was not employed at the time of the appeal.

On commencing employment with the DPP, Ms Harris immediately informed all other solicitors and support staff that she had represented Mr Rothschild, had a conflict of interests, and could not discuss any aspect of the matter at all.

In a joint judgment, Justices Underwood, Blow and Crawford held that there was no possibility that Ms Harris had communicated confidential information to other solicitors and staff employed by the DPP. There was no discussion of whether there was any other basis on which to restrain Ms Harris from acting. It was noted that the Family Court applies a stricter test than the Common Law cases (at 12):

*“The Family Court will grant such an injunction even if there is only a theoretical risk that a solicitor might disclose, even inadvertently, confidential information provided by a former client: **In the Marriage of Thevenaz** (1986) FLC 91-748; **In the Marriage of Magro** (1989) FLC 92-005; **In the Marriage of McMillan** (2000) FLC 93-048. In commercial cases, other superior courts have applied a less strict test, whereby an injunction will be granted for the purpose of protecting the disclosure of confidential information, but not if it is shown that there is no real risk of disclosure of that information. The decision of the House of Lords in **Prince Jefri Bolkiah v KPMG** [1999] 2 AC 222 has generally been followed: **Pradham v Eastside Day Surgery Pty Ltd** [1999] SASC 256; **Newman v Phillips Fox** (1999) 21 WAR 309; **World Medical Manufacturing Corporation v Phillips Ormonde & Fitzpatrick Lawyers** [2000] VSC 196; **A & B v Disciplinary Tribunal** [2001] TASSC 55; cf **Spincode Pty Ltd v Look Software Pty Ltd** [2001] VSCA 248.”*

¹⁰⁰

[2002] TASSC 100 (15 November 2002)

[9.6.8] In **Kossatz v Kossatz**¹⁰¹, Mullane J also considered an application for an injunction to restrain the solicitor from acting against a party. This raised two interesting questions:

- Firstly whether prior social contact with the parties should ground an injunction.
- Secondly whether involvement in proceedings in a judicial role could ground an injunction.

The wife made application to restrain the husband's solicitors, senior counsel and junior counsel from acting further for him in property proceedings on the basis that:

- A solicitor who had worked in the office of the wife's former solicitors when they acted for the wife in these proceedings had become an employee in the firm of solicitors acting for the husband. However, it was found that the solicitor had not obtained any information or knowledge about the firm or her proceedings while employed by the wife's former solicitors and therefore there was no confidence to protect and no conflict or breach to be feared.
- Junior counsel had previously been Registrar of the Court and granted an application by the husband for short service and made interim orders by consent. His Honour found it was not unseemly, improper or unfair for her to appear for the husband. There was nothing in the facts which created for her any duty or obligation to the wife or conflict with her duty to the husband - "*the argument... suffers from a basic logical defect - the sequence is that she has moved from the judicial role to a partisan one; not the reverse*".
- Senior counsel had had prior contact with her on a social basis and was alleged to have obtained experience of the wife's character, personality and weaknesses which could be used by him to her great disadvantage if he continued to act for the husband. His Honour found the wife's contact with senior counsel had been infrequent and their relationship was not close or familiar. He said:

"Two meals in 12 years and the other contacts referred to does not constitute what one might expect her to regard as a friendship. It was casual contact only."

And further that counsel for the wife "conceded that he was unable to provide any authority if knowledge of a lawyer obtained through social contact with a party to proceedings can base an order restraining him from acting against such party in the proceedings. Clearly such a lawyer is free to be a witness or adviser in respect of such knowledge and thereby assist an opposing party to the proceedings. There is no professional rule limiting a lawyer's freedom to act against a friend or former friend".

[9.6.9] In **In the marriage of B J McGillivray and P K Mitchell**¹⁰² the Full Court declined to prohibit a solicitor, who acted for the husband in his divorce from his first wife, from acting for the second wife in property proceedings against the husband. The Court took into account that the husband had failed to make his protest against the solicitor's representation of the second wife quickly enough and failure to do so cast doubt upon the bona fides of his later complaint about the practitioner having confidential information.

[9.7] Insurance cases – duties owed to insurer and to insured

[9.7.1] When a solicitor acts for an insured party on the instructions of an insurer, while the insurer is the party directing the litigation and the role of the insured may be limited to providing information, a solicitor/client relationship exists with both. This is particularly important in considering where the duty of confidentiality lies and what happens should a conflict of interest arise typically where information comes to light suggesting that the insurer should decline indemnity. Two fairly recent cases provide some guidance in this area.

[9.7.2] **C I & D Industries v Keeling**¹⁰³

Orders were made restraining a firm of solicitors from disclosing to any person other than the insured or its solicitors confidential material. Similar relief was obtained against the insurer. The solicitors had originally filed a defence in proceedings commenced against the insured which involved an issue

101 [1993] FLC 92-386

102 23 Fam LR 238

103 (1997) Unreported

of the definitions of "worker" and "who was the employer" of the plaintiff. The solicitors wrote to the insured indicating they had received instructions from the insurer who was "*currently considering whether indemnity should be extended to your company and we will be in further communication in this regard in due course.*" They said further "*In the meantime, so as to ensure that the interests of both our client, insurer and your company are protected we have been instructed to file a defence on your behalf.*" The insurer was the workers compensation insurer of the defendant but it emerged following further advice that the company should be represented by its public liability insurer.

The court rejected a submission that unless and until indemnity was confirmed a solicitor/client relationship did not arise between the solicitors and the insured. His Honour said "*I do not see why the matter of indemnity by the insurer could not be left to be determined with the solicitors nevertheless entering into a solicitor/client relationship with the insured. Such relationship would not depend only upon the implementation of the insurer's right to defend, (which it could seemingly have the right to do under the policy), even though a liability to indemnify was yet to be established*", and further "*It is however correct to say, that many of the cases dealing with the relationship between solicitor and client, where the insurer has under a contractual policy condition, or statutory provision, arranged for the solicitor to act for the party insured are cases where there was no dispute as to the existence of an indemnity under the relevant policy.*" Further comments are made in the judgment relating to this issue.

As to the duty of confidentiality arising from the solicitor/client or any other relationship his Honour said:-

"In my view assuming it be necessary for me to so decide, (absent a relationship of solicitor and client which I have found) I would also conclude that in the circumstances, a relationship of trust and confidence as and between the solicitor and [the insured] existed as to give rise to a duty of confidence and a duty on the part of the solicitors to protect confidential information."

[9.7.3] *Oceanic v HIH* ¹⁰⁴

Austin J dismissed a summons seeking an order that the first defendant, HIH, be restrained from continuing to retain the second defendants, a Sydney firm of solicitors and the third defendants, a Hobart firm of solicitors, in proceedings in the Supreme Court of Tasmania. The plaintiff also sought to prevent the defendants from using documents allegedly obtained in breach of duty.

His Honour fully explored the authorities relating to conflict of interest in acting against a former client and related principles, concluding that "*Oceanic has not made out any entitlement arising out of the law of fiduciary duties which would support injunctions to restrain HIH from retaining McCabes and Gunson, or to restrain McCabes and Gunson from acting for HIH.*" It was found that there was "*no real sensible possibility of conflict between McCabes' interest in advancing HIH's case and its duty to IRPS [an insurance agent of Oceanic]. Additionally, just as the assignment of the right to claim under the policy was not effective to give Oceanic any right to complain about a conflict of interest on the part of McCabes, so also was the assignment ineffective to give Oceanic any right to claim that McCabes breached its fiduciary duty of loyalty to IRPS.*"

In a third case, *British American Tobacco Australia Services Ltd v Blanch & Ors t/as Hicksons Lawyers*¹⁰⁵ delivered on 20 February 2004, Young CJ in Equity in the Supreme Court of New South Wales granted an injunction restraining a firm of solicitors from acting on a cross claim against BATAS in which they acted for the former employer of a worker who brought proceedings in the Dust Diseases Tribunal of NSW. The firm had previously acted for BATAS on the instructions of an insurer, Allianz, which also instructed them in the present claim. His Honour found that "Hicksons owed a duty to BATAS to protect the confidence and privilege in information which was imparted in confidence pursuant to the solicitor/client relationship ... any information which Hicksons acquired acting as solicitor for Allianz, the insurer for BATAS, from BATAS was subject to a similar obligation of confidence".

¹⁰⁴

(Unreported, NSW Supreme Court, Austin J, 1 April 1999 [1999] NSW SC292)
[2004] NSWSC 70

[9.8] Acquisition of knowledge as to client's personal characteristics

In *Mintel International Group Limited -v- Mintel (Australia) Pty Limited*¹⁰⁶ Heerey J considered a claim that counsel should be restrained from appearing for a party due to a conflict of interest in that he had formerly acted for an opposing party and therefore had a conflict of interest arising from his personal experience of the party and knowledge of that party's personal characteristics which amounted to conduct which was unconscionable and which the Court should not tolerate as affecting the administration of justice.

While accepting what Gillard J stated in *Younghanns and Ors -v- Elfic Limited*¹⁰⁷ ("... The relationship between solicitor and client may be such that the solicitor learns a great deal about his client, his strengths, his weaknesses, his honesty or lack thereof, his reaction to crisis, pressure or tension, his attitude to litigation and settling cases and his tactics. These are factors which I would call the "getting to know you" factors") it was not found in this case this should lead to restraint. Heerey J said "As for the "getting to know you" principal, this amounts to no more than Mr Collinson meeting with Dr Hughes and forming the impression that he was an intelligent and educated man who, in the course of the mediation, showed some originality in proposing settlement ideas. That, to my mind, falls far short of imposing the kind of restriction contended for".

[9.9] Confidential information obtained by employed solicitors and paralegal

In *McMillan & McMillan*¹⁰⁸ the Court considered an appeal against orders made restraining a firm of solicitors from acting in Family Court proceedings where a non-legally qualified law clerk had previously been employed by the solicitors acting in the proceedings for the opposing party and who had in the course of that employment worked on the opposing party's case had moved to work as a secretary for the other party's solicitor. The Full Court found that it made no difference that the employee was not a qualified lawyer. The appeal was dismissed. The Court referred to *Lord Ashburton -v- Pape* in which the English Court of Appeal stated 'The clerk of a solicitor is in a confidential position. His duty is not to disclose his master's business, the client's business...'.

Therefore it is clear that a conflict of interest and duties may arise even where no solicitor in a firm has confidential information but it resides in an unqualified person who might disclose it.

[10] Preventive measures: Conflicts registers/checks; Information Barriers

[10.1] Conflict register/checks

Experience indicates that when taking on a new client it is often tempting in smaller law practices to rely more on word of mouth whereas larger firms, because of the virtual impossibility of having an informal system which will highlight a conflict of interest, have quite sophisticated systems.

Examples of information which should be obtained are:-

- Have all interested parties to the transaction been identified?
- Have all clients who may have an interest in the transaction been identified?
- If a new client is a corporate client do you have details of all parent, subsidiary, associated or affiliated companies and details of all officers of such companies?
- Have all members of the firm registered their interest held outside the office eg offices, positions, financial interests?
- Would any such positions held potentially give rise to a conflict?
- Is a register maintained of all property owned by partners and would any such interest give rise to a conflict?

¹⁰⁶ (Unreported) Heerey J, Federal Court of Australia 29 September 2000 - [2000] FCA 1410

¹⁰⁷ (Unreported, 3 July 1998)

¹⁰⁸ Unreported judgment of Finn, Kay and Moore J J, Full Court of the Family Court of Australia at Melbourne unreported 6 October 1999 [2000] Fam Ca 1046

- Is the firm, by whatever means, in possession of confidential information obtained from the client base that is relevant to the present matter?

[10.2] Information Barriers (“Chinese Walls”)

The Background - attempts at definition

Some solicitors have sought to avoid the problems implicit in acting for more than one client in a transaction or proceedings by setting up “Chinese walls” as they are called in Australia or “cones of silence” as they are referred to elsewhere to impound the information. Most attempts have not survived judicial or professional scrutiny.

In 1992 a commentator described the term “Chinese walls” as an “imprecise metaphor” and noted an experienced commentator who suggested some cynicism behind the use of the name by saying *“the Chinese used to make walls out of paper through which you could whisper and therefore the name is a flagrant indication of what goes on”*.¹⁰⁹ I think while its use may have derived by analogy the more substantial wall in China in order to give some support for their use, the context in which they are referred to in the cases in Australia and also in New Zealand, Canada and the USA, departing from the English approach, suggest sympathy with the more cynical approach.

In *Malleons v KPMG Peat Marwick & Carter*¹¹⁰ (referred to above) Ipp J stated of the practice that has become known as a “Chinese wall”:

“The derivation of the nomenclature is obscure. It appears to be an attempt to clad with respectable antiquity and impenetrability something that is relatively novel and potentially porous.”

Of the particular issue his Honour stated:

“It was submitted that the physical separation between the taskforce and the rest of the firm would minimise the opportunities for “wordless communication” of the kind mentioned by Bryson J. While I accept that such opportunities have been reduced it has not been established that they have been removed altogether.”

The threshold question is not whether a Chinese wall can be set up to prevent a breach of duty arising from a conflict of interest but rather whether there is a conflict of interest/duties at all.

[10.2] Information Barrier Guidelines

In late 2005 the Law Society and the Law Institute of Victoria commenced collaboration on the drafting of information barrier guidelines. Submissions were invited from the profession and relevant entities noting that in recent years the courts have approved the use of information barriers and neutralise the conflict of interest when acting against a former client and that the standard to be achieved is quite stringent, therefore the barrier must effectively safeguard the information. On 16 March 2006 the Council of the Law Society approved the draft guidelines. The Information Barrier Guidelines are on the Law Society website.

[10.3] Asia Pacific Telecommunications Limited v Optus Networks Pty Limited¹¹¹

Bergin J refused to restrain Clayton Utz from acting for the defendant in Supreme Court proceedings on the basis that the plaintiff had not established a proper basis upon which the firm should be so restrained.

Her Honour said *“In my view a fair minded reasonably informed member of the public would conclude that the administration of justice is not adversely affected by the processes that have been put in place to protect the confidential information given to Clayton Utz during the Retainer. By reason of*

109 See Aitken, Lee “Chinese Walls’ and conflicts of interest” (1993) Roll 18 No. 1
Monash Law Review

110 (1991) 4 WAR 357

111 [2005] NSWSC 550 (20 June 2005)

the proof that there is no real reason that the information, said to be confidential, will be available to the solicitors for the defendant, I do not accept that the perception that justice must be done and appear to be done is at risk”.

Clayton Utz submitted that it had put in place sufficient arrangements to ensure that no lawyer involved in the proceedings appearing or acting for the firm's former client Optus would have access to any information provided during the period of the retainer during which the firm had received confidential information from the plaintiff. Evidence was put in place of arrangements to protect the confidentiality of the former client including undertakings which all relevant solicitors (those involved with the earlier matter and those involved with the current matter) would provide to the Court including, on the part of the solicitors acting in the current matter, that they would not discuss or seek to discuss with those solicitors involved in the earlier matter information obtained during the course of listed matters, and would not seek or obtain access to any files or documents, including electronic files and documents in the possession of the firm.

[10.5] **Prince Jefri Bolkiah v KPMG (A firm)** ¹¹² is essential reading. Lord Millett noted:

*“Chinese Walls are widely used by financial institutions in the City of London and elsewhere. They are the favoured technique for managing the conflicts of interest which arise when financial business is carried on by a conglomerate. ... they contemplate the existence of established organisational arrangements which preclude the passing of information and the possession of one part of the business to other parts of the business ... even in the Financial Services Industry, good practice requires there to be established institutional arrangements designed to prevent the flow of information between separate departments. Where effective arrangements are in place, they produce a modern equivalent of the circumstances which prevailed in **Rakusen’s case [1912] 1 Ch831**”. The case actually deals with a firm of chartered accountants, not a firm of solicitors but the Court found “The nature of the work which a firm of accountants undertakes in the provision of litigation support services requires the Court to exercise the same jurisdiction to intervene on behalf of a former client of the firm as it exercises in the case of a solicitor. The basis of that jurisdiction is to be found in the principles which apply to all forms of employment where the relationship between the client and the person with whom he does business is a confidential one”.*

A firm of chartered accountants was retained by Prince Jefri originally in his capacity as Chairman of the Brunei Investment Agency which was involved in major litigation relating to Prince Jefri's financial affairs. It was retained to provide forensic accounting services and litigation support and was given access to highly confidential information concerning the extent and location of Prince Jefri's assets. Not long after the litigation was settled he was removed from his position as Chairman of the BIA and the Brunei Government appointed a finance taskforce to investigate Prince Jefri's activities during the period of his Chairmanship. The BIA retained the same firm of chartered accountants to investigate the whereabouts of certain assets which it was suggested Prince Jefri had used for his own benefit. While they took steps to protect Prince Jefri's confidentiality the Court found that the defendants had not discharged the burden of showing there was no real risk that information confidential to Prince Jefri might unwittingly or inadvertently come into possession of those working on the current matter and an injunction was granted restraining the firm from continuing to act.

Bryson J in **D & J Constructions v Head**¹¹³ that “*the Court would not usually undertake attempts to build walls around information in the office of a partnership, even a very large partnership*”.

This concept is strongly supported in the **Prince Jefri** case where the test is stated in the following terms at page 227:

“Once the former client has established that the defendant firm is in possession of information which was imparted in confidence and that the firm is proposing to act for another party with an interest adverse to his in a matter to which the information is or may be relevant, the evidential burden shifts to the defendant firm to show that even so there is no risk that the information will come into the possession of those now acting for the other party. There is no rule of law that Chinese walls or other arrangements of a similar kind are insufficient to eliminate the risk. But the starting point must be that, unless measures are taken, information

¹¹² [1999] 2 W.L.R. 215

¹¹³ (1987) 9 NSWLR 118

moves within a firm. In MacDonald Estate v Martin,¹¹⁴ Sopinka J said that the Court should restrain the firm from acting for the second client “unless satisfied on the basis of clear and convincing evidence that all reasonable measures have been taken to ensure that no disclosure will occur” with the substitution of the word “effective” for the words “or reasonable” I would respectfully adopt that formulation”.

This obviously takes the requirements further by the substitution of the word “reasonable” with “effective” ie the firm must *ensure* that no confidential information is imparted rather than simply taking steps to attempt to quarantine it.

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

While this case and others note that it is theoretically possible to erect Chinese walls to quarantine information to prevent a breach of confidentiality to a former client, in practical terms it may be an almost impossible task.

It seemed not so impossible in the **Russell McVeagh** case referred to above. While the House of Lords rejected the reasoning in that case it is nevertheless a useful examination of case law up to that point.

A firm of sixty four (64) partners with a total of one hundred and ninety (190) fee earning personnel had taxation advice as one of its specialist areas of practice. It appealed against a decision of the New Zealand High Court at Wellington disqualifying it from acting or continuing to act for any party against the respondent, Tower Corporation. In September 1995 Tower had sought expert advice from a partner in the Wellington office of RMMB concerning a particular transaction entered into by Tower in 1990 affecting its taxation position in that year although the judgment notes “If tax was payable and inadequate provision had been made in Tower’s accounts, an adjustment would necessary be required in the accounts for the year in which the tax dispute was resolved”.

In May 1996 ie while the firm was still advising on the tax dispute, an Auckland partner of the firm was asked by another client to give advice on a means whereby Tower could be acquired and demutualised. Tower was strongly resistant to that aim.

The Auckland partner knew the Wellington partner had advised Tower on the tax dispute. The latter had earlier declined to accept instructions from another party to that transaction. The two partners thought that there was no problem in the firm acting in the latter matter and the first partner did not consider he had any information about Tower likely to be of interest to the other client. The Court noted that “it was never in contemplation” that the partner who handled the first matter or anyone in his team would have any involvement in the second matter. Therefore the Auckland office accepted the instructions but when Tower found out, some sixteen (16) months later, it objected.

The allegation of Tower is described as follows:-

“Tower alleges that in acting for it on the tax matters, particularly the tax dispute, Russell McVeagh had obtained information valuable to a hostile bidder like GPG about Tower’s method of operations, its negotiating style, its corporate culture and structure and the

personalities of members of its management team. It says that the firm has also gained particular knowledge about Tower's financial affairs. All this knowledge is said to be confidential to Tower and potentially useful to GPG in pursuing its planned acquisition".

The Court found that there had been no disclosure of information confidential to the former client and that "actual disclosure is now most unlikely to occur". It accepted that the solicitors had given undertakings that there would be no disclosure of confidential information and had put in place arrangements to ensure that the undertakings would be honoured. There did seem to be some doubt as to whether the confidential information (which came down to three sheets of figures relating to the year 1990) would have any present significance.

The judgment noted that the firm operates an Ethics Committee and internal procedures designed to cover conflict of interest situations.

Some comments were made about the hardship which might be occasioned to the current client requiring it to obtain other representation because of the extensive work RMMB had already done and its particular expertise.

[10.6] In **D & J Constructions Pty Limited v Head**¹¹⁵ the plaintiff sought to restrain a firm of solicitors from acting for another company with which it was in dispute, claiming the solicitors had previously acted for a director of the plaintiff and obtained confidential information which might be used against it. They had not acted for the company itself although there was ambiguity in the correspondence with the director. His Honour, in refusing to grant the injunction stated:

*"In my view, the legal basis on which the Court should act in restraining solicitors from acting for the opposite side after acting for one party before or during litigation appears from statements in the Court of Appeal of England in **Rakusen v Ellis Munday & Clarke** ... where confidential information has been communicated by a client to a solicitor and is relevant to litigation in which that client is now engaged and is still available to the solicitor, the Court should take a cautious approach to any proposal that it should allow the solicitor to act against that client: the considerations are much the same whether the information was communicated in the course of the litigation itself or in earlier business and whether or not the solicitor is a sole practitioner or is one of a number of partners employed by a principal. I would think that the Court would not usually undertake attempts to build walls around information in the office of a partnership, even a very large partnership, by accepting undertakings or imposing injunctions as to who should be concerned in the conduct of litigation or as to whether communications should be made among partners or their employees. The new client would have to join in such an arrangement and give up his right to the information held by such parties and staff as held it. Enforcement by the Court would be extremely difficult and it is not realistic to place reliance on such arrangements in relation to people with opportunities for daily contact over long periods, as wordless communications can take place inadvertently and without explicit expression..."*

Bryson J refused the injunction not being satisfied that the solicitors had any confidential information they could use to the plaintiff's detriment. He also found that there was in fact no solicitor/client relationship although that was not the crucial point. His Honour noted that the former director had not attempted to give evidence about the subject matter of any confidential information which he had conveyed to a solicitor of the firm and that although he may have made disclosures of material facts no evidence established whether he did make such disclosures, what they were or whether they were of information which was confidential to the plaintiff.

His Honour commented:

"The appearance which matters is the appearance presented to a reasonable observer who knows and is prepared to understand the facts. The Court should weigh the facts and assess the risks in the eye of reality, theoretical risks should be discarded and when as here there is no confidential information available and there never was a relationship of solicitor and client with any partner the appearance of the matter is not a basis for the Court to assume control over the retainer."

While quoting **Rakusen** with approval his Honour said:

"It would seem that in deciding the degree of control which it should adopt each court must to some extent interpret its own time and manners and of the conduct which it should expect from or even fear from its practitioners. Some ages and some classes of business could well require a more ready apprehension of mischief and the Court of Appeal of England and thought it appropriate in 1912 more than I think appropriate here and now."

[10.7] In **National Mutual v Sentry** (referred to above) GummowJ considered an objection by Sentry Corporation to solicitors who were previously consulted by it in acting for National Mutual in proceedings against it.

This problem arose out of the merger of firms. The firm which had originally advised Sentry was not part of the firm which subsequently acted for National Mutual at the time. The merged firm by that stage no longer acted for Sentry.

This is a problem which is arising more and more with the merger of firms and the movement of solicitors within firms. It is submitted that one must look closely at the facts of an individual case and this is supported by judicial comment in many of the cases cited.

In conclusion GummowJ said:

"There is a real possibility that the law in this country is no less stringent than that which Sentry submitted to be the law applied in New York Proceedings."

That is, his Honour noted, in some US courts presumptions have been applied that confidential information was revealed by the former client to his attorney and that the information would be used contrary to the interests of the former client.

Additional issues include the extent to which knowledge of a lawyer is imputed to other lawyers within a firm. This has a great bearing on the consideration of whether "Chinese walls" can operate effectively and whether undertakings will resolve a problem.

[10.8] In **Supasave Retail Limited v Coward Chance; David Lee & Co (Lincoln Limited) v Coward Chance** (see above) the English Court of Appeal considered an application to restrain a firm of solicitors from acting for a client where there had been a merger of two firms. Although the original firms were largely to remain geographically separate (being in different localities) and although they had undertaken to ensure there would be no leakage of confidential information, the Court found there was no evidence of concrete steps being taken to prevent that leakage before the Court would allow them to continue to act and there had to be more than a mere undertaking. The firms had previously acted for opposing sides in litigation involving allegations of fraudulent breaches of trust. One party wished the merged firm to continue to act but the other party objected as some of the partners previously advised them on sensitive issues.

The Court discussed the two aspects of the case as being "*the legal rights of the defendants and proper professional conduct*". Sir Nicholas Browne-Wilkinson found that there were serious allegations of dishonesty against a professional firm and the probability of a leakage of information within the merged firm would raise "*a strong prima facie case of mischief rightly anticipated*". Therefore, the question turned on whether there was evidence adduced before him "*of steps designed to produce a form of Chinese wall eliminate that prima facie real risk of abuse*". After considering the physical aspects of the case including the location of the partners and the various offices operated by the merged firm and the measures they had undertaken to observe to protect confidential information, he was not satisfied that the new firm had shown that "*the Chinese walls that they are proposing to erect will be soundproof*". Therefore it would not be lawful for the new amalgamated firm to continue to act. The Court found that no concrete steps had been implemented to ensure that staff were aware of the sensitive nature of the issues.

[10.9] In **In Re A Firm of Solicitors** ¹¹⁶, in 1982 to 1985 a firm of solicitors, comprising 107 partners, acted for a company in an investigation into the former management of two Lloyds' underwriting syndicates and received confidential information from another company and its subsidiary companies which were wholly independent of but closely associated with the then client

company. The firm ceased to act for the client company. In 1984, one of the subsidiary companies of the closely associated company, brought an action against a number of members of a third Lloyds' syndicate raising issues closely connected with the management of the other two syndicates. In 1990 one of the members of the third syndicate instructed the firm to act for information to the firm in the closely related matter applied for an injunction restraining the firm from acting on the basis of the acquisition of confidential information which would be relevant to the present litigation.

It was held that:

- The information given was relevant to the present litigation and although the applicants for the injunction had not been actual clients, the firm owed them a duty in relation to that confidential information similar to that owed to a former client.
- The Court would intervene to prevent a firm of solicitors from acting if a risk of a breach of the duty not to communicate confidential information could reasonably be anticipated and that despite arrangements made by the firm to prevent any leakage of information within it, the risk of such leakage could not be eliminated.

Parker LJ stated thus:

"On the totality of the evidence there can in my judgment be no doubt whatever that [the companies] and their subsidiaries did supply detailed information to the firm and to [the former client company] concerning the very matters which will be explored in the main action and although none were at any time clients of the firm the relationship between them was such that they can properly be described as informal clients. In my judgment also the firm owed to them very similar duties to those which they would have owed had they been clients in the strict sense."

His Honour commented further of the principle of the confidentiality that it "applies whether... the matter concerned is the same as or different from the matter in which the solicitor acted for the former client. This is clearly necessary. When acting for a former client a solicitor may for example have acquired knowledge relevant to a totally different matter in which he seeks to act for another client against his former client".

As to the "Chinese wall" and the undertaking, his Honour distinguished this case from **Rakusen** noting:

"The situation here is very different. The firm is a very large one and it acted for 3 years in a matter which attracted great public interest and much discussion in the legal profession and in the insurance world. Those who were then immediately concerned for [the original client company] will almost certainly have discussed it extensively with others not immediately concerned. All may genuinely believe that they have forgotten all about what then happened but anyone in the legal profession knows that a chance remark may bring details of an apparently forgotten case flooding back."

Staughton LJ delivered the minority judgment during the course of which he commented, referring to the obligation of disclosure:

"I cannot detect in that case any authority for the proposition that a large firm of many partners is obliged to disclose to each client any knowledge relevant to his affairs that may be possessed by any of its partners or staff... There has no doubt been a change in the way that many solicitors practice since 1912... There are, of course, still many sole practitioners or small firms today. But there are also giants with a hundred partners and more, employing large numbers of assistant solicitors and articled clerks, as I shall still call them. The solicitors in the present case comprised 107 partners at the last count. It seems to me impracticable and even absurd to say that they are under a duty to reveal to each client, and use for his benefit, any knowledge possessed by anyone of their partners or staff. I would not hold that to be the law."

This contrasts with but is not really inconsistent with the comment of Parker LJ that:

"In my judgment, any reasonable man with knowledge of the facts in the present case, including the proposals for a "Chinese wall", would consider that some confidential information might permeate the wall."

Sir David Croom-Johnson said:

"The firm have in good faith, which nobody doubts, erected what reads like a formidable "Chinese wall" to prevent leakage of information within their organisation. For this injunction to continue there must be a possible, but real, risk of such a leakage."

[10.10] **MacDonald Estate v Martin**¹¹⁷ is a leading Canadian case in this area reflecting an approach more akin to the Australian cases than to the **Rakusen v Ellis** approach. It is cited with approval in the **Prince Jefri** case, as noted above.

In 1983 the appellant retained the services of T, a QC who was assisted by D, a graduate articled student who later became a junior member of the firm. D was actively engaged in the appellant's case and was privy to confidential information communicated by the appellant to T.

In 1985 upon T's appointment to the Bench, D left the firm and joined another. In 1987, 8 of 11 members of D's firm, including D, joined the firm representing the respondent in the appellant's action and the appellant applied to restrain D's new firm from acting. Both D and senior members of her new firm swore affidavits that the case had not been discussed since D joined the firm and would not be discussed. The matter ultimately came before the Supreme Court of Canada.

SopinkaJ stressed the importance of solicitor/confidentiality in maintaining public confidence in the legal profession and expressed the view that in resolving the issue the Court is concerned with at least three competing values:

1. A concern to maintain high standards of the legal profession and integrity of the system of justice.
2. The count availing value that a litigant should not be deprived of his or her choice of counsel without good cause.
3. The desirability of permitting reasonable mobility in the legal profession.

His Honour preferred the test of *possibility* of real mischief to the **Rakusen v Ellis** test of *probability* of real mischief stating:

"In dealing with the question of the use of confidential information we are dealing with a matter which is usually not susceptible proof... [therefore] ... the test must be such that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur."

As to the use of Chinese walls his Honour felt that Chinese walls and cones of silence were "reasonable measures" but that the concepts "are not familiar to Canadian Courts and indeed do not seem to have been adopted by the governing bodies of the legal profession".

On the facts of the case it was held that it was clear that D was in possession of relevant confidential information and secondly that there was nothing beyond her sworn statement and that of her senior partner that no discussions of the case had occurred and would occur.

His Honour felt that the affidavits did not sufficiently "*demonstrate that all reasonable measures had been taken to rebut the strong inference of disclosure. Indeed there is nothing in the affidavits to indicate that any independently verifiable steps were undertaken by the firm to implement any kind of screening. There is nothing to indicate that when D joined the firm instructions were issued that there were to be no communications directly or indirectly between D and the four members of the firm working on the case".*

¹¹⁷

(1991) 77 DLR (Fourth) 249 SCC

By a narrow majority the Court found that the presumption arising from a previous relationship that confidential information had been imparted which could be used to the detriment of the former client is rebuttable.

Lord Millett noted in the *Prince Jefri* case in relation to conflict of interest generally and acting against a former client that "The question has become of increased importance within the emergence of huge international firms with enormous resources that operate on a global scale and offer a comprehensive range of services to clients."

The examination of these cases is important in showing the difficulty which the issue has provided to the Courts and to the profession.

[10.11] Photocure ASA v Queen's University At Kingston¹¹⁸

This case offers an interesting insight into the way confidential information may be protected within a large firm – effectively, how to construct a Chinese Wall.

In this case, the Intellectual Property division of Freehills in Sydney represented Dusa International Pty Limited, the local licensee of a patent owned by Queen's University in Canada. Dusa at the time of the case had sought to have the patent transferred to it, and had foreshadowed an application to be joined to the litigation – effectively, becoming the respondent. Photocure had made an application seeking a declaration that the patent owned by Queen's University was invalid and that it be revoked. In the proceedings in question, it sought an order restraining Freehills from acting for Dusa.

The alleged conflict arose out of advice sought on behalf of PhotoCure from Freehills Patent Attorneys (later Freehills Carter Smith Beadle – "FCSB") in November 1999. The Patent Attorney firm was located in Melbourne and had since that time, progressively become more integrated into the national structure of Freehills. The two firms worked, and continue to work, closely together on the same matters. His honour was 'satisfied that I should treat Freehills, the firm of lawyers, and FCSB, the firm of patent attorneys, as parts of the one firm'.

The court found that FCSB was in possession of confidential information belonging to PhotoCure that was relevant to the current proceedings. The evidence, however, demonstrated that none of the solicitors or support staff acting for Dusa had ever had, or could have, access to the materials, either physically or through the firm's computer system. On discovering the fact that FCSB had previously advised Photocure, the file was immediately located and locked in a cupboard to which only one uninvolved partner possessed the key.

His Honour Justice Goldberg discussed the approach adopted in the *Prince Jefri* case in some detail, and confirmed his acceptance of the principle that a firm can be restrained from acting against a former client only on the basis of protection of confidential information. He adopted an approach looking at the issues that need to be considered:

"50. It is apparent from Lord Millett's judgment that there are three stages which need to be considered:

- * whether the firm is in possession of information which is confidential to the former client;
- * whether that information is, or may be, relevant to a matter in which the firm is proposing to act for another party with an interest adverse to the former client;
- * whether there is any risk that the information will come into the possession of those persons in the firm working for the other party.

51. The burden of establishing the first two propositions is upon the former client but the burden of establishing the third proposition moves to the firm proposing to act once the first two propositions are satisfied."

His Honour discussed a number of recent cases including *Spincode Pty Limited v Look Software Pty Limited* (discussed above re the fiduciary duty of loyalty) where he disagreed with the approach of Brooking J, ie that other factors must be taken into account including the breach of a duty of loyalty

and the desirability of restraining solicitors as officers of the Court. His Honour also discussed the approach of Bryson J in **D & J Constructions v Head**¹¹⁹ quoting the following passage (at para 59):

I would think that the court would not usually undertake attempts to build walls around information in the office of a partnership, even a very large partnership, by accepting undertakings or imposing injunctions as to who should be concerned in the conduct of litigation or as to whether communications should be made amongst partners or their employees. The new client would have to join in such an arrangement and give up his right to the information held by such parties and staff as held it. Enforcement by the court would be extremely difficult and it is not realistic to place reliance on such arrangements in relation to people with opportunities for daily contact over long periods, as wordless communication can take place inadvertently and without explicit expression, by attitudes, facial expression or even by avoiding people one is accustomed to see, even by people who sincerely intend to conform to control. Here in Sydney and now there is a thriving diverse and talented legal profession and the court need not fear that a litigant who is deprived of the services of one firm will not be able to retain adequate representation.

His Honour commented that:

*"61 D & J Constructions was decided fifteen years ago and since that time the nature of legal practice has changed. The courts are now more prepared to accept the concept of "Chinese walls" and the quarantining of information within an organisation as Lord Millett recognised in **Bolkiah**, Steytler J accepted in **Newman v Phillips Fox** (1999) 21 WAR 309 and Ryan J accepted in **Bureau Interprofessionnel Des Vins De Bourgogne v Red Earth Nominees Pty Ltd (t/as Taltarni Vineyards)** (*supra*)."*

The case was decided on the issue of whether there was a "real and sensible possibility or risk of misuse of confidential information." On consideration of the evidence of steps taken to prevent the transmission of information, and on the giving of comprehensive undertakings by relevant members of Freehills, his Honour said "*I am not satisfied that there is a real risk of future disclosure of any of the information which is confidential to PhotoCure to anyone at Freehills or FCSB who may be acting for Dusa. Although that risk is theoretically possible, I do not consider it to be a real risk from a practical point of view. The dissemination of the confidential information between November 1999 and May 2000 was to a limited group of persons in Melbourne who did not have regular contact with the people who will be in Mr Muratore's team in Sydney acting for Dusa. There is also substantial protection from disclosure to those persons in the future available from the undertaking which have been proffered.*"

[10.12] In **Bureau Interprofessionnel Des Vins De Bourgogne, Société Civile Du Domaine De La Romanée-Conti, And Institut National Des Appellations D'origine V Red Earth Nominees Pty Ltd (Trading as Taltarni Vineyards)**¹²⁰ Justice Ryan looked closely at the facts of the case in declining to grant an injunction restraining a firm from acting.

The Applicants commenced proceedings against the Respondent to restrain the use of the names "Tache" or "Taché", being too similar to the French controlled appellation of origin "La Tâche". The Applicants were represented by Corrs Chambers Westgarth. The respondent sought to restrain that firm from acting on the basis that it had in the past extensively instructed a senior practitioner, Ms Ann Dufty, then of Mallesons Stephen Jaques, who was from September 2000 employed as a part-time consultant in the Intellectual Property division of Corrs. While at Mallesons, Ms Dufty had been responsible for the respondent's intellectual property work including the provision of advice in the initial stages of the present dispute with the applicants. She had no involvement in Corrs' representation of the applicants.

His Honour Justice Ryan found that Ms Dufty had been in possession of confidential information belonging to the respondent but that it was not relevant to the current proceedings due to the lapse of time. Further, the respondent had not been sufficiently specific in identifying any piece of confidential information that could be used against it. However, his Honour went on to discuss whether her knowledge would be imputed to other members of the firm if it were the case that she was in possession of relevant confidential information. He held that this is a question of fact, adopting a similar approach to that of his Honour Justice Goldberg in the **PhotoCure** case. He found that the only person who could possibly be in possession of the confidential information was Ms Dufty, and

¹¹⁹ (1987) 9 NSWLR 118

¹²⁰ [2002] FCA 588

that no information had ever actually passed to any other member of staff. It was also very important that Ms Duffy, being a senior practitioner working on a part-time basis, was almost entirely independent of other members of the firm, conducting her own practice and requiring very little supervision. Further, he found that measures put in place by Corrs, particularly computer security, physical relocation of offices and files, special mail-handling procedures, undertakings and education of support staff and the client, meant that there was no real risk of accidental transmission of confidential information. In this respect, the case was distinguished on its facts from **Prince Jefri Bolkiah and Newman v Phillips Fox (1999) 21 WAR 309.**

[10.13] *Newman v Phillips Fox*¹²¹

The plaintiff was represented by members of the legal firm Hely Edgar in an arbitration. Before the conclusion of the proceedings, the firm was dissolved and the solicitors who had handled the plaintiff's case joined the firm that was representing the defendant, Phillips Fox. The solicitors terminated the retainer with the plaintiff but continued to represent the defendant. The plaintiff took proceedings to restrain Phillips Fox from acting.

There was no dispute that, with the employment of the Hely Edgar solicitors, Phillips Fox was in possession of confidential information that could be used to the detriment of the plaintiff.

4 solicitors and 7 support staff from Hely Edgar were employed by Phillips Fox. It was noted that these people were in a different section to those who represented the defendant, and worked on different floors. It was noted that Phillips Fox is a large firm. The question was then, whether there was a risk of the confidential information going to the solicitors representing the defendants.

His Honour Justice Steytler looked at the three bases usually given for restraining a solicitor from acting in these circumstances, namely:

1. the breach of the fiduciary duty of confidentiality;
2. conflict of interest; and
3. the "jurisdiction to exercise authority over officers of the court as to the propriety of their behaviour".

His Honour thought that the first and the third bases were applicable to the case before him.

In discussing the third aspect, His Honour considered that the knowledge of the Hely Edgar personnel was not automatically imputed to all members of Phillips Fox. Adopting the line of reasoning in **Bolkiah** and a number of earlier cases, he found this to be a rebuttable presumption – "whether a particular individual is in possession of confidential information is a question of fact which must be proved or inferred from the circumstances of the case."

The case contains an interesting discussion of the policy reasons behind the first basis, including consistency with the doctrine of legal professional privilege, the duty of loyalty that survives termination of the retainer, the perception of justice, and the desirability of clients being able to choose solicitors without undue restriction. In relation to the last-mentioned factor, His Honour quotes with approval a US commentator:

"Judges must exercise caution not to paint with a broad brush under the misguided belief that coming down on the side of disqualification raises the standard of legal ethics and the public's respect. The opposite effects are just as likely – encouragement of vexatious tactics and increased cynicism by the public."

His Honour comments at para 55 that he does not see any proper reason for the application of a stricter test in family law matters. The test adopted when assessing the risk of misuse of confidential information is that adopted in the **Mallesons** case – that of a 'real and sensible possibility' of misuse. His honour saw this test as being substantially the same as that adopted in the **Bolkiah** case, ie a risk that is real, not fanciful or merely theoretical.

Of particular practical application is the discussion of the effectiveness of the 'Chinese wall' proposed by Phillips Fox. His Honour noted that to succeed, a 'wall' must be timely and organised properly, not merely on an ad hoc basis. It should include the following elements:

¹²¹

(1979) 21 WAR 309

- physical separation of personnel involved;
- regular educational programme;
- strict procedures for dealing with any contact between personnel involved or any other crossing of the wall;
- monitoring by compliance officers;
- disciplinary sanctions.

The wall in this case was found wanting because:

- it was put in place too late;
- it proposed no record-keeping or sanctions;
- it proposed no educational programme;
- it did not deal with the support staff;

As such, His Honour found that there was a risk of inadvertent disclosure and ordered that Phillips Fox be restrained from acting for the defendant.

[10.14] In *Australian Liquor Marketers Pty Ltd v Tasman Liquor Traders Pty Ltd*¹²² the defendant, TLT, sought to restrain Deacons from acting for the plaintiff.

TLT was based in Victoria and was represented there by Hardys Solicitors. Hardys instructed Deacons' Queensland office to act as its agent in proceedings brought against it in Queensland by another party, Venacorp. In the meantime, Deacons' Victorian office was instructed by the plaintiffs to act for it in an unrelated matter in which TLT was on the other side. That matter became litigious, and so Deacons was in a position whereby it was acting for the plaintiff in the current proceeding and for the defendant in unrelated proceedings in Queensland.

When the matter was raised with Deacons, they responded by saying that no information had passed between the two offices, they undertook not to seek or pass on any information, they expressly limited their retainer with ALM so that they were released from any obligation to use information about TLT for the benefit of ALM .

His Honour Justice Habersberger discussed in some detail the duty of loyalty that is undoubtedly owed to a solicitor's client. He examined a number of authorities and said "*That a solicitor owes a duty of loyalty to his or her client is now well established.... However, only one of those authorities, as I read them, goes as far as holding that it is a breach of a solicitor's duty to act at the same time both for and against the one client in unrelated matters.*" (at 14).

His Honour identified two risks inherent in the proceedings. The first was the risk of important matters including the 'getting to know you' factors (*Yunghanns* case) being communicated to the Melbourne office, and the second, the possibility of divided loyalties which would be a constraint on the defendant confiding in its solicitor. He found that the first could be adequately protected by the limitation of ALM's retainer with Deacons and the safeguards against communications between the Queensland and Victorian offices. As to the second, he rejected the defendant's argument that '*in a case based on a breach of the duty of loyalty, the applicant did not have the onus of showing that there was a "real and sensible possibility" of any misuse of confidential information. It was enough to show that the solicitor's undivided duty of loyalty had been breached. I do not agree with that submission. In my opinion, one cannot conclude that there has been a breach of the duty of loyalty by a solicitor acting for two clients without examining the extent to which, if at all, the interests of the two clients are adverse to each other.*' (at 25).

His Honour concluded (at 26):

"Taking into account all of the circumstances of this case, including in particular that the two proceedings are truly unrelated; that there is no question of any confidential information having been obtained by Deacons; the nature of the disputes involved in the two proceedings; the fact that one proceeding is being handled in the Brisbane office of Deacons and the other in the Melbourne office; that Deacons in the Queensland proceeding is acting on the instructions of Hardys, TLT's own solicitors; and the assurances given by Deacons that appropriate safeguards would be put in place, I have reached the conclusion that the balance

¹²²

[2002] VSC 324 (14 AUGUST 2002)

favours there being no restraint on Deacons continuing to act for the plaintiff in this proceeding. This is because I have concluded that, provided certain conditions are met, there is no "real and sensible possibility" of any misuse of any "getting to know you" factor, which in the end was the only concern which I consider the defendant could legitimately raise. I am also of the view that a member of the public knowing all of these circumstances would accept that it was not inappropriate to allow the plaintiff in this proceeding to retain the solicitors of its choice."

His Honour's judgment concludes with suggested undertakings to safeguard the interests of both clients.

The case is interesting as it permits the construction of a Chinese Wall where there would otherwise be a current matter conflict on existing principles. The fact that the solicitors are in different states is an important factor, but it will be interesting to see if the case will eventually provide a basis for allowing the 'walls' to be built within the one office.

[10.15] Undertakings

A study of cases such ***Prince Jefri, In Re A Firm of Solicitors, Rakusen, Coward Chance*** and ***D&J Constructions*** suggests that while the Courts do not reject the idea that undertakings might prevent the "real and sensible possibility of mischief" it does appear that solicitors might have difficulty in establishing that there would be no risk of detriment to the former client.

In ***D & J Constructions*** it was held that if there was relevant confidential information the plaintiff's claim could not be disposed of by making arrangements within the firm, which His Honour noted was plainly a very large one, to see that the relevant solicitor and those associated with him have no conduct in the part of the present litigation but arrangements would have to be made with their present client with respect to any information which the solicitor and those assisting him now had.

In ***Photocure*** (see above at [10.11]) Goldberg J accepted the protection afforded by the giving of comprehensive undertakings – "*There is also substantial protection from disclosure to those persons in the future available from the undertakings which have been proffered*".

In ***Gugliatti v City Of Stirling*** (see above at [7.6]) the solicitors were not restrained from acting but the court took the precaution of ordering a particular solicitor to undertake not to disclose to any other member of his firm any further information in his possession which he might later recall.

[11] Where the Solicitor's Interest is Involved and Disclosing Personal Interests

[11.1] Rule 10 of the Professional Conduct & Practice Rules prohibits solicitors from acting where there is a conflict of interest between the client and the solicitor. It says:

"10.1 *A practitioner must not, in any dealings with the client -*

10.1.1 allow the interests of the practitioner to conflict with those of the client;

10.1.2 exercise any undue influence intended to dispose the client to benefit the practitioner significantly in excess of the practitioner's fair remuneration for the legal services provided to the client;

10.2 A practitioner must not accept instructions to act for a person in any proceedings or transaction affecting or related to any legal or equitable right or entitlement or interest in property, or continue to act for a person engaged in such proceedings or transaction when the practitioner is, or becomes, aware that the person's interest in the proceedings or transactions is, or would be, in conflict with the practitioner's own interests."

[11.2] In ***Harvey's case*** (see above at [7.13]), the situation where a solicitor is dealing/involved in a transaction with his own client, Street CJ said:

"The conflict of interest may, and usually will, be such that it is not proper, or even possible, for the solicitor to continue to act for and advise his client. A solicitor, who deals with his

client while remaining his solicitor, undertakes a heavy burden... it would be a rare case where he should not, at least, advise his client to take independent legal advice."

Even where the conflict has not been anticipated "this circumstance does not alter the duty of the solicitor already referred to".

In **Wan v McDonald**¹²³ Burchett J commented:

"Where, as here, the solicitor who acts for both parties has close family and commercial ties with one of them, his conflict of duty and interest is obvious. Nothing short of a truly informed consent can justify his position."

Burchett J referred to the 1989 Canadian case of **Garofoli v Kohn & Raimondi** which stated of the failure of a solicitor who has a personal interest to advise the client to obtain independent advice (which is obviously the best way to get properly informed consent) "failure to do this is a ... breach of [the solicitor's] fiduciary duty".

[11.3] In **Wan v McDonald** there was a litany of failure which one could speculate would not have occurred had the solicitor not also been acting for the other party and/or had an interest. It is relevant to quote further from the judgment to emphasise the problem. It is possibly an extreme example.

The solicitor:

"... failed to obtain the informed consent of Mrs Wan to his acting for her when he had a plan conflict of interest; he failed to advise her that, in the circumstances, she should obtain independent advice; he dealt with trust monies in a manner inconsistent with his duty, and he failed to recover trust monies misapplied, when it was his plain duty to do so; he also failed to give his client, Mrs Wan, the benefit of his knowledge of what had transpired which was directly relevant to a matter in which he was acting on her behalf; he failed to advise her of the further facts that he had taken no steps to ensure that her equitable lien, as a purchaser who had paid the whole of the purchase money, could not be defeated, and that he had not taken title, nor even retained the certificate of title, on her behalf; and he advised Dotwell, and acted on its behalf in relation to the removal of the caveat, in respect of the very transaction in which he had been acting for Mrs Wan, his former client."

Burchett J found that the solicitor was a shareholder in the company which was the other client and quoted fairly extensively from the judgment of Deane J in **Palmisano v Hyman** which I have referred to above, a case where the defendant acted as solicitor for the plaintiffs and also for a company in which he held shares as a trustee:

"It is hardly to the point that the defendant's shareholding... was that of a trustee. That fact, indeed, left him with less discretion to prefer the interests of the plaintiffs than he would have had if he [had] owned the share in his own right... The defendant does not suggest that he informed any of the plaintiffs other than Palmisano of this conflict of interest. On my finding he did nothing to inform Palmisano of it..."

"... In a situation where he was acting as the plaintiffs' solicitor, his failure to advert to the existence of the conflicts both of interest and duty or even to raise the possibility of the plaintiff seeking independent legal advice not only constituted a flagrant breach of his fiduciary duty to the plaintiffs. It tainted whatever advice he gave to the plaintiffs or actions he performed for them, as a solicitor, in relation to the overall transaction."

[11.4] In **Mallesons'** case, Ipp J quoted Lord Cranworth LC in **Aberdeen Railway Co v Blaikie Bros**, on the duties of a fiduciary:

"It is a rule of universal application, that no-one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect."

[11.5] This is also an important issue discussed in ***Blackwell v Barroile*** in which it was noted in the majority judgment at page 17 “*the final settlement which was arrived at... was driven in part by [the solicitor's] desire to secure the fees which were owing to his firm*” and “*it was wrong for [the solicitors] to arrange the execution of a Settlement Deed which effected, inter alia, the payment of their outstanding fees, without giving notice to Blackwell, of whose interest in the matter they had been informed and were aware*”.

[11.6] The New South Wales Court of Appeal dealt with the issue of disclosure of a solicitor's interests in ***O'Reilly v Law Society of New South Wales***¹²⁴ where the Court held that the solicitor who had an interest in finance which he procured for his client, no matter how indirect that interest was, was obliged among other things “*to disclose the interest fully and candidly to the client, preferably confirmed in writing in case of later disputes or enquiries*”.

[11.7] Other ways in which a solicitor's interests may conflict with a client's

See Revised Professional Conduct and Practice Rules

11 Drawing wills and other instruments

12 Borrowing from clients

38 Referral fees and commissions

[12] Solicitor/Material Witness

[12.1] A conflict of interest can arise where a solicitor is a material witness in a client's case. The Ethics Committee frequently considers enquiries concerning Rule 19 of the Revised Professional Conduct and Practice Rules, 1995 which provides:-

“A practitioner must not appear as an advocate and, unless there are exceptional circumstances justifying the practitioner's continuing retainer by the practitioner's client, the practitioner must not act, or continue to act, in a case in which it is known, or becomes apparent, that the practitioner will be required to give evidence material to the determination of contested issues before the Court.”

There are two bases for the Rule:

- A practitioner who has to give evidence in a client's matter may thereby come into conflict with the client. This brings in the principles encapsulated in Rule 10 (Avoiding a conflict between a client and a practitioner's own interest). Rule 10.1.1. provides that a practitioner must not, in any dealings with the client allow the interest of the practitioner or an associate of the practitioner to conflict with those of the client.
- As is stressed in the cases in the commentary in the NSW Solicitors Manual, the client's position may be compromised in that the Court might not afford the practitioner's evidence the weight it would be afforded were the practitioner not acting for the client.

The Ethics Committee has expressed the view that Rule 19, as presently drafted, does not extend to other members of the practitioner's firm. It resolved to consider, as a general issue, whether the Rule should be amended to refer specifically to the other members of the practitioner's firm and noted that “a practitioner” is defined in the Rules to mean “A legal practitioner who holds a current practising certificate as a barrister and solicitor, or as a barrister and includes a practitioner corporation”, and that it is not logical to distinguish between a corporation and a firm in this context.

[12.2] The Committee considered the small amount of case law on the issue. In ***Chapman v Rogers: Ex parte Chapman***¹²⁵, Campbell CJ observed:

¹²⁴ (1988) 24 SWLR 204

¹²⁵ [1984] 1 Qd R 542

For the reason that it is desirable to avoid any suggestion of real or apparent conflict between the duty to the court and the obligation to the client, I consider that it is generally unwise for a solicitor who is not himself appearing as advocate or as instructing solicitor in court but who is aware that it is likely that he will be called as a material witness (other than in relation to formal or non contentious issues) to continue, either personally or through the firm, to represent the client if that can be reasonably avoided. (emphasis added)

This approach is consistent with that taken in cases involving a solicitor acting for more than one party, or against a former client, where a firm has been regarded as being in no better position than a sole practitioner.

Further material may be obtained from the Ethics Section of the Professional Standards Department at ethics@lawsociety.com.au.

[13] Miscellaneous points, Common misconceptions, FAQs

[13.1] Personally Acquired Information

There may be situations where you will have a conflict of interest in acting against a party from whom you have obtained confidential information arising from a relationship other than a solicitor/client relationship. This relationship may have been a purely personal relationship having nothing to do with your professional capacity or may have arisen in your professional capacity but not involving a solicitor/client relationship but may have involved an element of trust such as where the person you have dealt with is "as good as a client" for example a director or employee of a company or the spouse of a client.

The position of trust might have arisen from your having employed a person who subsequently has a dispute with a client or you might have obtained confidential information as an officer or employee of a company with whom your client comes into dispute. On the other hand, it may be a situation in which no duty of confidentiality is present.

This is explored particularly in four cases to which I have already referred, **Macquarie Bank v Myer**, (see [7.4.6]) **Gagliano v Gagliano**, **Kossatz v Kossatz** (see [9.6]) and **D & J Constructions Pty Limited v Head**¹²⁶

As Marks J said in **Macquarie Bank v Myer**, "*there must be something in the communication between a solicitor and the person seeking restraint which gives rise to truth or to stamp it with confidentiality*" and further that "*as a general rule, it might be expected that this kind of communication will occur where there exists a relationship of solicitor and client. It is not necessary here to say that it cannot otherwise occur...*".

You may have obtained information about a party during a personal relationship which is not known to the world at large, you will not necessarily be disqualified from acting against that party.

As Renaud J put it in **Gagliano v Gagliano** of a solicitor who acted for the husband in family law proceedings who was his brother "*his observations, and possibly his impressions of the wife formed during the parties' marriage, would not necessarily be any more prejudicial to her than those of witnesses called by the husband, and there is no general prohibition on a party retaining a solicitor/relative to act for him*".

Her Honour did refer to the "*distinct possibility that the solicitor might lack professional objectivity*" in acting for his brother and that is a point to bear in mind although lack of professional objectivity is not the same as conflict of interest.

I would say that if, during the course of a personal relationship, you are asked to keep certain information confidential, then you would have a conflict of interest in acting against the owner of that information if it were relevant to a present client's case but that may arise simply from your general ethical duty to act fairly rather than from a breach of fiduciary duty.

126

(1987) 9 NSWLR 118

The judgment in **Kossatz v Kossatz** makes it clear that the personally acquired information would have to be quite significant before its use would give rise to the question of conflict of interest and even then, bearing in mind the statements of RenaudJ in **Gagliano**, it might be insufficient to base an argument of conflict of interest.

[13.2] Duty without retainer

In **Watkins & 6 Ors T/as Watkins Tapsell v De Varda**¹²⁷ delivered on 12 September 2003, the New South Wales Court of Appeal explored whether a firm of solicitors owed a duty of care to the respondent in the absence of a retainer.

The Court upheld the trial judge's finding that the firm owed a duty of care to him which the "mere absence of a retainer" did not negate, and found that while he was not contractually a client of the solicitor handling the matter, that solicitor knew the respondent was relying on him to proceed in accordance with his interests.

In the Court's view, once that situation had arisen the solicitor "was in a position of conflict" and "did nothing to alleviate that position" (which he could, and should, have done by strongly advising the respondent to approach another solicitor for independent advice).

[13.3] Remedies/Ramifications: who pays?

The cases I have described above show that there are a number of serious consequences arising from a conflict of interest and there are a number of remedies available for a client whose interest has been affected which may have an adverse effect on you or the client whose interests you have allegedly favoured.

These remedies include:

- an injunction to restrain you from acting with a resulting order for costs against you
- damages for breach of duty of care
- compensation for breach of fiduciary duty and an account of the profit from such breaches
- an order for delivery up or destruction of materials
- the setting aside of a transaction and a consequent award of damages against the other client.

The issue of who should pay where there is a conflict of interest was raised a number of years ago by the Senate Committee enquiring into the cost of justice in litigation. The Committee produced a paper on legal ethics to which the Society was asked to respond. One of the issues was who should pay where a solicitor has to cease acting because of a conflict of interest. This would be in respect of any extra work which would need to be done because of the change of solicitors. The Society's answer was that it depends upon the circumstances. If blame can be laid at the feet of the solicitor who has the conflict then perhaps the solicitor should be liable. If it is just fortuitous then the client should be liable for costs in the usual way.

As well as being sued, it is possible that you will be complained about and face the prospect of disciplinary action. You must think of the client's position but also think of yourself. You can be sure if something goes wrong the client or former client will be looking for someone to blame and it will in all probability be you. You may also face criticism from the Court because of your actions.

As the Legal Profession Disciplinary Tribunal said in relation to the solicitor involved in **Manettas'** case at [8.2] referred to earlier:

"Of course, when things go bad those who have commercially lost look around for someone that they can blame for their misfortune. Mr Manettas found the solicitor and, when sued by the GIO, he joined the solicitor."

¹²⁷

[2003] NSWCA 242

A reading of ***Blackwell v Barroile*** and ***Wan v McDonald*** at [8.2] which are all similar cases and of the outcomes for the solicitors in those cases has more than a sobering effect.

On 15 December 1998 the Legal Services Tribunal Division of the Administrative Decisions Tribunal delivered its determination and orders in the ***Matter of Patrick William Bird***, solicitor¹²⁸. The Information against the Legal Practitioner alleged professional misconduct for what essentially amounted to a conflict of interest. Having found the solicitor guilty of unsatisfactory professional conduct the Tribunal ordered that he be publicly reprimanded, fined and pay the Society's costs. The background facts appearing in the judgment are as follows:-

"A short summary of the relevant facts is as follows:-

On 11 July 1984, Messrs H and C entered into new contracts for employment with SME. Mr H for a period of five (5) years as General Manager and Mr C for a period of four (4) years as Assistant Manager.

In late May 1995, the relevant Minister announced various reform proposals to the electricity industry and on 8 June 1995, issued a direction as to employees within the industry, that Direction effectively freezing employee levels and salary arrangements as at that date. On 9 June, the Minister appointed new Chief Executive Officers to various merged organisations within the electricity industry.

On 13 June 1995, Messrs H and C consulted the Legal Practitioner and sought advice in relation to their position under their Contracts for Employment with SME. On 14 June 1995, the Legal Practitioner provided his advice in writing to Messrs H and C. At a Board Meeting of SME that afternoon, the Board purportedly terminated the employment of Messrs H and C on the basis of redundancy. The Legal Practitioner subsequently prepared Deeds of Release as between H and C and SME, which were to be entered into in consideration of significant contract payout amounts being paid to H and C.

On 15 June 1995, the Legal Practitioner was requested to provide an advice in relation to a proposed rescission motion to be put before the Board of SME that day to rescind the motion to terminate the Employment Contracts of H and C. The Legal Practitioner prior to providing such advice had been informed by an appropriate Officer of SME that H and C had been paid their redundancy entitlements as a consequence of the Board's resolution the previous day. The Legal Practitioner prepared and provided to SME an advice in relation the proposed rescission motion, which he knew would be considered by the Board of SME in relation to the proposed rescission.

Subsequently, the relevant Minister intervened. The Board of SME was dismissed and on 31 July 1995, the New South Wales Independent Commission against Corruption commenced an enquiry in relation to matters which included the termination of the Contract for Employment of Messrs H and C. The Legal Practitioner gave evidence in those proceedings and as a consequence of those proceedings, the matter was referred to the Law Society of New South Wales."

[13.4] Common misconceptions

The Professional Conduct Rules are minimum standards. There may be situations where a practitioner will not be in breach of any of the Rules relating to conflict of interest but may nevertheless be restrained or face disciplinary or other action.

[13.4.1] A conflict of interest does not necessarily arise where:

- you have previously acted for the opposing party unless of course you have obtained confidential information from that party which you could use to that party's detriment
- there is a perceived bias towards the other party
- you are related to your client

¹²⁸

The judgment is published in the Legal Professional Disciplinary Reports, supplement No.1 of 1999 to the Law Society Journal of June 1999.

- you act against a former opponent
- you have previously presided in a judicial capacity in a matter involving one of the parties (see **Kossatz**)
- the opponent does not wish you to act for any reason and may suggest a conflict of interest as a tactical ploy
- the client is dissatisfied with your performance. In **Murray v Macquarie Bank** the Court found that dissatisfaction with one's solicitor's performance does not amount to the creation of a conflict of interest as would require the solicitor to cease to act for another party whose interest is substantially the same as the dissatisfied party
- you have obtained irrelevant confidential information
- otherwise confidential information was disclosed in the presence of the other party (see **Griffis**)
- where the information you have obtained is a matter of public record.

[13.4.2] Likewise, it is no answer to an allegation of conflict of interest that:

- the client will be inconvenienced in having to find a new solicitor. That will not outweigh the conflict. See for example **Coward Chance [9.3.3]**. There the Court held that hardship to the client in the form of costs and instructing another firm of solicitors did not outweigh the other party's right to confidentiality. This is also expressed in **Magro** where it stated "*this Court will be slow to allow considerations of this kind to outweigh the importance of ensuring that fiduciary duties are not only observed by its officers, but are also seen to be observed*".
- it is raised as a tactic. In **Village Roadshow v Blake Dawson Waldron [9.5.3]** Byrne J considered a submission that the application to restrain was made as "a tactical manoeuvre" but did not find that any such reason undermined the argument that the firm should cease acting.
- simply because your client wants you to continue to act. This of course has to be balanced against the right of a client to choose a legal representative but such a right will be outweighed if a conflict of interest will be of detriment to another party to whom you owe a duty of confidence
- it is a different solicitor in the firm who has the handling of the matter from the solicitor who previously acted for the party alleging the conflict, unless appropriate safeguards are put in place.
- you cannot recollect at the time the conflict of interest is raised having received the confidential information the former client alleged was imparted to you. The issue is what information has been given to you not what you can remember at any one point in time.
- the party alleging the conflict of interest who is said to have given you confidential information was not a client. There may be other relationships which may give rise to a duty of confidentiality and conflict of interest if you breach that duty.

[13.5] FAQs

1. Does acting for competitors involve a conflict of interest?

It may do so depending on the nature of the respective matters and the information obtained. A commercial conflict may arise even if an ethical conflict does not.

2. Can I cross examine a former client?

Not in relation to confidential information relevant to the current client's matter. In that case you may have to cease acting.

3. What if I receive an unsolicited email from an opponent?

4. Can I accept a gift from a client?

"Gifts from clients - manna from heaven?" Law Society Journal, June 1997, Vol.37, p.31

5. Can I continue to act if I may have been negligent?

This will quite possibly involve a conflict between your duty to your client and your interest in protecting your own position.

6. Can I lend to a client?

There is no Rule which prohibits it but you must consider possible conflict of interest (See Rules 10 and 12)

[14] Useful links

[14.2] Do an [advanced search](#) on the Journal archive on "conflict of interest and ethics" and "confidentiality and ethics" for useful articles.

[14.3] See [Guidelines](#) for Solicitors' involvement in commercial schemes.

[15] Concluding Remarks

It is clear from a consideration of these principles and the case studies and examples cited that ethical principles are strongly intertwined with legal practice and common law authority. Conflict of interest is not an easy issue and each case must be looked at in accordance with its own particular circumstances.

VIRGINIA P SHIRVINGTON
APRIL 2006

THE LAW SOCIETY OF NEW SOUTH WALES

STATEMENT OF ETHICS

The true profession of law is based on an ideal of honourable service*.

We acknowledge the role of our profession in serving our community in the administration of justice. We recognize that the law should protect the rights and freedoms of members of society. We understand that we are responsible to our community to observe high standards of conduct and behaviour when we perform our duties to the courts, our clients and our fellow practitioners.

Our conduct and behaviour should reflect the character we aspire to have as a profession. This means that as individuals engaged in the profession and as a profession:

We primarily serve the interests of justice.

We act competently and diligently in the service of our clients.

We advance our clients' interests above our own.

We act confidentially and in the protection of all client information.

We act together for the mutual benefit of our profession.

We avoid any conflict of interest and duties

We observe strictly our duty to the Court of which we are officers to ensure the proper and efficient administration of justice

We seek to maintain the highest standards of integrity, honesty and fairness in all our dealings.

*Riley, NSW Solicitors Manual

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