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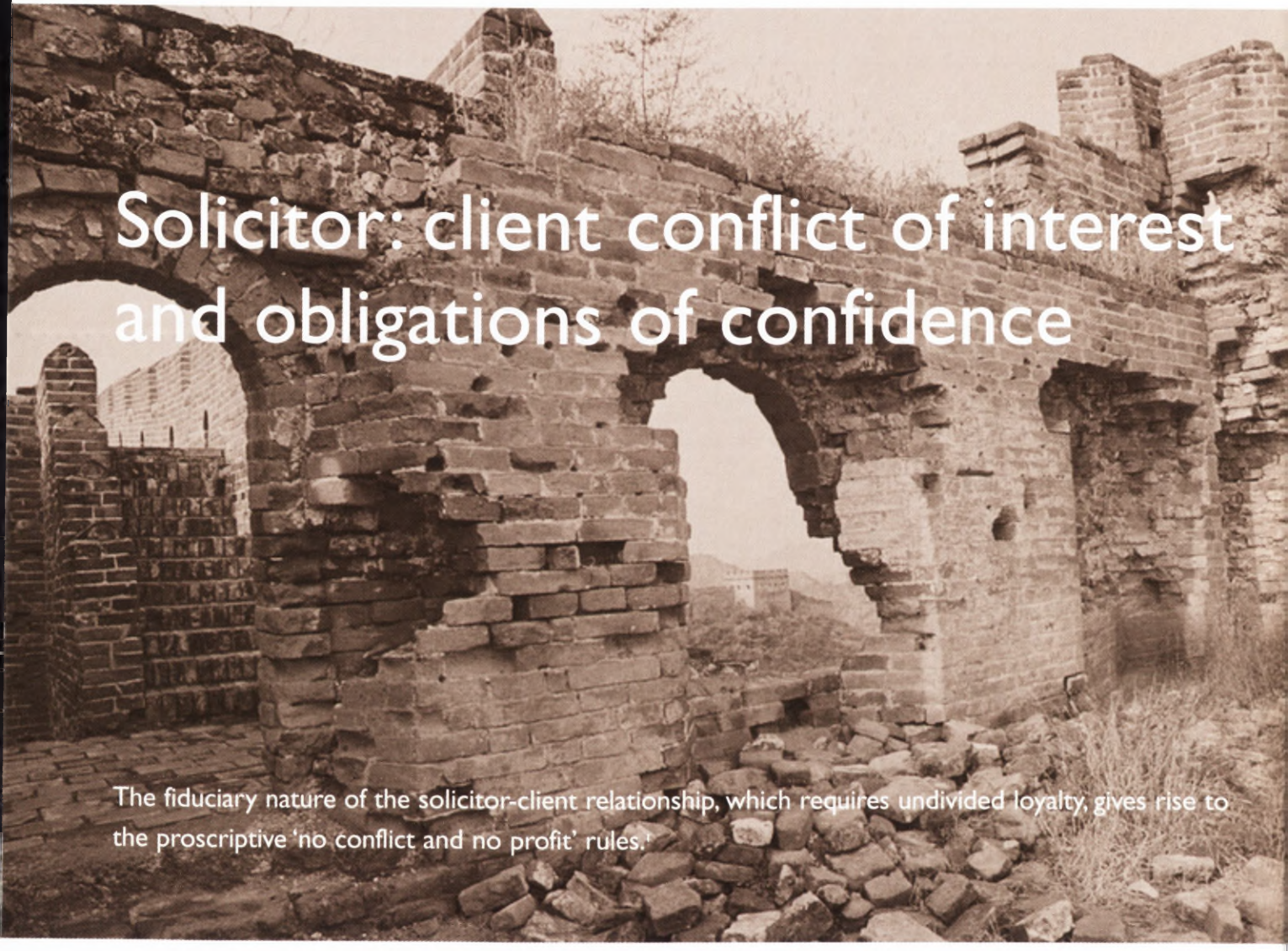
Solicitor: client conflict of interest and obligations of confidence



The fiduciary nature of the solicitor-client relationship, which requires undivided loyalty, gives rise to the proscriptive 'no conflict and no profit' rules.[1]

This relationship may also give rise to an equitable obligation of confidence. Where a solicitor purports to act for two or more parties in respect of the same matter, or acts against a former client, these equitable obligations may operate to restrict the solicitor's capacity to continue to act in the matter.

The 'no conflict' rule requires that, in the absence of fully informed consent, solicitors should not place themselves in a position where there is a real and sensible possibility of conflict between:

(a) their personal interest and that of their clients (conflict of duty and interest) ; or

(b) duties owed to two or more clients (conflict of duty and duty).

The 'no profit' rule requires that solicitors shall not make a profit out of their position as fiduciary unless their clients have given their fully informed consent.[2]

In addition to the fiduciary duty of undivided loyalty, solicitors may also owe an equitable obligation to their clients not to disclose information received in confidence during the course of the solicitor-client relationship without consent. The obligation of confidence may also arise as an implied term of the contract of retainer.[3]

This article gives a brief overview of the relevant law and discusses the recent New South Wales Supreme Court

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decision of Chief Justice Young in Eq in *British American Tobacco Australia Services Ltd v Blanch.*[4] In *BATAS v Blanch,* His Honour confirmed that, where an injunction is sought to restrain a solicitor from acting against a former client, the sole basis of relief is breach of the obligation of confidence, save in exceptional cases where relief in equity may be warranted.

ACTING FOR TWO OR MORE PARTIES IN RESPECT OF THE SAME MATTER[5]

Where a solicitor accepts retainers to act for two or more clients in respect of the same matter and their interests may diverge, the potential arises for a conflict between the duty to one client and the duty to another. Although equity does not proscribe a solicitor acting in such cases,[6] a solicitor commits a breach of fiduciary duty if he or she continues to act for more than one party after a conflict of duty arises.[7] The proscription against acting for two or more clients in these circumstances simply reflects the fiduciary notion of undivided loyalty.[8]

In *Watkins v DeVarda,*[9] Justice Ipp[10] endorsed the following remarks made by Davies J in *Oceanic Life Ltd v HIH Casualty and General Insurance Ltd:*[11]

> 'A conflict of interest is an insidious thing. It clouds the mind. Aspects of a duty of care, which ought to be seen clearly and distinctly, are seen in a hazy light when a solicitor seeks to reconcile the interests of two clients who each have interests which differ from those of the other. Over many years, in judgments which I have written or in which I have joined, the point has been made that solicitors should never allow themselves to have a conflict of interest. Those judgments appear to have had no impact. Too many solicitors continue to act for two or more clients who have conflicting interests. Year after year, cases come before the courts because a solicitor, in such a position, has failed to fulfil his duty to one or more of his or her clients.'

The decision to accept a retainer from the second client may also create a possibility of conflict between the solicitor's personal interest in the fee from the second client, and the duty to the first client for whom the solicitor already acts.[12]

Recently, in *BATAS v Blanch,* Young CJ in Eq confirmed that, if a solicitor acts for two or more parties in the same matter and acquires confidential information relevant to one of them, he or she cannot use that information against that client, either in favour of his or her other client, or for a stranger.[13]

ACTING AGAINST FORMER CLIENTS[14]

The fact that a solicitor has acted for a client in a matter does not of itself entitle the client to restrain that solicitor from acting against the client in a later matter.[15] However, a solicitor cannot act against a former client if he or she possesses confidential information unless there is no risk of disclosure - the risk must be real and not fanciful.[16]

If clients have genuine concerns about their former solicitors acting against them in later litigation, they must take the point at least in correspondence with the other side at the earliest opportunity. Failure to take the point initially casts doubt on the bona fides of any later complaint concerning the existence of confidential information, and on the bona fides of any alleged apprehension regarding the possible misuse by the practitioner in question of such confidential information.[17]

> "A conflict of interest is an insidious thing – it clouds the mind."

In *Belan v Casey,*[18] Chief Justice Young noted[19] that, in applications for injunctions to prevent practitioners acting against former clients, three jurisdictional bases had been relied upon:[20]

- breach of duty to hold information confidential;[21]
- breach of fiduciary duty of loyalty and preventing conflicts of interest;[22] and
- the court's inherent jurisdiction over solicitors as officers of the court to prevent the perception of impropriety and to protect the integrity of the judicial process.[23]

However, His Honour noted that the decision of *Prince Jefri Bolkiah v KPMG (A Firm)*[24] held that the jurisdiction where a retainer was no longer active was founded solely on confidential information and was not connected with principles of conflict of interest. After discussing this decision, Chief Justice Young said:[25]

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

Recently, in *BATAS v Blanch,* Chief Justice Young reconsidered the circumstances in which an injunction is available to restrain a solicitor from acting against a former client. His Honour affirmed his view in *Belan v Casey*[26] that the basis of relief is breach of confidence, save in exceptional cases.

In *BATAS v Blanch,* the plaintiff, a cigarette company (BATAS), brought an application for an injunction to restrain the defendants, a firm of solicitors (Hicksons), from acting against it in a cross claim for contribution before the Dust Diseases Tribunal (DDT).

The DDT litigation related to a claim brought against Brambles Holdings Ltd (Brambles), by a former employee (Mowbray), seeking damages for lung cancer allegedly sustained as a result of exposure to asbestos dust and fibre and diesel dust and fumes during his employment. Brambles, insured by Allianz Australia Limited (Allianz), consented to a $200,000 award to ▶

Mowbray. Mowbray was a smoker. Allianz/Brambles cross-claimed against BATAS for contribution, claiming that the synergy between his work conditions and smoking combined to cause Mowbray's damage.

BATAS alleged that in previous litigation where Hicksons were instructed by Allianz as BATAS' insurers (and in some cases as BATAS' solicitor), Hicksons became privy to much of BATAS' confidential information, including information about its knowledge at the relevant time of such synergy. BATAS sought an injunction preventing Hicksons acting against it in the DDT claim.

BATAS' founded its claim on:

(a) the *Prince Jefri* principle ('properly understood'[27]);
(b) the duty of loyalty, which was alleged to survive the cessation of legal services; and
(c) the court's supervisory jurisdiction over solicitors.

Hicksons argued that the facts and circumstances did not justify relief because the subject information was in the public domain, thus not confidential or, if confidential, it was irrelevant to the DDT claim.[28]

Chief Justice Young said that, despite contrary authority,[29] until the NSW Court of Appeal or High Court ruled otherwise, he would adhere to his view in *Belan v Casey* that the sole touchstone of relief where a solicitor acts against a former client is the danger of misuse of confidential information.[30] He noted, however, that in exceptional[31] cases, equity might consider in conscience that relief should be given, without risking breach of confidence.[32]

Therefore, absent exceptional circumstances, to make out a case for an injunction to restrain a solicitor from acting against a former client, a plaintiff must establish that:[33]

- the solicitor is in possession of information, including matters involving a client's forensic tactics and strategies,[34] which is confidential to the plaintiff, and disclosure has not been consented to; and
- the information is, or may be relevant to, a matter where the other client's interest is, or may be adverse to, its own.[35]

The court will then generally intervene, unless the solicitor discharges the onus of showing no risk of disclosure.[36] The risk must be a real one, not merely fanciful or theoretical, though it need not be substantial.[37]

A solicitor retained by an insurer for an insured owes the same duty to the insured as if he or she had been retained by the insured, but the insured cannot complain if the solicitor acts in accordance with the insurer's instructions within the insurer's rights under the policy.[38]

Chief Justice Young said that it was appropriate 'not to examine the facts too fully, but to make a broad assessment of the case and then see if the lawyers can demonstrate no real risk'.[39] He held[40] that the information was confidential[41] and that a material part of it appeared relevant to the DDT claim.[42] Further, Hicksons had not discharged the onus of establishing that there was no real risk of prejudice to BATAS.[43]

A defence of laches and acquiescence was raised, as Allianz had expended large sums of money and effort on legal fees to Hicksons and counsel and in preparing material for them in respect of the DDT claim. His Honour held that the defence could not succeed, as BATAS' conduct 'did not amount to acquiescence' nor did it cause 'proven serious and unfair prejudice to Hicksons'.[44]

Allianz considered only two law firms to have sufficient specialist legal expertise. It was submitted that where there were only a limited number of expert lawyers, it was against the public interest to grant an injunction which had the practical effect of denying a litigant adequate legal representation before a court or tribunal.[45] Chief Justice Young held that there was no impediment to justice in this case. The law preferred the first client's confidentiality over the second client's right to choose its own lawyer. He commented:[46]

> 'Moreover, lawyers generally are a pretty able lot and it usually does not take long for someone to develop the skills and experience which places him or her among the major league in particular fields of little competition.'

As Hicksons had not discharged the onus that there was no real risk of prejudice to BATAS arising out of misuse of confidential information relevant to the DDT claim, and no defence or discretionary consideration precluded relief, BATAS was awarded an injunction with costs.[47]

CONCLUSION

Where a solicitor purports to act for two or more parties in respect of the same matter, or acts against a former client, the fiduciary obligation of undivided loyalty and/or the equitable obligation of confidence may restrict the capacity of the solicitor to continue to act. If the solicitor was retained by an insurer on behalf of an insured, subject to the contract of insurance, the solicitor owes the same duty to the insured as if he or she had been retained directly.

If a same matter conflict arises, the fiduciary duty of undivided loyalty will preclude a solicitor from acting[48] and the solicitor is subject to the equitable obligation not to disclose confidential information without consent.[49]

In cases of former client conflict, *BATAS v Blanch* confirms that the basis of relief is breach of confidence, despite suggestions that relief may also be available for breach of duty of loyalty, or as part of the court's supervisory jurisdiction over solicitors.[50] Therefore, absent exceptional circumstances, unless solicitors discharge the onus of showing no real risk of disclosure, former clients will be awarded injunctions to restrain the solicitors from acting against them if they can establish that the solicitors acquired confidential information from them and that this information is relevant to a matter where the new client's interest is, or may be, adverse to the former client's.[51]

Chinese walls, though intended to protect against breaches of confidence, have not always been regarded by the courts as sufficient.[52] In *Prince Jefri*, Lord Millet said:[53]

> 'There is no rule of law that Chinese walls or other arrangements of a similar kind are insufficient to eliminate that risk. But the starting point must be that, unless special measures are taken, information moves within a firm.'

As noted by Chief Justice Young, the approach of the courts is 'not to examine the facts too fully, but to make a broad assessment of the case and then see if the lawyers can demonstrate no real risk'.[54] It may be difficult for solicitors to discharge this onus. PL

Endnotes: **1** *Chan v Zacharia* (1984) 154 CLR 178 per Deane J at p198. **2** As to fiduciary relations generally, see Dal Pont and Chalmers, *Equity and Trusts in Australia* (3rd ed, LBC Information Services, 2004), Chapter 4. **3** *British American Tobacco Australia Services Ltd v Blanch* [2004] NSWSC 70 at [43] per Young CJ. **4** [2004] NSWSC 70 (*BATAS v Blanch*). **5** See generally, Dal Pont *Lawyers' Professional Responsibility in Australia and New Zealand* (2nd ed, LBC Information Services, 2001), Chapter 8. **6** *Clarke Boyce v Mouat* [1993] 3 NZLR 641 (PC). **7** *Stewart v Layton* (1992) 111 ALR 687; *Clarke Boyce v Mouat* [1993] 3 NZLR 641 (PC). **8** Dal Pont and Chalmers *Equity and Trusts in Australia* (3rd ed, LBC Information Services, 2004), p105. **9** [2003] NSWCA 242. **10** Ibid at [172] with whom Foster AJA (at [213]) and Sheller JA (at [1]) agreed. **11** *Alexander v Perpetual Trustees WA Limited* [2001] NSWCA 240. **12** *Oceanic Life Ltd v HIH Casualty and General Insurance Ltd* [1999] NSWSC 292; BC9901325 at [42]. **13** [75]. **14** See generally, Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand* (2nd ed, LBC Information Services, 2001), Chapter 9. **15** *Rakusen v Ellis Munday & Clarke* [1912] 1 Ch 831. **16** *Prince Jefri Bolkiah v KPMG (A Firm)* [1999] 2 AC 222; cited with approval in *Belan v Casey* [2002] NSWSC 58. **17** *In the marriage of BJ McGillivray and PK Mitchell* (1998) 23 Fam LR; 15 July 1998; Ellis, Baker and Finn J. **18** [2002] NSWSC 58. **19** Ibid at 15. **20** cf. *Spincode Pty Ltd v Look Software Pty Ltd* [2001] VSCA 248; BC 200108170 at [60]. **21** *Rakusen v Ellis Munday and Clarke* [1912] 1 Ch 831. **22** There must be no real or sensible possibility of conflict: *Carindale Country Club Estate Pty Ltd v Astill* (1993) 42 FCR 307. **23** See generally DA Ipp, 'Lawyers Duties to the Court' (1998) 114 LQR 63; see also, *Gugiatti v City of Stirling* [2002] WASC 33; BC200200751 per Templeman J; *Newman as Trustee for the Estates of Littlejohn v Phillips Fox (a firm)* [1999] WASAC 171; BC9905941 at [18] – [24]; *Wan v McDonald* (1992) 33 FCR 491; 105 ALR 473 at para 6 per Burchett J. **24** [1999] 2 AC 222 (*Prince Jefri*). **25** Supreme Court NSW, Equity Division; unreported judgment 3909 of 2001at 21. **26** [2002] NSWSC 58. **27** Young CJ was invited to reconsider *Belan v Casey* in so far as it held that the sole basis was breach of confidence. **28** See [58] – [69]. **29** Such as *Spincode Pty Ltd v Look Software Pty Ltd* (2001) 4 VR 501 per Brooking JA (discussed at [98]-[100]). **30** [108] –[113]. **31** Or 'extreme', see [144]. **32** [112]. **33** [93]; citing *Prince Jefri* at pp235-7. **34** [113] The information must be identified with sufficient particularity: *Mancini v Mancini* [1999] NSWSC 800; *Belan v Casey*. **35** *Prince Jefri* at 235; (discussed at [88]-[97]). **36** [46]; [70]. **37** *Prince Jefri* at 237. **38** [72]-[73] citing *Groom v Crocker* [1939] 1 KB 194; *McKenzie v Director General of Conservation and Natural Resources*[2001] VSC 220 at [47], [50]. **39** [115] citing *Prince Jefri*. **40** [130]. **41** Ie, not in the public domain - even if information is publicly recorded somewhere, but only accessible with some difficulty it might still be protected [123]. In any event, he was 'not sure that it is an answer to a claim for injunction to prevent disclosure of confidential information that the material is in the public domain': [124]. **42** It was relevant, as much of it went to establishing that smoking together with Brambles asbestos produced a synergy that caused the disease: [45]; [125]-[128]. **43** [47]. A Chinese wall was not feasible, as the *same* partner was acting. His duty was to provide all his helpful knowledge and information about BATAS to Allianz/Brambles: *Clark Boyce v Mouat* [1994] 1 AC 428. **44** [49]; [131]-[137]. **45** Discussed [138]-[144]. **46** [142]. **47** [145]. **48** *Stewart v Layton* (1992) 111 ALR 687; *Clarke Boyce v Mouat* [1993] 3 NZLR 641 (PC). **49** [75]. **50** See the criticism of these suggestions in Dal Pont and Chalmers, *Equity and Trusts in Australia* (3rd ed, LBC Information Services, 2004). [4.115]. **51** [93]; citing *Prince Jefri* at pp235-7. **52** *Prince Jefri; Mallesons Stephen Jacques v KPMG Peat Marwick* (1990) 4 WAR 357; *Freuhauf Finance Corp Pty Ltd v Feez Ruthning* [1991] 1 QdR 558; *BATAS v Blanch* at [47]. **53** At 237. **54** [115] citing *Prince Jefri*.