'CHINESE WALLS' AND CONFLICTS OF INTEREST

LEE AITKEN*

A firm of solicitors may take instructions, only to discover that the prospective plaintiff proposes suing an existing client whom it has previously advised about the same matter. A commonly suggested solution to such a perceived conflict is to erect a 'Chinese wall' within the firm to avoid the ethical difficulty in attempting to act for both parties.[1] The problem of conflicts of interest is not confined to solicitors. Barristers,[2] accountants[3] and investment bankers[4] may face similar dilemmas.

What is a 'Chinese wall'? What are the limits to its use? How should the conflict between the interests of old and new clients be resolved? Courts in several jurisdictions[5] have recently considered these questions in great detail. Any Australian court may choose from a smorgasbord of authority, absent a ruling of the High Court of Australia, or an intermediate appellate court.

In two recent overseas decisions, *MacDonald Estate* v *Martin*[6] and *Re a*

* BA/LLB (Hons)(ANU); BCL (Oxon); Solicitor of the Supreme Court of New South Wales; Lecturer, Faculty of Law, University of Hong Kong.

[1] The matter is discussed in most detail in P D Finn, 'Conflicts of Interest and Professionals' in *Professional Responsibility* (Legal Research Foundation Inc Seminar conducted at the University of Auckland, 28 and 29 May 1987) ('Finn-Conflicts'). The article forms the basis of two further pieces shortly to appear. I am most grateful to the editors and to Professor Finn for their assistance in making the paper available to me.

[2] The relevant New South Wales Bar Rule, Rule 65, is set out in Mr Justice Young's *Civil Litigation* (Sydney, Butterworths, 1986) p 76. It provides:
'Where a barrister obtains confidential information or knowledge of a person's business or personal affairs and is later placed in a position where that information could be used against that person, he shall thereafter not act or continue to act in the proceedings against that person. A barrister shall not use confidential information and knowledge which he has obtained concerning a person to the detriment of that person in subsequent proceedings whether that person is involved in those proceedings or not.'
As his Honour notes, this provision conflicts with the 'cab rank' rule and 'if it is a situation where the first client may reasonably suspect a problem with confidentiality, *the barrister should not take the second brief at all*' (emphasis supplied); id p 77. This approach is harsher than the present position concerning solicitors and looks to the *appearance* of conflict, not the substance. There is much to be said for this stricter line. Note, however, the decision of Mackenzie J in *Australian Commercial Research and Development Ltd* v *Hampson* [1991] 1 Qd R 508. There, after a detailed examination of the authorities, Mackenzie J declined to injunct a leading Queen's Counsel from appearing in a matter in which he had previously advised the other party.

[3] For example, *Re National Safety Council of Australia, Victorian Division* [1990] VR 29, where the Victorian Full Court held that the possibility that a proposed provisional liquidator may have to investigate a preferential payment to his own firm as pre-liquidation investigators of the business in liquidation precluded the appointment, notwithstanding the duplication and expense of appointing a new liquidator.

[4] See, on problems in the City of London, Berg, 'Chinese Walls come tumbling down' (1991) *International Financial Law Review* 23–6.

[5] For an exhaustive analysis of the American authorities see W R Habeeb, 'Annotation; Representation of Conflicting Interests as Disqualifying Attorneys from Acting in a Civil Case' 31 ALR (3d) 715 (1970) and (1990) Cumulative Supplement.

[6] [1991] 1 WWR 705 (Supreme Court of Canada).

firm of solicitors,[7] the Supreme Court of Canada and the English Court of Appeal respectively have adopted a 'strict' approach to conflict of interest, similar to that espoused in the United States.[8] This prevents solicitors from continuing to act against former clients where the appearance of conflict arises. In *Fruehauf Finance Corporation Pty Ltd* v *Feez Ruthning (a firm)*,[9] a recently reported Australian decision, on the other hand, an injunction was refused where appropriate safeguards by way of undertakings were given.

This article examines the conflicts situation under the following heads:

(a) what is a 'Chinese wall'?
(b) what aspects of an agent's fiduciary duty are relevant to using a 'wall'?
(c) what Anglo-Australasian authority applies to conflicts?
(d) are Family Court cases a discrete category?
(e) does *MacDonald Estate* v *Martin* suggest a different result to Australian authority?
(f) do mega-firms require a different treatment?
(g) what is the basis of the court's jurisdiction over solicitors if a conflict has arisen? and
(h) how do the rules of equity and common law, and the ethical duties as prescribed by various Law Society rulings interact?

Tangential issues, such as the remedy if a breach of duty can be demonstrated, are also discussed.

WHAT IS A 'CHINESE WALL' OR 'CONE OF SILENCE'?

The term 'Chinese wall,' is an imprecise metaphor; in *Re a Firm of Solicitors*,[10] Staughton LJ commented: 'in order that metaphor may not cloud meaning, I prefer to call [it] an information barrier'. (While certainly part of legal language, the term to date has outpaced the Oxford English Dictionary so it is impossible to be categoric about its derivation.) Professor Finn has defined a 'wall' as follows:

> 'A Wall is a organisational contrivance within an enterprise designed to prevent the flow of confidential information to or from a part or parts of that enterprise. Its alleged purpose is to prevent it being able to be said that an 'insulated' area of a firm or company has in fact used or will be in a position to use confidential information possessed by another part of the same firm or company'.[11]

[7] [1992] 1 All ER 353.

[8] For a recent thorough analysis of the United States cases and the policies which inform them, particularly in the securities industry, see R Tomasic, 'Chinese Walls, Legal Principle and Commercial Reality in Multi-Service Professional Firms' (1991) 14 UNSWLJ 46.

[9] [1991] 1 Qd R 558 (Lee J). The later decision of Ipp J in *Mallesons Stephen Jaques* v *KPMG Peat Marwick* (1990) 4 WAR 357 (noted by R M Garratt and A S Savrianou (1991) 65 ALJ 229) examines *Fruehauf* in detail and is itself discussed at the text to footnotes 77 to 85.

[10] [1992] 1 All ER 353, 367.

[11] Finn-Conflicts, supra p 33.

An experienced commentator has suggested that the name is used cynically: '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 . . .'[12]

In *Mallesons Stephen Jaques* v *KPMG Peat Marwick*[13] Ipp J observed: '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.'[14]

The metaphor described isolating knowledge about a case, or business transaction, within a restricted part of the law firm; this may be achieved either by a physical separation of the partners who are handling the matter, or by erecting an 'information barrier' by permitting them to discuss it matter only with those who have a 'need to know'. In the result, there is 'effective "screening" to prevent communication between the tainted lawyer and other members of the firm.'[15]

It is easy to see why, in practice, courts may be reluctant to trust to the impermeability of such a 'wall' as a method of preserving confidence and avoiding conflict. As Browne-Wilkinson V-C mordantly observed in *Supasave Retail Ltd* v *Coward Chance*,[16] 'experience in [the Chancery Court] demonstrates that the maintenance of security on either side of Chinese walls in the context of the City does not always prove to be very easy.'

If handled properly, its supporters contend that the 'Chinese wall' allows the firm to continue to deal with a problem either for both sides, or against a former client; the 'wall' does not remove the conflict but removes its dangers.

From a business viewpoint, being 'conflicted out' is undesirable. To begin, it will cost the firm at least one side of the transaction; at a subtler level it will inevitably require a rival firm to handle the matter for an existing client. This may have a debilitating effect on the long term relationship. (In order to minimise unforeseen conflicts, most large firms have a more or less computerised client search facility[17] so that any potential conflict may be revealed and considered as early as possible in the transaction.)

A 'cone of silence' is not a technique mentioned in Australian cases.[18] In *MacDonald Estate* v *Martin*[19] Sopinka J said: 'A "cone of silence" is achieved by means of a solemn undertaking not to disclose by the tainted solicitor'. It may be doubted whether attempts to differentiate between various aspects

[12] J Quarrell, 'Modern Trusts in Legal Education' (1991) 5 *Trusts Law International* 99, 103–4.
[13] Supra fn 9.
[14] (1990) 4 WAR 357, 371.
[15] *MacDonald Estate* v *Martin* [1991] 1 WWR 705, 715 (SCC) per Sopinka J.
[16] [1991] 1 All ER 668, 675.
[17] This fact was recognised in, and important to, the judgment of Cory J in *MacDonald Estate* v *Martin* and is discussed below at the text to footnotes 119 to 121.
[18] Sir Anthony Mason has caustically observed: 'As the expression "cones of silence" had its origin in high farce, I can scarcely credit that it now gives rise to a serious legal question': 'Legal Liability and Profession Responsibility' (1992) 14 *Sydney LR* 131, 135.
[19] [1991] 1 WWR 705, 715.

of undertakings, whether by way of a 'wall' or 'cone' is worth making in practice.

Solicitor as Agent: His Fiduciary Duty

A conflict of interest generates difficult questions concerning the nature and extent of the fiduciary obligations which an agent, the solicitor, owes to the client, his principal. As Dr Reynolds has noted, 'the old rules as to imputation of knowledge between partners may well be inadequate to modern conditions.'[20] Despite copious discussions in monographs and legal periodicals,[21] the law is opaque and 'fact-orientated'; the examination of recent cases, conducted below, illustrates that slight variations in the relevant facts will lead different courts to different results in finding that a 'wall' is appropriate.

Professional considerations, peculiar to solicitors, also apply to the performance of their duties as agents. How should the duties which the solicitor owes to his client be enforced? The cases, examined below, reveal an ambivalent approach. It may be said that the question of 'conflict' involves a matter of professional ethics which should be left to the internal adjudication of the relevant Law Society to resolve.[22] Alternatively, it may be contended that a solicitor stands in no different position to any other fiduciary so that the Court may grant relief as appropriate. Certainly, as we will see, there is no doubt about the Court's jurisdiction to do so when it wishes.[23]

The Importance of Maintaining Confidentiality

When considering the interrelationship of the solicitor's duty as fiduciary to former and existing clients, two main issues arise. First, a solicitor is bound to preserve all confidences professionally imparted to him; he will, accordingly, risk betraying a confidence when he acts for the new client assuming that the retainers overlap. It is the former client's fear of this potential abuse which the 'Chinese wall' will endeavour to allay.

Secondly, a solicitor owes a duty to any client, old or new, to use all the information and skill he possesses in best vindicating his client's interest. Superficially, the two duties appear impossible to reconcile. Two dicta set out the contradictory principles.

First, courts have recently stressed the importance of maintaining legal professional privilege; the underlying problem with any notion of a 'Chinese wall' is that it threatens to undermine confidentiality and thus indirectly weaken the legal system. In *Grant* v *Downs*[24] Stephen, Mason and Murphy JJ noted that such privilege

[20] F M B Reynolds, 'Solicitors and Conflict of Duties' (1991) 107 LQR 536, 537.

[21] The topic of attorney-conflict has received detailed examination in the United States. See, in particular, Comment, 'The Chinese Wall Defense to Law-Firm Disqualification' (1980) 128 University of Pennsylvania LR 677, 678 fns 9 and 16 for a full bibliography of relevant literature. In Australia, see P D Finn, *Fiduciary Obligations* (Sydney, Law Book Co, 1977).

[22] *In the Marriage of Magro* (1988) 93 FLR 365, discussed at the text to footnotes 95 to 97.

[23] See text to footnotes 135 to 136.

[24] (1976) 135 CLR 674, 685; 11 ALR 577, 586 per Stephen, Mason and Murphy JJ.

> 'promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor.'

Similar sentiments were expressed in *Baker* v *Campbell*.[25] As Gummow J commented recently in *National Mutual Holdings Pty Ltd* v *Sentry Corporation*,[26]

> 'there is an underlying principle that a person should be entitled to seek and obtain legal advice in the conduct of his affairs without the apprehension of his being thereby prejudiced; the concern is with the general preservation of confidentiality and encouragement of full and frank disclosure between client and solicitor: *Baker* v *Campbell*.'

Secondly, in *Spector* v *Ageda*, Megarry J observed that

> '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.'[27]

This latter obligation is expressly stated in the English Law Society's Guide:

> 'A solicitor is usually under a duty to pass on to his client and use all information which is material to his client's business regardless of the source of that information. There are, however, exceptional circumstances where such duty does not apply.'[28]

Unless he is willing to run the risk of 'unconscious plagiarism', a solicitor cannot in logic fulfil his duties to both an old and new client — he will be duty bound to utilise all the information in his possession (including that previously imparted in confidence) in furthering the interests of the new client. This involves the unconscious infringement of the duty of confidence owed to the old client where one solicitor (or his firm) has advised them both.

Should this approach to an individual's knowledge apply when a firm, composed of hundreds of attorneys, constructively 'possesses' it? Many, perhaps most, of these will have no idea at all day to day what colleagues are doing. The Supreme Court of Canada has rejected any difference while some Anglo-Australian authority supports drawing it in appropriate cases.

Important related questions are these: to what extent may the duty to disclose be 'waived' at the discretion of the client so as to make it easier to fashion

[25] (1983) 153 CLR 52, 114–15 per Deane J.
[26] (1989) 87 ALR 539, 559 (footnote omitted).
[27] [1973] Ch 30, 48 citing *Moody* v *Cox* [1917] 2 Ch 71. *Spector's* case concerned a solicitor's involvement in a money-lending transaction with the client but the principle is of general application and the case has been cited on the question of conflict generally.
[28] English Law Society's Guide to Professional Conduct of Solicitors (1990), para 12.07, cited by Staughton LJ in *Re a firm of solicitors* [1992] 1 All ER 353, 364–5.

a suitable undertaking to prevent 'leakage' of confidential information? May the contract of retainer be 'sculpted' to excuse the solicitors from revealing all they know? These topics are addressed in detail in the analysis of cases below.

RAKUSEN v *ELLIS, MUNDAY AND CLARKE* AND ANGLO-AUSTRALIAN AUTHORITY

In Anglo-Australian and Canadian jurisprudence, the decision of the English Court of Appeal in *Rakusen* v *Ellis, Munday and Clarke*[29] in 1912 is the usual starting point.

Rakusen was an unusual case. The firm had only two partners, Munday and Clarke. Each conducted his practice entirely separately from the other. The plaintiff, in 1911, consulted Munday on a possible claim against Rakusen Ltd for possible wrongful dismissal. In the course of discussion, the plaintiff naturally revealed much confidential information. Clarke was then away on holiday. Later that year, the plaintiff changed solicitors and a writ for wrongful dismissal was issued against the company. The matter went to arbitration and Rakusen Ltd used its solicitor, Clarke. Rakusen objected to Clarke acting and sought an injuction to prevent his doing so.

At first instance, Warrington J granted an injunction even though Munday proffered undertakings not to act in any way in the arbitration nor to discuss the question with Clarke; furthermore, Clarke's name alone would appear on all papers.

The Court of Appeal allowed an appeal; the effect of the Court of Appeal's judgments in *Rakusen* was summarised by Browne-Wilkinson V-C in *Supasave* as follows:

> 'There is no absolute bar on a solicitor in a case where one partner in a firm of solicitors has acted for one side and another partner in that firm wishes to act for the other side in litigation . . . [E]ach case must be considered as a matter of substance on the facts of each case . . . [T]he court will only intervene to stop such a practice if satisfied that the continued acting of one partner against a former client of another partner is likely to cause . . . real prejudice to the former client.'[30]

Subsequent decisions, in applying *Rakusen*, have attempted to distil the nature of the 'prejudice' which the client must demonstrate to obtain an injunction. Unhelpfully, each of the judges in *Rakusen* expressed himself in different terms. Cozens-Hardy MR talked of 'real mischief and real prejudice [which] will in all human probability result'[31] from the solicitor continuing to act. Fletcher Moulton LJ put the matter in terms of 'a probability of mischief',[32] while Buckley LJ, elliptically, said that an injunction may be granted

[29] [1912] 1 Ch 831 (CA).
[30] [1991] 1 All ER 668, 673.
[31] [1912] 1 Ch 831, 835.
[32] Id 841.

if there exists, or may reasonably be expected to exist 'a danger of a breach of that which is a duty . . . not to communicate confidential information.'[33] No undertaking was directed to be given either by Warrington J, or the Court of Appeal, but Clarke's name was substituted for that of the firm.

Recently, *Rakusen* was considered in three important English cases. Hoffmann J in *Re a Solicitor*,[34] approached a similar conflict dispute by asking whether there was a real risk of prejudice if the solicitors continued to act. In *Supasave Retail Ltd* v *Coward Chance*,[35] Browne-Wilkinson V-C, purporting to follow Hoffmann J, felt that the appropriate standard was whether 'mischief was rightly anticipated.' The Vice-Chancellor was not sure that *Rakusen* should still represent the law today.

Finally, in *Re a firm of solicitors*,[36] the Court of Appeal considered an application for injunction where a company sought to restrain a mega-firm of 107 partners from acting for a defendant when the firm had, some years previously, advised companies associated with the plaintiff company in matters closely bound up with the main action. In particular, the solicitors were privy to expert accountant's reports dealing with various allegations of impropriety.[37]

Parker LJ and Sir David Croom-Johnson restricted *Rakusen* to its own facts; Staughton LJ, more realistically it is suggested, would permit *Rakusen* to operate in a modern context, subject to necessary safeguards.

Parker LJ rejected the approach of Cozens-Hardy MR in *Rakusen*.[38] He seemed to prefer an amalgam of the views of Fletcher Moulton and Buckley LJJ saying, 'the proper approach is to consider whether a reasonable man informed of the facts might reasonably anticipate . . . a danger' of breach of the duty not to disclose confidential information.[39] To avoid apparent injustice is as much in the public interest, his Lordship felt, as to fetter a client's choice of solicitors. Nor did it make a difference that the company was only *associated* with the former client.[40] Since such a danger would be apparent to a reasonable man, an injunction should be granted subject only to the 'Chinese wall'.

Parker LJ discountenanced any reliance on a 'wall' except in very special cases[41] which he did not particularise. He held that a reasonable man would not be confident that restricted information would not 'permeate' it.

Sir David Croom-Johnson agreed with Parker LJ in adopting a 'reasonable anticipation' test. On the facts, he held that a risk did exist, notwithstanding the efforts to prevent leakage of information. Adopting a Law Society

[33] Id 845.
[34] (1987) 131 SJ 1063.
[35] [1991] 1 All ER 668.
[36] [1992] 1 All ER 353.
[37] Id 357–8 per Parker LJ, quoting *in extenso* from a letter to a firm from solicitors seeking to have the firm injuncted.
[38] Id 361.
[39] Id 362.
[40] Ibid, citing the English Law Society's Guide to Professional Conduct of Solicitors (1990), paras 11.02 and 12.07.
[41] Id 363.

suggestion,[42] he held that a 'wall' should only be used if 'overriding and compelling need' existed and that was not the case.

Staughton LJ took an altogether broader view of *Rakusen* than the majority. He focussed on the 'duty' of solicitors to convey to a new client *all* the information in their possession. As he said,[43] such a 'duty', if it exists, was completely overlooked by the Court of Appeal in *Rakusen*, which noted that a firm could act against an old client 'without putting any strain upon their memory, conscience or integrity.'[43] Considering the size of the firm, Staughton LJ felt it unrealistic to impute the knowledge of one to all.[45] Furthermore, he was not attracted by North American authority which prevents the firm from acting if any conflict, irrespective of the substance of the matter, arises. Moreover, to do so might, in certain specialised areas of practice, deprive a party of counsel.[46] On the test to apply, Staughton LJ preferred that of Hoffmann J — whether mischief was rightly anticipated.

Upon review of the actual 'information barrier' in place, Staughton LJ found it adequate and so would have allowed the appeal. He disagreed with Parker LJ that the size of the firm in any way affected the principle.

The majority in *Re a firm of solicitors* has certainly narrowed the operation of *Rakusen*. But, are not the fears of the majority chimerical? Solicitors are well aware of the need to maintain confidences and the Court rightly disregarded the likelihood of any deliberate transmission of information. As a matter of precedent, as Staughton LJ noted, *Rakusen* is binding on English courts in the absence of a ruling of the House of Lords. It seems no less likely that a solicitor would learn about confidential matters adventitiously at non-firm social drinks or dinner than he would in the context of the firm, especially when he has been adjured not to discuss the matter at all. If there is a theoretical problem with an individual 'emptying' his mind of material, there is surely no difficulty when the minds of two separate individuals are variously engaged upon a common problem. It is suggested that the majority in *Re a firm of solicitors* took too narrow an approach when the scale of the protagonists (ie the size of the firms involved) is considered. While a small practice may be in difficulty in avoiding conflict, it is submitted below that practicalities necessitate mega-firms being treated differently.

THE AUSTRALASIAN POSITION

This section analyses the Australasian cases. It looks at them in chronological order; so fast have cases in the area been appearing that many of the more recent decisions do not refer to all relevant authority, either overseas or in Australia itself. As a result, it is difficult to find any real consensus on how the topic should be decided or to deal with all questions thematically. Of course,

[42] Id 369. Contained in a leaflet dated May 1988.
[43] Id 364.
[44] [1912] 1 Ch 831, 839 per Cozens-Hardy MR.
[45] This issue is discussed in greater detail infra at text to footnotes 126 to 127.
[46] [1992] 1 All ER 353, 366, commenting on 'tactical' objections in the United States.

many of the recent cases do raise broadly similar issues and resonances between them are highlighted in the discussion.

There is no relevant Australian appellate decision except for the old case of *Mills* v *Day Dawn Block Mining Co Ltd.*[47] Here, the Full Court of the Supreme Court of Queensland held that the suggestion of a conflict of interest was, in itself, sufficient to disqualify a firm from continuing to act for the parties; the court would not examine the evidence as to the existence of any relevant confidence between the parties.

There, a solicitor had acted nominally as town agent but was also active in the investigation of the plaintiff's claim against the company and advised on it. He moved to another town and was then retained by the company to defend it in the same litigation. Lee J, in discussing the decision in *Fruehauf Finance Corporation Pty Ltd* v *Feez Ruthning (a firm)*[48] stressed the importance of the unlimited retainer held by the solicitor for his new client, the company, which necessarily involved him revealing *all* that he knew which might assist its prosecution of its case.

The subsequent decision of Hodges J in *R* v *O'Halloran, Ex parte Hamer*[49] followed a similar approach. There his Honour held that the agency which each partner exercised on behalf of his fellows, without more, prevented a partner in a firm entering an appearance to a writ issued by another partner.

This simple approach would make resolution of an alleged conflict easy for the court. Moreover, it accords, for example, with the New South Wales Bar Rule[50] and the view in several United States jurisdictions and with the majority of the Court of Appeal in *Re a firm of solicitors.*

Later Australian cases, however, have taken a more pragmatic approach to the problem of conflict. In *D & J Constructions Pty Ltd* v *Head*[51] Bryson J in obiter suggested that the Court should

> 'weigh the facts and assess the risks in the eye of reality, theoretical risks should be disregarded and when ... 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.'[52]

His Honour did not address the policy issues involved in detail because the issue did not arise for decision.

In *D & J Constructions Pty Ltd* v *Head*, Bryson J doubted whether the erection of a 'Chinese wall' would solve the problem. His Honour observed:

> '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

[47] (1882) 1 QLJ 62.
[48] [1991] 1 Qd R 558, 567.
[49] [1913] VLR 116.
[50] Cited supra, fn 2.
[51] (1987) 9 NSWLR 118.
[52] Id 123.

concerned in the conduct of litigation or as to whether communications should be made among partners or their employees.'[53]

The reason for this was simple. The new client would have to forego expressly his right to the knowledge of the 'immunised' partners and it would be well-nigh impossible to police any such restrictive order. More importantly, from a practical point of view:

'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.'[54]

This assumes, however, that the individuals concerned are still in close daily contact. What if, in compliance with an order, the parties are physically separated? Moreover, it is surely straining belief in the forensic skills of even Australia's finest attorneys to believe that 'facial expression' or 'avoiding' someone whom one is accustomed to see may tip the balance in litigation lasting presumptively for years! As to the first, we may take the position in criminal law, where a judge's Associate's 'pulling faces' at the jury was not ground for discharge; as to the second, no question of 'avoiding' arises if the court has dictated it.

Subsequently, in *Sogelease Australia Pty Ltd* v *MacDougall*[55] Wood J declined to restrain Messrs Dawson Waldron from continuing

'to act for a plaintiff in an action on a guarantee . . . where a partner of the firm had previously taken instructions from the defendants in relation to another guarantee involving the same principal debtor.'[56]

It appears that his Honour preferred to leave the ethical considerations to the Law Society. His Honour did, however, reject two suggestions: first, that the firm could continue to act where different partners dealt with the matter and there was no communication between them, and secondly, where one client was informed of the existence of the potential conflict at the time he gave instructions and was cautioned that the firm would continue to act for the old client but not for him if a conflict arose.

In *National Mutual Holdings Pty Ltd* v *Sentry Corporation*[57] Gummow J had to determine whether or not Mallesons was precluded from acting for an existing client, National Mutual, in complicated litigation with a United States corporation over the acquisition of certain companies. It was argued that Mallesons should not do so because the New York office of Stephen

[53] Id 122–3.
[54] Id 123.
[55] Unreported, Supreme Court of New South Wales, 17 July 1986, Wood J. Extensive quotations from the judgment appear in *In the Marriage of Magro* (1988) 93 FLR 365 (Rourke J).
[56] Per Rourke J in *In the Marriage of Magro* (1988) 93 FLR 365, 371.
[57] (1989) 87 ALR 539.

Jaques had previously advised the United States company on various aspects of the transaction including due diligence covenants.

Gummow J had doubts, obiter, about the applicability of *Rakusen* to modern conditions. Quoting from Professor P D Finn's article,[58] his Honour outlined the following problems with *Rakusen*:

(1) *Rakusen* was decided when breach of confidence was 'in an embryonic state';
(2) *Rakusen* fails to address the problem of 'unconscious plagiarism';
(3) applying *Rakusen*, the burden is on the former client to demonstrate prejudice and this attacks the basis of the solicitor-client relationship;
(4) *Rakusen* places the solicitor in an impossible position since he is obliged to reveal all knowledge which may assist his new client and this necessarily includes information which he obtained in confidence from his old one; and
(5) *Rakusen* does not discourage a community apprehension that confidences imparted to a solicitor may be subsequently revealed to a third party.

The second and fourth arguments pick up the point well-made by Megarry J in *Spector* v *Ageda*[59] but must be read subject to the strictures of Staughton LJ in *Re a firm of solicitors* who doubted whether such a duty to disclose exists.[60] On the broad view, when a client approaches a solicitor, the client is entitled to expect that he will have the benefit of the full knowledge of that solicitor brought to bear upon the problem. Such knowledge will necessarily include confidences previously imparted to the solicitor in other contexts. Gummow J expressed no decided view on what the present Australian position should be since he was considering whether to stay certain New York proceedings; he did note, however, that 'there is a real possibility that the law [in Australia] is no less stringent than that ... in New York proceedings'. Accordingly, Sentry lost no legitimate juridical advantage by not proceeding in New York.

There is no New Zealand case dealing with conflicts between old and new clients in terms (ie there is no New Zealand case found which specifically addresses the conflicts issues most recently discussed in England, Canada and Australia). The leading New Zealand authority on the solicitor's fiduciary duty, *Farrington* v *Rowe McBride and Partners*,[61] stresses the importance of the fiduciary relationship between the former client and the firm. There solicitors were sued by a client who, acting on the firm's advice, had invested the proceeds of a common law damages claim in a contributory mortgage scheme offered by another client of the firm. The investment was almost totally lost

[58] Finn-Conflicts, supra.
[59] [1973] Ch 30, 48.
[60] [1992] 1 All ER 353, 365, where his Lordship said:
'It seems to me impracticable and even absurd to say that they [the partners] are under a duty to reveal to each client, and use for his benefit, any knowledge possessed by any one of their partners or staff. I would not hold that to be the law.'
[61] [1985] 1 NZLR 83.

upon the insolvency of the investment company. The client complained that the firm had not revealed that it acted for that company before he invested in it.

As Richardson J observed, two main issues arose. The first concerned the conflict between the solicitor's duty to his client and his personal interest. The second related to the conflict 'between his separate duty to each client when he attempts to serve two masters at the same time in the same transaction.[62] His Honour felt that such a course was impermissible if there was a 'conflict of responsibilities' unless the fully informed consent of both clients was obtained.[63]

On the other hand,

> 'the acceptance of multiple engagements is not necessarily fatal. There may be identity of interests or the separate clients may have unrelated interests. In some circumstances they may even be able and prepared to look after their own interests.'[64]

Situations where a conflict may arise occur if the solicitor acts for both sides in a conveyancing transaction.[65]

Furthermore, Richardon J said that the 'strict' view of a fiduciary's duty which Professor Finn espoused in *Fiduciary Obligations*,[66] ie that lack of informed consent without more involved a conflict of interest, may go too far. On the facts, however, his Honour had no doubt that a conflict had arisen for which an appropriate equitable remedy was available.[67]

Mullin J in a separate judgment agreed with Richardson J, holding that the lender should have been advised to obtain separate representation.[68]

In *Fruehauf Finance Corporation Pty Ltd* v *Feez Ruthning (a firm)*[69] Lee J, in the Supreme Court of Queensland declined to restrain the firm, which operated in discrete 'sections', from continuing to act when one section acted for the plaintiff and another subsequently[70] accepted instructions to act in a second action brought against the plaintiff. Relevant confidential information had been imparted from the plaintiff to the firm. Lee J noted that 'a great deal of time and cost' would be lost if a change of firm was required. The problem noted in *Spector*[71] and *National Mutual*[72] on the duty to disclose *all* information was avoided by expressly agreeing that the firm should *not* have that obligation. Various other practical undertakings to prevent any leaks were also given.

62 Id 89.
63 Id 90.
64 Ibid.
65 Ibid per Richardson J, citing *Moody* v *Cox and Hatt* [1917] 2 Ch 71; *Goody* v *Baring* [1956] 2 All ER 11; *Smith* v *Mansi* [1962] 3 A11 ER 857; and *Spector* v *Ageda* [1973] Ch 30. See, too, the Code of Ethics of the New Zealand Law Society, para 1.1.3.
66 P D Finn, *Fiduciary Obligations*, op cit p 253.
67 The nature of the remedy had not been discussed in the lower court and the matter was remitted for the remedy to be considered by it.
68 [1985] 1 NZLR 83, 99.
69 [1991] 1 Qd R 558.
70 There was no knowledge of the previous retainer for the plaintiff.
71 [1973] Ch 30.
72 (1989) 87 ALR 539, 560.

Lee J conceived the matter as a balancing exercise. Confidence had to be preserved and the appearance of justice maintained. Equally, a client should be able to retain counsel of his choice. As Lee J noted, many of the cases[73] which had considered the duty to disclose involved an *individual*; none dealt with a large firm. Similarly, the cases often discussed a conflict *in the same proceeding* where 'the Court is likely to take a stricter view.'[74] His Honour noted that 'walls' already existed in *Fruehauf* since the firm operated in discrete sections[75] so that, were the retainer to disclose limited, the objections of Bryson J in *D & J Constructions* would largely disappear. As a matter of fact, Lee J held that there was no real risk of prejudice, nor prospect of detriment. Situations involving a large firm which might generate concern would, his Honour felt, be resolved by the firm declining to act.[76]

In *Mallesons Stephen Jaques* v *KPMG Peat Marwick*,[77] decided after *Fruehauf*, Ipp J considered whether Mallesons should be restrained at the suit of the defendants from acting on behalf of the Commissioner for Corporate Affairs in a pending prosecution against the defendants, when one of the defendants had previously sought legal advice from Mallesons about certain audit work previously conducted. It was said by the defendants that information previously disclosed to Mallesons and subject to legal professional privilege might be disclosed or otherwise used to their prejudice in the prosecutions. Mallesons denied the existence of any conflict and sought a declaration that they were entitled to act for the Commissioner.

The Commissioner endeavoured to limit any suggestion of conflict by restricting Mallesons' retainer 'to exclude any obligation on the part of Mallesons to disclose any confidential information or knowledge obtained by Mallesons' in the course of previously acting for the defendants. Such species of limitation had been approved by Lee J in *Fruehauf Finance Corporation Pty Limited* v *Feez Ruthning*. In rejecting this form of 'Chinese Wall', Ipp J observed that '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 . . .'[78] Any limitation of the retainer would not remove 'the intangible advantage and detriment' which woud arise in a lengthy trial

> 'where prosecuting counsel are briefed by the same firm of solicitors that has been the recipient of confidential disclosures by the defendant concerning several issues relevant to the charges against him.'[79]

Citing *Rakusen's* case, Ipp J noted that the mere fact of previously acting for a client does not automatically disqualify the solicitor from acting against him

[73] [1991] 1 Qd R 558, 566, citing *Mills, Moody, Spector, Australian Commercial Research and Development* and *Sogelease*, which concerned either individual solicitors or counsel.
[74] Ibid.
[75] Id 571.
[76] Ibid.
[77] (1990) 4 WAR 357.
[78] Id 371.
[79] Ibid.

subsequently.[80] After a detailed analysis of the facts, however, Ipp J concluded that a conflict existed which would mean that Mallesons could not continue to act for the commission, notwithstanding that the members of the firm were 'persons of the highest professional integrity and standing.'[81] His Honour held that, as a matter of the general law affecting fiduciaries, the giving of undertakings to maintain confidentiality were insufficient: '. . . a firm of solicitors placing itself in a conflict of interest situation cannot be avoided by some partners undertaking not to disclose information to others.'[82]

In considering the degree of risk, Ipp J analysed the authorities and noted that the 'probability' approach had been adopted both by Bryson J in *D & J Constructions Ltd*, and subsequently by Lee J in *Fruehauf Finance Corporation Pty Ltd* v *Feez Ruthning*.[83] Ipp J concluded that

> 'if, by a solicitor acting for a new client, there is a *real and sensible possibility* that his interest in advancing the case of the new client *might conflict* with his duty to keep information given to him by the former client confidential, or to refrain from using that information to the detriment of the former client, then an injunction will lie.'[84]

There was an ever present danger of subconscious use of confidential information which could not be avoided.[85] Even though there was a physical separation between the members of the Prosecution Taskforce, Ipp J felt that the public interest required that justice should be seen to be done:

> 'More than in any other kind of litigation, the appearance of justice being done would not survive any general impression that a firm of solicitors could readily change sides to assist in a criminal prosecution, although they previously advised the accused defendant on many of the issues which are the subject matter of the prosecution . . . [T]he countenancing by the courts of such a *volte-face*, substantially on the grounds that the partners in possession of the critical information have given undertakings that they will not disclose the information to those assisting the prosecution, will inevitably give rise to such an impression.'[86]

Given the size and scope of the firm, and the mutual knowledge imputed to each partner in it, undertakings would not remove the problems arising from acting for the prosecution.

Most recently, in *Murray* v *Macquarie Bank Ltd*,[87] Spender J declined to restrain a firm from acting where an associate director of a bank, C, had given a statement to the solicitors acting for the bank in the action brought by the applicant against them both. C gave a statement to the bank's solicitors. The bank's solicitors then began to act for C and he gave to them diaries which contained notes of appointments. C became dissatisifed with his represen-

[80] Id 360.
[81] Id 372, adopting the description of Lee J in *Fruehauf Finance Corporation Pty Ltd* v *Feez Ruthning*.
[82] Ibid.
[83] [1991] 1 Qd R 558.
[84] (1990) 4 WAR 357, 362–3 (emphasis supplied).
[85] Id 371.
[86] Id 374.
[87] (1992) 105 ALR 612.

tation and sought to restrain the solicitors from acting for the bank or communicating to any other person information obtained from him.

Spender J stated that an 'essential question'[88] to determine was whether or not the solicitors were, in fact, going to act for adverse parties.[89] After analysing the facts he concluded that there was no question of a 'Chinese wall' arising.[90]

In *Wan* v *McDonald*[91] Burchett J considered a claim under the *Trade Practices Act* involving a conveyance to satisfy a migration scheme in which a firm of solicitors had acted for both the promoter of the scheme and the immigrant. His Honour stressed that in such a situation only the fully informed consent of the client would allow the solicitor to continue to act.[92] His Honour distinguished between situations such as *Australian Commercial Research and Development Ltd* v *Hampson*[93] and *D & J Constructions Pty Ltd* v *Head*[94] in which the barrister or solicitor had acted for another party *in the past* and cases 'where the one solicitor, having acted for both parties, seeks to act against one of his former clients, and in the interest of the preferred client, in litigation arising out of the very matter in which he himself acted for both . . . [I]t could only be in a rare and very special case of this latter kind that a solicitor could properly be permitted to act against his former client, whether or not any real question of the use of confidential information could arise.'[95]

His Honour endorsed both the importance of a solicitor maintaining loyalty to a former client,[96] and the views expressed in *MacDonald Estate* v *Martin*. Looking at the mechanics of a conveyance, Burchett J suggested that if a conflict of interest arose between vendor and purchaser then the solicitor acting for both should cease to act for either.[97]

Apart from *Fruehauf*, the latest Australian cases, while not going as far as *Re a firm*, appear to support a similar approach. This prohibits the solicitor from continuing to act when the possibility/probability of prejudice might arise. Dicta suggest an antipathy towards building a suitable 'wall' around certain sections of the firm to isolate knowledge within it. There is an apparent distinction, however, between matters of recognised sensitivity (such as criminal or family cases) and those with purely commercial elements. As a general proposition, it will be much more difficult to argue that a 'wall' should

[88] Id 614.

[89] Order 45, r 2 of the Federal Court Rules provides:
'Where a solicitor or his partner acts as solicitor for any party to any proceedings, or is a party to any proceedings, that solicitor shall not, without leave of the Court, act for any other party to the proceedings not in the same interest.'

[90] (1992) 105 ALR 612, 618.

[91] (1992) 105 ALR 473.

[92] Id 492–5 citing *Farrington* v *Rowe McBride & Partners* [1985] 1 NZLR 83, 90 and *Commonwealth Bank of Australia* v *Smith* (1991) 102 ALR 453, 478.

[93] [1991] 1 Qd R 508.

[94] (1987) 9 NSWLR 118.

[95] (1992) 105 ALR 473, 494.

[96] Ibid, citing with approval Professor Finn op cit p 16, footnote 23 who relies upon *Cholmondeley* v *Lord Clinton* (1815) 19 Ves 261; 34 ER 515.

[97] (1992) 105 ALR 473, 496.

be permitted where the solicitor wishes to act for only one party where he has previously acted for both as opposed to merely acting against a former client. Additionally, the involvement of the solicitor personally rather than through some other partner in the firm will increase the likelihood that the court will restrain him from continuing.[98]

Family Court Cases: A Clearer Category?

Four recent Family Court cases have examined the problem of conflict in some detail. They are important because they illustrate the issues in the context of the smaller firm and because it has been said that the stresses of Family Court litigation necessitate a stricter approach than that which may apply in commercial or other litigation.[99]

In *In the Marriage of Thevenaz*,[100] Frederico J held that a solicitor who had previously acted for the husband and wife could not act for the wife in proceedings in relation to matrimonial property. It was argued for the husband that to allow the solicitor to act would give the wife access to crucial documents on the financing of the matrimonial home, and allow the husband to be exposed to damaging cross-examination because of the firm's knowledge of his affairs. No specific confidence was asserted.

Frederico J, citing *Spector's* case, held that the solicitor was obliged to put all his knowledge at the disposal of his client. Adopting the strict position in *Mills*, his Honour held that the solicitor should not continue to act, even though 'the risks were he to do so are more theoretical than practical'. Even a theoretical risk might mean that 'justice might not appear to be done'.[101]

Subsequently, in *In the Marriage of Magro*,[102] Rourke J on the application of the wife restrained a firm of solicitors from continuing to act on behalf of a husband. The solicitor who had previously acted for the wife as an employed solicitor changed his employment to that of the firm which acted for the husband. When the matter was raised with the new employers, they intimated that they intended to continue to act since the employee was 'resident' at another of the firm's offices and had nothing whatever to do with the husband's case.

Rourke J recognised the difference in approach between *Marriage of Thevenaz* and *Sogelease* and *D & J Constructions*. In *Magro*, the Law Society of New South Wales had indicated that it would defer any ruling on the ethical difficulties involved until the decision of the Family Court. Despite undertakings offered by both the employer firm and its employee to preserve confidences previously reposed by the wife Rourke J felt that 'with the best

[98] Supra fn 73.

[99] For example, in *Marriage of Magro* 93 FLR 365, 372 Rourke J said when distinguishing *Sogelease*:
'It would be hard to imagine litigation involving more complex factual issues than a contested property proceeding in this jurisdiction involving valuable property of the nature and to the value of the assets at stake in these proceedings.'
He then went on to discuss the bitterness between the parties.

[100] (1986) 84 FLR 10.

[101] Id 13.

[102] (1988) 93 FLR 365.

will in the world, it would be difficult . . . for [the employer] not to stumble upon some confidential information possessed by his tight-lipped and ethical employee'.[103]

Founding himself on the peculiarly complex nature of Family Law property disputes and the need to preserve the objective appearance of fair play, Rourke J granted the relief sought. The considerations that this would involve the husband in the expense of instructing new solicitors, and that the wife had frequently changed solicitors, were not decisive: '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.'[104]

In *In the Marriage of Gagliano*,[105] Renaud J granted a wife's application to restrain solicitors from continuing to act for the husband in a custody/property dispute. Once again, the perceived difference between a bald application of *Rakusen* and *Marriage of Thevenaz* was addressed. Renaud J doubted whether the alleged complexities of Family Court litigation, of themselves, justified a difference in approach. He noted that the wrongful dismissal involved in *Rakusen* itself might be thought to generate strong passions. As a matter of fact, however, there was no possibility of conflict in *Marriage of Gagliano*. The only relevant instructions which the wife had given to the husband's solicitor involved a conveyance and the drafting of her will. Neither of these categories were capable of subsequently embarrassing her if the solicitor continued to act for the husband.

On a more limited basis a restraining order was justified. Since the firm also acted for the wife as trustee of a fund put in her name 'for tax purposes', a conflict existed between the firm's duty to the husband and its duty to the wife as cestui que trust.[106] As in *Magro*, the detriment to the husband in having to retain new solicitors was not sufficient to outweigh the possible injustice to the wife.[107]

Finally, in *In the marriage of A* v *B*,[108] the most recently reported case, Smithers J had to consider whether to grant a wife's application against her husband's solicitors, who had previously acted for the wife's new partner, C, in his own divorce, to prevent their acting for the husband in an unusual property dispute which extended to the ownership of, and funding for,

[103] (1989) 93 FLR 365, 374. This view was strengthened by the fact that a letter from the Law Society marked 'Private and Confidential' relating to the case and addressed to the employee was opened and replied to by his employer.

[104] Id 375.

[105] (1989) 95 FLR 88.

[106] The firm itself could also be *personally* interested since it had apparently acted in breach of the trust so that 'it may . . . be in their interests to advise the husband to argue in the property proceedings that the money was not intended as a gift to the wife . . . in the hope of negativing their apparent breach of trust': id 97.

[107] So, too, in *Supasave Retail Ltd* v *Coward Chance* [1991] 1 All ER 668, 675 Browne-Wilkinson V-C held that the extra expense to which the party enjoined was put in 're-educating' a new firm of solicitors was insufficient prejudice to override the duty to avoid a conflict.

[108] (1989) 99 FLR 171.

embryos[109] to be used in an *in vitro* frozen embryo programme on which she had embarked.

It was said that the solicitors, and the barrister whom they had instructed, had obtained detailed and confidential information when acting for C against his former wife and this could be used in the current dispute.

Smithers J noted that on the approach in *Marriage of Thevenaz*[110] and *D & J Constructions Pty Ltd* v *Head*,[111] 'the solicitor acting in the current litigation is imputed to have the knowledge of the solicitor who acted for C in the past.'[112] His Honour concluded that there was a 'real risk of injustice to the wife', not just a theoretical risk, if junior counsel and the solicitor continued to act, and they were restrained from doing so.[113]

The Family Court cases represent an extreme position where almost by definition emotions will be inflamed and personal and intimate details will have been disclosed. All the cases involve comparatively small firms in which the erection of any form of 'wall' would be very difficult.[114]

At present it is difficult to say whether the Family Law cases do or should represent a separate doctrinal area in conflicts. Certainly, the cases are apt to generate more bitterness and the detailed knowledge gained by a solicitor about a former client (be it husband or wife) may prove more useful in cross-examination than in some dry, commercial dispute. The cases are consonant with the 'strict' view and with the conclusion of Ipp J in *Mallesons* which also involved the sensitive issue of a fair prosecution for an alleged criminal offence. They also accord with *Supasave* on its facts where there were very serious allegations of fraud made against Clifford Chance.

CONCLUSIONS FROM AUSTRALASIAN AUTHORITIES

It is submitted that the following conclusions may be tentatively drawn from the present Australian authorities:

(a) Notwithstanding the apparent retreat from *Rakusen* exemplified by *Re a firm*, Australian courts will still approach a conflict by asking whether a real possibility of prejudice exists to the client.

(b) It may be possible, if a very large firm is involved, to fashion a suitable undertaking, to be given by the party wishing to retain the firm, releasing it from the requirement that it disclose *all* relevant information previously obtained, as part of its contract of retainer. Although there are said to be theoretical difficulties in such a case, Lee J's judgment in

[109] The embryos were the result of a fertilisation of 7 of the wife's ova with sperm provided by the husband. The husband opposed their implantation, arguing 'it is inappropriate for there to be the opportunity for children to be born to the wife in this way, having regard to the breakdown of the marriage': id 172.

[110] (1986) 84 FLR 10.

[111] (1987) 9 NSWLR 118.

[112] (1990) 99 FLR 171, 175.

[113] Id 176.

[114] See, for example, *Magro* at p 368 and the quotation at fn 103 which demonstrates how easily information may 'escape' in a small firm.

Fruehauf is a clear statement of the possibility of immunising information, *particularly where a large firm, which handles matters in discrete 'sections' of the firm, is involved in both sides of the dispute.*

(c) In matters of high sensitivity, such as criminal prosecutions and Family Law cases, it is unlikely that a court will permit the firm to continue to act in the event of objection from the other party.

(d) The Australian situation is fluid and there is a reluctance to apply a blanket rule barring a firm so soon as a conflict is mooted; weight will be given to the entitlement to choose a solicitor, and to the public interest in avoiding cost and time-wasting involved in instructing new solicitors.

(e) The question of the professional integrity of the firm in maintaining complete confidence, through the relevant attorneys, is never an issue, other things being equal (ie if the solicitor has given some reason for the court to doubt that his bond is his word then it would be reluctant to accept his undertaking to maintain confidentiality).

(f) Unlike some United States cases, and *MacDonald Estate*, no real emphasis has been laid on the need to maintain the market mobility of solicitors as a policy consideration in resolving conflicts, or the societal advantages said to accrue from such mobility. Yet, since our own legal market is increasingly concentrated in a small number of firms, this issue may become more important.

The Decision in *MacDonald Estate* v *Martin*

In examining the question as a matter of public policy on the broadest level, the Supreme Court of Canada in *MacDonald Estate* v *Martin*[115] identified three 'competing'[116] values. First, there is the concern to maintain the high standards of the legal profession and the integrity of the legal system. (This topic is emphasised in some of the recent Australian cases and explored below.) Secondly, 'there is the countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause. Finally, there is the desirability of permitting reasonable mobility in the legal profession.'[117]

In *MacDonald Estate*,[118] the Supreme Court of Canada considered the following facts. A prolonged estate accounting dispute had been conducted by a partner of a firm on behalf of the defendant. The partner was assisted by an articling student, Ms X, who subsequently joined the firm; 'she was actively engaged in the case and was privy to many confidences disclosed by [the defendant].'[119] Subsequently, the partner was made a judge and the student,

[115] [1991] 1 WWR 705, 711 per Sopinka J, with whom Dickson CJC, La Forest and Gonthier JJ concurred.

[116] It is not apparent, with respect to his Lordship, why the considerations compete *inter se* for reasons explored in the accompanying text.

[117] *MacDonald Estate* v *Martin* [1991] 1 WWR 705, 711 per Sopinka J.

[118] Reversing the split decision of the Manitoba Court of Appeal reported at [1989] 3 WWR 653; 58 DLR (4th) 67; 57 Man R (2d) 161.

[119] [1991] 1 WWR 705, 709 per Sopinka J.

now a solicitor, joined a merged firm which acted for the plaintiff. Affidavit evidence showed that there was no discussion between the solicitor handling the case and Ms X.

After an extensive review of all common law authority available at that time,[120] Sopinka J concluded that the 'clear trend is in favour of a stricter test. This trend is the product of a strong policy in favour of ensuring not only that there be no actual conflict but that there be no appearance of conflict.'[121] It followed that:

(a) there was a rebuttable presumption, difficult to discharge, that confidential information was imparted by a former client;[122] and
(b) it would only be in 'exceptional circumstances'[123] that a court would accept the existence of a Chinese Wall or 'cone of silence' as justifying the firm in continuing to act. That said, if there was 'clear and convincing evidence', likely to convince a reasonable member of the public 'that all reasonable measures have been taken to ensure that no disclosure will occur by the "tainted" lawyer to'[124] other relevant members of the firm, it could continue to act.
(c) mere statements of counsel in affidavits, in the absence of some institutional mechanism to prevent disclosure, would be insufficient to rebut the presumption of conflict.[125]

In the result, in the absence of 'verifiable steps . . . to implement any kind of screening'[126] or instructions that no indirect communication between Ms X and relevant members of the firm could occur, the firm was restrained from acting.

Cory J[127] imposed an even stricter standard in dissent, holding that an irrebuttable presumption of conflict arose once confidential information was shown to have been imparted.[128] His Honour recognised that potential conflicts may interfere with mergers but felt that the possibility of such conflicts can be 'easily ascertained' by computer 'and a price fixed for the value of the files that will have to be turned over to other firms in order to avoid any appearance of conflict of interest.'[129] (Most large Australian firms maintain a more or less automated system with which to reveal timeously to the inquirer from within the firm whether the firm has previously acted for or against a client before the final decision is made whether to accept instructions to act.

[120] Sopinka J's judgment considers *Rakusen*, the United States authorities, *D & J Constructions Pty Ltd* (S.Ct N.S.W. Bryson J), *National Mutual Holdings Pty Ltd* (Fed Ct Gummow J), *Marriage of Thevenaz*, *Marriage of Gagliano*, and all Canadian cases.
[121] [1991] 1 WWR 705, 723.
[122] Id 725. 'The burden must be discharged without revealing the specifics of the privileged communication.'
[123] Id 726.
[124] Id 726. Sopinka J also stressed the importance of the relevant professional bodies developing institutional standards and guarantees to be applied across Canada.
[125] Id 727 invoking the observation of Richard Posner J in *Analytica Inc* v *NPD Research Inc* 708 F 2d 1263 (USCA 7th Circ 1983) at 1269 that such affidavits provide no objective verification sufficient to allay justified public concern.
[126] Ibid.
[127] With whom Wilson and L'Heureux-Dubé JJ concurred.
[128] [1991] 1 WWR 705, 733.
[129] Ibid.

With the largest international firms, even the use of a centralised computer system into which all client instructions are logged will not necessarily reveal a potential conflict straddling jurisdictions particularly where urgent legal advice is being sought with less time for a full cross referral at head office.)

MacDonald Estate is important for its analysis of competing policy arguments on a broad level. At a lower order of inquiry, it illustrates the benefit which flows from having a 'blanket' rule to dispose of conflicts; such a rule will, presumably, lower costs in the event that an alleged conflict arises.

The Problems of the 'Mega-Firm'

The main area of continuing dispute does not concern small firms engaged in contentious litigation but very large firms with hundreds of solicitors employed by them. In Australia, as in other parts of the common law world, much legal work is now concentrated in the hands of 'mega-firms'. By various reckonings, much of the largest legal work in Australia is now carried out by eight or nine such firms, all of which maintain offices in each of the State capitals. This process of amalgamation has led to the concentration of certain types of expertise in a small group of the largest firms. Should different considerations apply where very large firms are involved? Does it make any difference that one mind is not required to perform the difficult task of consciously forgetting? The matter has been examined in detail in both *MacDonald Estate* and in *Re a firm of solicitors*.[136]

In *MacDonald Estate* the possibility of imputing knowledge of one attorney to a firm numbering perhaps hundreds of lawyers was not 'too demanding'[131] or likely to prevent mergers. Cory J, agreeing in the result but taking a stricter view than the majority, argued:

> 'No matter how large the mega-firm, there will be innumerable occasions when a lawyer with a possible conflict of interest will be meeting with those lawyers in the firm who are in opposition to that lawyer's former client. Whether at partners' meetings or committee meetings, at lunches or the office golf tournament, in the boardroom or the washroom, the lawyer of the former client will be meeting with and talking to those who are on the other side of the client's case.'[132]

No matter what structure was in place, a reasonable member of the public would still fear a disclosure of confidence.

A similar view was expressed by the majority of the English Court of Appeal in *Re a firm*[133] where it had to consider a case in which it was proposed to safeguard confidential information in a large firm by the erection of a Chinese wall. Furthermore, the new client had specifically released the solicitors from their obligations to make use of all information previously acquired (including that obtained from the former clients). Staughton LJ however, gave a most interesting judgment in dissent.

[130] [1992] 1 All ER 353.
[131] [1991] 1 WWR 705, 730 per Cory J.
[132] [1991] 1 WWR 705, 730.
[133] [1992] 1 All ER 353.

Staughton LJ noted that the main authority in favour of the duty of disclosure was *Moody* v *Cox and Hatt.*[134] There a solicitor, Hatt, and his managing clerk, Cox, were trustees of certain property and acted for the purchaser, Moody, in his purchase of it without disclosing information in their possession as to its value. Commenting on *Moody's* case, his Lordship observed:

> '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. Nor do I think it right to enlarge the law to that extent, quite apart from the authority of *Rakusen's* case. There has no doubt been a change in the way that many solicitors practice since 1912. In that case [*Rakusen*] Mr Munday and Mr Clarke were the only partners in the firm; they were in the habit of doing business separately and without any knowledge of each other's clients, and each of them had the exclusive services of some of their clerks. There are, of course, still many sole practitioners or small firms today. But there are also giants with 100 partners and more, employing large numbers of assistant solicitors and articled clerks . . . 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 any one of their partners or staff. I would not hold that to be the law.'[135]

Adopting this robust approach, his Lordship could see no reason why a 'Chinese Wall' would not be effective. The other judges, in the majority, were less sanguine. Parker LJ observed that 'all may genuinely believe that they have forgotten all about what then happened [in the earlier litigation] but anyone in the legal profession knows that a chance remark may bring details of an apparently forgotten case flooding back.' Parker LJ adopted a strict test. The gist of his judgment seems to be that in the absence of evidence that the proposed 'wall' would 'eliminate' the risk of breach of confidence and prove 'impregnable' the new solicitors could no longer act. He added that, except for 'a very special case such as *Rakusen's* case, I doubt . . . whether an impregnable wall can ever be created and . . . it is only in very special cases that any attempt should be made to do so.'[136]

Manville Canada Inc v *Ladner Downs*[137] exemplifies some of the problems faced by large firms, or firms acting in association. There one Canadian firm, based in British Columbia, which operated internationally in conjunction with two others based respectively in Toronto and Montreal, acted for a large number of plaintiffs who were suing the applicant multi-national corporation, based in Colorado, for claims arising from use of asbestos. The Toronto firm had from time to time acted for the applicant, including giving advice with respect to actions litigated by the respondent.

Esson CJSC dismissed an application that the British Columbia firm

[134] [1917] 2 Ch 71.
[135] [1992] 1 All ER 353, 365.
[136] Id 363.
[137] [1992] 2 WWR 323 (Esson CJSC British Columbia). I am grateful to Professor Finn for drawing my attention to this case.

should be restrained from acting. His Honour distinguished *MacDonald Estate* on the basis that the three firms were not carrying on a single practice; rather, they had combined to allow for joint activity on an international level only. This form of special or limited partnership did not attract the full operation of the conflicts rule.

> 'Were it the case that the three firms are, as a matter of law, a single firm in the same way that the various offices of "national" firms are part of one firm, they would for these purposes be "a lawyer". But that is not the case. The "domestic" firms are not carrying on one practice in three locations.'[138]

In reaching that conclusion his Lordship considered detailed affidavit evidence which deposed to the financial and management relationships between the associated firms.

Although it was not strictly apposite, Esson CJSC held that the test of conflict propounded by Sopinka J in *MacDonald Estate* would be satisfied in this case.[139] A reasonable member of the public acquainted with the facts would not conclude that an unauthorised disclosure of confidential information either had or would occur. The test to be applied is an objective, not a subjective one: it is what a reasonable man would fear, not what the particular client fears, that is decisive.[140] He also noted that applications to disqualify had, since *MacDonald Estate*, 'become a growth area as it began to do 20 or so years ago in the United States where it seems to have reached the stage of being a common feature of major litigation.' He observed that such applications were frequently made for tactical purposes only 'to discomfit the opposite party by adding to the length, cost and agony of litigation.'[141]

The matter is still an open one in Australia and it is submitted that there are good grounds under local conditions for permitting mega-firms, subject to suitable safeguards, to act in transactions where a conflict might otherwise arise. The decision in *Manville Canada* is particularly relevant given the large number of 'associations' which now exist between various firms in the capital cities. Many of these go beyond a mere agency and are on a formal and institutional footing. In Australia, it is in relation to these associations that the major problems concerning conflict are likely to arise in the future.

This is particularly the case where the legal talents required are specialised and concentrated in perhaps only two or three firms. Although much of the reasoning in *Manville* turned on the lack of a formal partnership in the strict sense between the firms, there seems nothing inherently improper in a local context in the Sydney office of a 'national' partnership conducting litigation

[138] Id 334.
[139] Id 336.
[140] Id 337. His Lordship noted that *MacDonald Estate* had focused on public perceptions and this might suggest giving greater weight to the subjective fears of the client. He concluded, however, that 'the language of the majority ... does not ... preclude the court, in deciding whether to grant the extraordinary and drastic remedy sought in applications of this kind, from having regard to the reality rather than to appearances or perceptions.'
[141] Id 339.

in the Federal Court against its Melbourne counterpart, *pace* Cory J's fears on some *lapsus linguae* at golf revealing all.

The Basis of the Court's Jurisdiction

A brief note on the court's jurisdiction in the matter is relevant since it emphasises that the topic is properly dealt with as one of professional conduct even though the appropriate equitable rubric may be 'breach of confidence'. The courts have always retained a jurisdiction to deal with conflicts of interest between solicitor and client. The principle was clearly expressed by Sir Lancelot Shadwell V-C in *Davies* v *Clough*[142]

> 'all courts may exercise an authority over their own officers as to the propriety of their behaviour: for applications have been repeatedly made to restrain solicitors who had 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'.

The usual remedy sought by a former client is a declaration or injunction to prevent the solicitor from acting or continuing to act on behalf of a new client where a conflict exists. Since the supervisory jurisdiction of the court over its officers is involved, a mere intimation that a conflict exists and the solicitor should discontinue acting should usually suffice without need for formal order,[143] although in *Mallesons* Ipp J granted injunctions notwithstanding the impeccable standing of the firm. The remedies available in the event that a firm does, in fact, act, although subject to a conflict are discussed below.

What if it appears that a firm has allowed a conflict of interest to occur and acted in breach of its ethical duty to a former client? This aspect of the matter recently came before the Hong Kong Court of Appeal in *CS Low Investment Ltd* v *Freshfields (a firm)*.[144] There a statement of claim alleged that the firm, Freshfields, had negligently advised the plaintiff with respect to causes of action open to it, and allowed their duty and interest to conflict. It was asserted that the firm had placed itself in a position where its duties to the plaintiff conflicted with its own interests, failed to give impartial advice, and failed to act in the best interests of the clients. This last duty was said to involve, among other things, 'divulging to the plaintiffs information and knowledge in [the firm's] possession which might have a bearing on the instructions given by the plaintiffs.'[145] The firm moved to have the pleading struck out.

It was argued for the plaintiff that one of the fiduciary duties owed by a solicitor to his client was one of full disclosure of all material facts. So, it was said, there is a duty to disclose whether the firm has accepted instructions

[142] (1837) 8 Sim 262; 59 ER 105, 106–7.
[143] See per Frederico J in *Marriage of Thevenaz* (1986) 84 FLR 10, 13.
[144] [1991] 1 HKLR 12. For a recent Hong Kong application of the principles involved see, *McKenna and Co (a firm)* v *Johnson, Stokes and Master (a firm)* [1992] 1 HKLR 82 in which the defendants were restrained from acting for a party after two senior consultants to the firm gained an intimate knowledge of the plaintiff's case through their involvement on the Law Society's Professional Claims Scheme.
[145] [1991] 1 HKLR 12, 16–17 per Fuad V-P.

from a party when the client has asked for advice whether to sue that party or not. It was said to be material 'because it might affect the client's decision whether or not to retain, or continue or retain, the solicitor.'[146]

Following *Rakusen*,[147] the Court of Appeal held that no cause of action arose unless the plaintiff was 'able to plead (and later prove) an actual conflict of duty and not merely a theoretical one, with resulting loss.'[148]

Hunter JA described the position as follows:

'1. If investigation of B's proposed retainer reveals that it is quite unconnected with the relevant affairs of A, or if there appears to be no prospect of conflict, the solicitor may safely act for B.
2. If on the other hand a potential risk of conflict is revealed, the solicitor accepts instructions from B at his peril, but does not by his act of acceptance breach his fiduciary position to either.
3. The solicitor only commits a breach of this duty to either client if the position of conflict leads him to give defective advice or to fail to give proper advice or information to either client.
4. If in consequence of such behaviour either client suffers damage, his cause of action whether for compensation in equity or for damages is complete.'

His Lordship stressed that a solicitor could find himself in a quandary if he was bound to reveal instructions, received in unrelated non-contentious matters, from a previous client whom the present client intended to sue. He observed that 'the concept of informed choice is untenable . . . [T]he problem is one which the solicitor cannot share but must solve for himself.'[149]

The case is important because it is the only appellate judgment which examines the position if an alleged conflict has *occurred* rather than merely being *feared*. Although the usual position will involve *quia timet* relief being sought by a client, the actual position if a *past breach* of fiduciary duty is involved reveals the difficulties of disclosure which may confront a firm.

The Practice Guides

As a general comment, it is interesting to note how the Courts, in reaching their decisions on conflicts, sometimes suggest that the question is essentially one for the profession to decide by the institution of appropriate safeguards (eg Sopinka J's judgment in *MacDonald Estate*[150]), sometimes that the question of 'ethics' must be resolved in a strictly legal manner by applying relevant rules of law or equity.

The New South Wales Solicitors Manual provides an example[151] of the sort of approach adopted by professional bodies. It states that:

[146] Id 23 per Fuad V-P.
[147] The case was decided before the most recent decision in *Re a firm* but it is not clear, on the reasoning adopted by the Court, that the result would have been any different even had that authority been available.
[148] Id 25.
[149] Id 28 per Hunter JA.
[150] [1991] 1 WWR 705, 712–14.
[151] Note, too, the rule set out in the Queensland Law Society's (1988) *Solicitor's Handbook* which was quoted by Spender J in *Murray* v *Macquarie Bank* (1992) 105 ALR 612,

'a solicitor should not act when it is possible that he may be regarded as having an obligation to respect privileged communications from his former client; and that he should always consider whether his duty to his former client will or may conflict with his interest. The principle that he should not act is not inflexible and where it is clear that there is no possibility of a former client's interests being affected, a solicitor may properly act against him. The question is one of fact and in the final analysis, may be one for the solicitor himself to decide as a matter of conscience.'[152]

This approach does not address the question of the *appearance* of the propriety of continuing to act, nor the difficulty of the solicitor's duty to put *all* available information at the disposal of his client.

It is instructive to compare this flexible approach with the relevant New South Wales Bar Rule[153] and the Victorian position, set out in Gifford, *Legal Profession Law and Practice in Victoria*,[154] which was quoted with approval by Frederico J in *Marriage of Thevenaz*[155] and which sets out a 'strict approach': if confidential information has been imparted 'the court will not weigh conflicting evidence as a to confidence: it will act upon the evidence of the client who swears that he has made the confidential communication.'

Moreover, although it is theoretically possible to obtain a ruling from the relevant professional body through its ethics committee, the delay in quickly obtaining an authoritative response must tend to make such consultation underused. Furthermore, the ethics committee itself may regard the matter as one in which the Court, rather than it, is the appropriate source of a ruling. For example, in *Marriage of Magro* Rourke J in considering a complicated conflict noted that:

'The Law Society of New South Wales has expressly acceded to a suggestion that it should defer its consideration of the ethical questions 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.'[156]

It follows that while the Court will pay attention to the relevant professional

613–14 as follows:
Paragraph 4.002 — '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 confidences, the practitioner shall not thereafter use such information against that client's interests 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.'
Paragraph 9.000 — '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. Nothwithstanding 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.'

152 P 56 cited by Frederico J in *Marriage of Thevenaz* (1986) 84 FLR 10, 12.
153 Set out at footnote 2.
154 Kenneth H Gifford, Sydney, Law Book Co, 1980, p 356.
155 (1986) 84 FLR 10, 12.
156 (1988) 93 FLR 365, 372.

rules embodied in practice guides, it must ultimately determine questions of conflict on the basis of the relevant rules of law and equity.

GENERAL CONCLUSIONS

Two lines of authority currently compete for acceptance. The 'strict' position embodied, for Australia, in *Mills* and since reiterated in *Re a firm* and *MacDonald Estate* has much to commend it. It obviates any argument about practical difficulties; it is easy to decide what to do once a comparison of the retainers[157] reveals the conflict; it has been adopted in certain United States jurisdictions; it avoids any appearance of impropriety, or fear by the credulous that confidential information previously imparted is being abused; it allows a client to have the full benefit of his attorney's knowlege without any need for self-censorship by the latter; it preserves unimpaired the appearance of justice.

It is not, however, without its own costs. If an irrebuttable presumption of conflict is applied then the exclusion will be too broad since it will catch cases where there was no danger of conflict at all, yet the solicitor will be prevented from acting. Secondly, applying a strict rule will have an adverse effect on the current client who will perforce be required to retain new counsel.[158] As was noted in the Manitoba Court of Appeal in *MacDonald Estate* v *Martin*, 'many years of work and large fees will go down the drain. New counsel will have to be instructed which will mean loss of time and additional costs . . .'.[159] Where, however, the court has detected an ethical problem, the question of costs which are thrown away has not figured highly in the court's considerations.

The 'flexible' approach would proceed case by case and only require abstention in the event that a 'real and sensible possibility' of clear conflict becomes apparent. There is probably little hope, in practice, of obtaining a timeous ruling from the relevant ethical committee, and the flexible approach does impose a strain on the conscience of the solicitor. The cases (in particular, *Mallesons* and the Family Law decisions) indicate that a stricter line will be taken if criminal, or Family Court, proceedings are involved in the alleged conflict. This in the former case flows from the general public interest in the administration of justice[160] and in the latter from the peculiar levels of bitterness and enmity which may be attracted by the subject matter.

Wood J in *Sogelease* has alluded to the difficulties in building and policing a 'Chinese wall'. Ipp J in *Mallesons* confirmed the practical problems. The English Court of Appeal in *Re a firm* has suggested that an 'impregnable wall' can rarely be erected. American writing has emphasised the importance of

[157] Here, of course, the court looks at the substance of the retainer. Ipp J in *Mallesons* discountenanced an attempt to avoid a perceived conflict by adroit wording of the second retainer on behalf of the Commissioner.

[158] The costs of a strict rule are analysed in Comment, 'The Chinese Wall Defense to Law-Firm Disqualification' (1980) 128 *U Pa LR.* 677, 682.

[159] (1989) 58 DLR (4th) 68, 70 per Monnin CJM in the Court of Appeal Manitoba.

[160] (1990) 4 WAR 357, 374 per Ipp J.

clarifying the internal procedures to police the wall,[161] and of educational steps 'to make every member of the firm aware of the ban on exchanges of information'.[162]

A 'Chinese wall', however, may be the only practical solution in large scale commercial litigation between national corporations. Legal talent[163] in Australia is being increasingly concentrated in 8 or 10 'mega-firms'. A large corporate client may then be faced with an invidious choice: either retain the professional services of its preferred 'national firm' and take the consequences of a conflict, or be forced to seek the counsel of another smaller firm which lacks the perceived and actual abilities of the 'mega-firm' but which is free of conflict.

In such a situation, the client may well opt to retain the firm notwithstanding the apparent conflict in order to retain a particular solicitor. It is surely going too far to say that the 'strict' approach should *automatically* bar the Sydney office of a 'mega-firm' (or Legal Group) from acting against its Melbourne counterpart despite full disclosure and consent by the respective clients. There is nothing in any of the cases to suggest that there is any overriding rule of public policy which precludes the giving of a consent to continue to act by the client to the firm if a conflict appears to have arisen.

Manville Canada Inc and earlier Canadian and United States cases cited in it suggest that there is a divergence between the strict legal position applying to fiduciaries and the ethical approach which the model practitioner would adopt. Those cases make clear that a mere 'tactical' complaint, designed to embarrass an opposing party by a claim of prejudice will be rejected by the court in the absence of real danger of harm to the former client.[164] Such a situation is relatively easy to detect. More difficult are those situations where even a Chinese wall will still leave a former client nursing a sense of grievance; if such grievance appears objectively reasonable then it is likely that the firm will be enjoined from acting. It is likely that the peculiar concentration of particular legal expertise in Australia in a small number of firms may require an 'autochthonous' solution to be fashioned here, as it has in other areas.

Since matters of conflict are invariably brought on speedily and usually decided on an interlocutory basis, it will be some time before a suitable case for definitive judgment will reach an appellate court, or the High Court by way of special leave. Until it does, there is a plethora of authority and argument to bemuse courts of first instance.

[161] Note, too, *Calgas Investments Ltd* v *784688 Ontario Ltd* (1991) 4 OR (3d) 459 in which the Court granted an injunction to restrain the attorney where it was not happy that the mechanical arrangements for 'policing' the 'wall' were adequate to ensure that the relevant knowledge was segregated.

[162] Note, 'Developments — Conflicts of Interest in the Legal Profession' (1981) 94 Harvard LR 1247, 1367.

[163] This is not to suggest that expert lawyers do not practise outside of the large firms but simply to recognise the reality that only firms of 200 or 300 solicitors can retain 'teams' of 8 to 10 solicitors as overhead on standby to handle very large cases requiring voluminous discovery.

[164] Eg *Bank of Nova Scotia* v *Imperial Development (Canada) Ltd* [1989] 3 WWR 21.