Conflicts of interest and the "information barrier" –
Caselaw confronts commercialty?

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Introduction

In this brief paper I wish to put forward a number of propositions with respect to judicial method and the practice of law as they apply to conflicts of interest and the operation of "information barriers" in the Australian and New Zealand context. Many of the points I attempt to make are banal and self-evident but in my experience are not usually directly confronted either by legal advisers, or their clients. Some of the argument will be controversial in the sense that it will cast doubt on some shibboleths with respect to information barriers and fiduciaries generally.

1. Most of the authority available to determine the scope of the "information barrier" in the context of successive representation is of little use. This is because the most fiercely fought matters (particularly where it is said that a solicitor is evidencing "disloyalty to the client" rather than potentially misusing confidential information) involve stakes which are very small, except to the parties directly concerned. Thus, the paradigm heated case will involve a claim that a solicitor should be restrained from acting against a former client in a family law matter in which the disaffected husband complains when the solicitor who formerly acted for both husband and wife attempts to act only for the wife in the matrimonial proceedings: see for example the decision in **Black v. Taylor** [1993] 3 NZLR 403. Even the leading case, **Prince Jefri Bolkiah v. KPMG** [1999] 2 AC 222, can be seen as a large-scale fraternal dispute. (The most recent full analysis of all the law in the area may be found in Tuch, "Contemporary challenges in takeovers: avoiding conflicts, preserving confidences and taming the commercial imperative" (2006) 24 Company and Securities LJ 107.)

2. Secondly, while other larger jurisdictions (such as the United States, the UK and Canada) have a sufficiently large pool of experts to permit new advisers to be brought in to large-scale commercial disputes, our own jurisdictions (both Australia and New Zealand) are too small in terms of the expertise available readily to permit advisers chosen by the parties to be removed from a commercial context on the grounds of conflict alone. This fact is implicitly recognised by both advisers and clients alike. (It was explicitly recognised by the New Zealand Court of Appeal in **Russell** McVeagh – see the judgment of Richardson P, Gault and Henry JJ, Thomas J dissenting at [1998] 3 NZLR at page 655.) That may be seen from the fact that there have been very few purely "tactical" applications made in contested takeover or other contexts. Given that the stakes are usually very large, and the comparative cost of arguing for injunctive relief quite small, the absence of claims suggests that parties are unwilling to seek "tactical" orders in very large matters. Part of this may be because of a perception on the part of clients of "mutually assured destruction" ie unless it is recognised and accepted that a single firm may be advising multiple and potentially conflicting parties, the potential range of expertise available to all the parties may be drastically limited. (This is of course a matter which is not susceptible of proof).

3. Thirdly, the stakes involved in a situation say, in which Large Sydney firm X ("LSFX") is advising (with "information barriers" in place) both Bank Y which is involved in funding a transaction and parties A and B who are interested in bidding for the particular target are too large for any matter ever to be litigated to a conclusion rather than resolved. This is part of a more general contractual rule, nowhere expressed or discussed in the legal literature, that there is a range of matters above say the $50 million mark which will never be litigated because the consequences of a loss are too large. (An analysis of the cases will show that with very few exceptions indeed

most fiercely contested litigation between private parties involves welterweight contenders who are in for $20 - $30 million as the very upper limit. (This makes the C7 litigation of peculiar interest but for reasons already expressed it will resolve some how or other without ultimately troubling Justice Sackville. The Bell claim before Justice Owen in Western Australia between the banks and others may be an exception to my general proposition but that is because the government is involved. It seems unlikely in my opinion that any judgment would ever be given against the defendant banks in the order of the billions at stake.)

4. It follows from proposition 3 that it will be necessary at all times to consider the "commerciality" of the position of the parties, rather than the strict legal precedent which is of very limited use. That, however, raises another difficulty as a matter of jurisprudence – if the only cases in which the conflicts rule is either raised or strictly enforced are very small "family" disputes and their commercial equivalents, how then can solicitors advise on larger claims? Is it more likely that such larger claims will never come before the court. (For an example of large commercial matters which had been regarded as **extra litem** (in the sense that no-one had ever litigated the matter before) consider the recent litigation in relation to the constitutionality of the Takeover Panel, and the actions by ASIC concerning proprietary trading. (But note the decision in New Zealand in **Carter Holt Henry Forests Ltd v. Sunnex Logging Ltd** [2001] 3 NZLR 343 where injunctive relief was granted in the context of a mediation where a conflict might have been perceived).

5. As a result of 4, so long as the general proprieties are observed (so that say a former confidential adviser in LSFX does not turn up on Monday at Target having previously

advised Bidder until the previous Friday, no-one will complain about the multiple conflicts which currently exist.

Case law and commerciality – the inherent tension

Many distinguished jurisprudents and judges have noted the dysfunction between the law as it is revealed in the cases decided by the courts, and the actual practice of the law as undertaken day by day in an office. The cases argued and decided by the courts represent only the smallest percentage of the most difficult cases which are taken to a conclusion. They provide the backdrop against which any advice must be given but in any case where the stakes are too large for either side readily to accept the consequences of a total loss the cases are of little moment. It is for this very sound reason that a judge in a very large case will urge the parties to mediate the matter, or conciliate it, or use some non-judicial method for resolving it (the C7 litigation is a good example involving such judicial exhortation).

Clients (even expert clients) will always ask: "what are our chances?" The form and intent of the question reveal a touching, and naive, faith in the legal process. Implicit in them is the expectation that in a quasi-mathematical way the "odds" of a particular judicial officer coming to a particular, and favourable, conclusion may be confidently expressed by an expert adviser. Nothing is further from the truth. The Equity Division judge is not sitting as a kadi, under his palm tree. He is granted no Solomonic ability under the Supreme Court Act fairly to apportion the proceeds of the failed joint venture, or equity participation, or syndicated loan. True to his oath, he will determine matters according to law, and since the time of Heneage Finch, even the rules of Equity have been more or less immutable. A layman understands none of this, and much of a confidential adviser's talent lies in hiding that unpalatable truth from him. Thus, whatever the "chances" before hearing, the result of the forensic process will be (usually)

a total and disastrous loss for one side, and a total victory (subject to absence of indemnity costs) for the other.

Mediation – a solution unsatisfying to lawyers

A key problem with mediation is the unfavourable view that purist, black-letter lawyers ("PBLL") (a category which with justice sadly describes the author) have of it. "Mediation", because it necessarily lacks the formal structures of court proceedings is somehow less attractive to those who think that the case will ultimately be won by applying **Foxwell v. Van Grutten**, or **Bahr v. Nicolay (No 2)**.

To those who consider litigation as a well-paid and exquisitely intellectual game, it is unfulfilling to apply the "fuzzy" logic of a day-long, rolling mediation to the problem. In a very real sense, mediation takes lawyers away from a key comfort zone which is to state what the law as revealed in the cases actually is, rather than to apply more radical notions of fairness and conscience to it: in short, to attempt to resolve the matter "fairly". Hence the truth of the age-old dictum that "the only successful settlement is one which leaves every party dissatisfied".

A mediation provides a means of "testing" the legal and factual propositions and views of both sides. But this, of course, assumes that both sides are equally well-advised by their lawyers who are operating in their customary role as "predictors" of what the Equity Division Judge is likely ultimately to hold. In such a context, a deliberately "maniacal" approach is often taken by the party with the weaker case who threatens to protract proceedings on the basis that, Micawber-like, "something will turn up" if enough resistance is shown.

There is no easy answer to these problems. One practical solution is to appoint as a mediator a person with enough forensic and moral "clout" to convince recalcitrant parties that when the matter finally comes to court - THEY WILL LOSE! Concealed in the problem of quality of legal advice is the "customer problem". A basic problem with successful mediation is that, by definition, the lay-client has little or no idea of the true strategic position. This will equally be true of very large concerns where the "in-house" counsel is concerned only to manage the litigation for her board. Compounding this problem with some in-house advisers is that they will conveniently have been seconded from the very firm which is providing the legal advice and will wish ultimately to return there at some higher rank. It follows that bluster and bragdaccio will frequently find a place in the mediation - all of which is distasteful to the PBLL.

Black letter outline - Possible bases of the jurisdiction to restrain the former legal adviser

The jurisdiction to restrain a solicitor from acting against a former client is long-standing: **Chomondley v. Lord Clinton** and has a number of bases. It may be regarded as a conflation of the duty to preserve confidential information, to preserve the fiduciary relationship between solicitor and client, and as part of the court's control over the conduct of its officers. Each issue may, however, arise separately.

In **Oceanic Life v. HIH Casualty** Austin J examined in great detail the theoretical and overlapping underpinnings of the solicitor's duty. His Honour observed that:

"a surprisingly large number of principles may be brought into play. The relevant principles may include the law of contract, the law of fiduciary duty, the law which protects confidential information, the law with respect to legal professional privilege, the law with respect to the solicitor's duty to the court and the Court's discretion to supervise the conduct of its officers, and ethical principles developed and applied by a professional disciplinary body."

In taking this approach, his Honour acknowledged that he was continuing a process of necessary identification of the respective sources of the duty which had been analysed by Ipp J in **Mallesons v. KPMG** and by Hayne J in **Farrow Mortgage Services v. Mendall Properties** where his Honour noted that the most usual jurisdictional basis is to prevent the abuse of a confidence.

"Simultaneous" and "successive" representation

The whole question of the solicitor's fiduciary obligations must also be considered in the light of the judgment of the New South Wales Court of Appeal in **Beach Petroleum v. Abbott Tout**. As the Court of Appeal there made clear, there is a difference in the approach to a solicitor's duty to a client where (a) he or she acts for separate clients in the one transaction ("simultaneous" representation) and (b) he or she acts in a case in which he or she has previously obtained confidential information which is relevant to the present transaction ("successive" representation).

"Simultaneous" representation is in the "heartland" of fiduciary law. In such a case, the solicitor may not act because of the inescapable conflict of interest inherent in the situation. With "successive" representation, the only serious problem which is likely

to arise stems from the need to preserve the confidences of the former client. "...[T]he mere fact that a solicitor has acted for a client in the past does not preclude him or her from acting against the client on a later occasion even in respect of the same matter."

The present position on information barriers – an overview

The scope of the equitable duty of confidence has been discussed in a number of cases and articles (see, Aitken, "'Chinese walls' and conflicts of interest" (1992) 18 Monash ULR 91, Edmonds, "Trusting lawyers with confidences - Conflicting realities" (1998) 16 Aust Bar Rev 222, Justice Ipp, "Lawyer's duties to the court" (1998) 114 LQR 63, 93, Aitken "Chinese walls, fiduciary duties and intra-firm conflicts – a pan-Australian perspective" (2000) 19 Australian Bar Review 116). I have already noted the article by Andrew Tuch which was produced in his role as rapporteur for a long conference which brought together members of the legal profession, and bankers.

It is clear now in English law that:

"there is no rule of English law which precludes a solicitor from acting in relation to any matter in circumstances where he is acting against a previous client. The rule is only that a solicitor should not so act if he is or might be in possession of information which is confidential and\or privileged which might be relevant in the main action and there is a risk that such information might come into the hands of the client for whom he now seeks to act, to the detriment of his former client" per Latham LJ in **Albion Plc v. Walker Morris (a firm)** [2006] EWCA 429 para [5] citing **Prince Jefri Bolkiah**.

It is also useful to bear in mind the admonition of Tuckey LJ in **Koch Shipping v. Richards Butler** [2002] 2 All ER (Comm) 957, 972 where his Lordship said:

"in these days of professional and client mobility it is of course important that client confidentiality should be preserved. Each case must depend on its own facts but I think there is a danger inherent in the intensity off the adversarial process of the courts being persuaded that a risks exists when, if one stands back a little, that risk is no more than fanciful or theoretical. I advocate a robust view with this in mind so as to ensure the line is sensibly drawn".

The recent Australian approach

We can discern in the authorities a slight variation between the New South Wales and Victorian approaches to the matter in relation to the position in litigation. The New South Wales cases make it clear that the sole determinant is the possibility of misuse of confidence which may be restrained by injunction so long as the information likely to be misused may be identified: **Belan v. Casey** [2002] NSWSC 58 at [21]; **British American Tobacco v. Blanch** [2004] NSWSC 70; **Asia Pacific Telecommunications Ltd v. Optus Networks Pty Ltd** [2005] NSWSC 550 at [52]

The Victorian cases raise as an additional factor the question of the "loyalty" of the solicitor to the former client so that any suggestion of "disloyalty" over and above a mere misuse of confidence may be raised as a basis for restraint principally because of the public perception of acting first for one party, and then another: **Spincode Pty Ltd v. Look Software Pty Ltd** [2001] 4 VR 501 at [52] per Brooking JA.

It is, of course, possible in NSW for the Court to intervene where, in the words of Brereton J in **Kallinicos v. Hunt** [2005] NSWSC 1181 at [76] "a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice". However, intervention on that ground is exceptional and must take into account the general public importance of the litigant not being deprived of her counsel of choice. A similar approach has been applied recently in Victoria in **Adam 12 Holdings Pty Ltd v. Eat and Drink Holdings Pty Ltd** [2006] VSC 152. (Compare **Pinnacle Living Pty Ltd v. Elusive Image Pty Ltd** [2006] VSC 202 and **Rapid Metal Developments (Australia) Pty Ltd v. Anderson Formite Pty Ltd** [2005] WASC 255).

Recent authority in New Zealand

The House of Lords was pressed in argument in **Prince Jefri** with the decision of the New Zealand Court of Appeal in **Russell McVeagh McKenzie Bartleet & Co v. Tower Corporation** [1998] 3 NZLR 641. There, in a takeover case, the Court applied a balancing approach to determine whether or not to grant relief. In doing so, it noted three questions. First, is the confidential information if disclosed likely to affect the "concerned (former) client's interests adversely"? Secondly, is there a "real or appreciable risk that the confidential information will be disclosed"? Thirdly, should the court's "discretionary power" to disqualify be exercised?

In resolving those questions, the New Zealand Court of Appeal had observed:

"All three questions will frequently overlap. The nature and sensitivity of the information, the extent of the risk, and the adverse effect of possible disclosure are likely to affect all three enquiries. In making a final determination of whether enjoinder in the nature of disqualification is appropriate, the Court will need to take into account the competing factors of a person's right to the services of a solicitor of choice, and the corresponding right of the solicitor to offer his or her services to the public generally. ... We would therefore reject the notion of an irrebuttable presumption, and also that of a rebuttable presumption. The preferable approach is the common sense practical one of assessing the evidence".[i]

In contrast to a "practical approach" Lord Millett in **Prince Jefri** preferred that of the "bright line". In the absence of fully informed consent by the former client,

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

More recently, in New Zealand, in **Norbrook Laboratories Limited v. Bomac Laboratories** [2004] 3 NZLR 49; [2004] NZCA 56 (Keith, Tipping and McGrath JJ) the Court noted that the House of Lords in **Prince Jefri** had adopted a rule which is "marginally stronger" than in **Tower Corporation** concerning the onus of proof: Judgment para [25]. However, the Court of Appeal rejected any suggestion that "contractual obligations of confidentiality in a commercial context require that there should be a legal or evidential onus of a party in possession of confidential information

to satisfy the Court that is has not misused it. Any other approach would unduly inhibit competition …": at para [27].

Canadian authority: relevant or not?

Canada provides a possible foretaste of the sort of tactical applications which too rigorous a requirement of confidentiality may engender. The leading Canadian case remains **Macdonald Estates v. Martin**. There, Sopinka J writing for the majority noted the following broad principles:

(a) questions of the potential misuse of confidential information are not usually susceptible of proof;

(b) since no express proof is possible, 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";

(c) the overriding question is: "is there a disqualifying conflict of interest? ie did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? Is there a risk that it will be used to the prejudice of the client?

(d) once it be demonstrated that there existed a previous relationship related to the retainer from which it is sought to remove the solicitor, the court should "infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge";

(e) there is a strong inference that lawyers who work together share confidences.

There are, in effect, three competing policy values:

1. There is a general concern to maintain the high standards of the legal profession and the integrity of the justice system;

2. A litigant should not be deprived of his or her choice of counsel without good cause; and

3. There is a general desirability in maintaining reasonable mobility within the profession.

Conclusion: a recognition of the "resource problem"

Very large firms of solicitors and accountants now dominate the legal landscape and are deployed indifferently, now on one side and now on the other, in most large scale pieces of litigation. There may well be a general resource problem if it is not possible to use the services of a firm which has been joined by the former partner of a firm previously acting in the contrary interest.

Yet it is clear that there have not been a plethora of cases in which purely "tactical" applications have been made with a view to obtaining some short term advantage. It would seem that the resource problem has been recognised on all sides. Thus, there is no incentive to immunise the expertise of LSFX by attempting to injunct some of its staff from working for both sides of a transaction simultaneously. It follows that provided that clients are astute to avoid any particularly egregious example of a "conflict" in the sense of permitting multiple representation without a relevant "information barrier" in place, it is unlikely that any litigation may occur. This ultimately is a function of the market's awareness of the limited resources available to it, and a perhaps unconscious acceptance that this is a small price to pay for having expertise on hand.

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