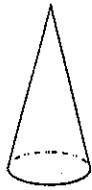

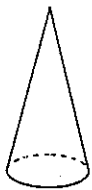


# SOLICITORS' CONFLICTS OF DUTY AND INTEREST: THREE DIFFERENT SCENARIOS

In a period of five months in 1997, three cases, one of the Supreme Court of Western Australia, one of the Victorian Supreme Court, and one of the Supreme Court of Queensland, demonstrated the difference in judicial consideration of the question as to whether a solicitor should be restrained from acting for a client due to a conflict of interest.

Each decision illustrates a different scenario in which 'a real and sensible possibility of conflict of interest'<sup>1</sup> can arise between the solicitor's duty to maintain the confidentiality of information provided to the solicitor in trust, and his or her interest in advancing the case of another client:

Scenario 1:	Scenario 2:	Scenario 3:
<p><i>Mytton's Ltd v Phillips Fox (a firm)</i><sup>2</sup></p>	<p><i>South Black Water Coal Ltd v McCullough Robertson (a firm)</i><sup>3</sup></p>	<p><i>Unioil International Pty Ltd v Deloitte Touche Tohmatsu (a firm)</i><sup>4</sup></p>
Dispute between clients A and B:	Dispute between clients A and B:	Dispute between clients A and B:
<p>lawyer X acts for client A</p>  <p>lawyer Y, in same firm as X, used to act for client B</p>	<p>lawyer X acts for client A</p>  <p>lawyer Y, moves to X's firm; Y acted for client B at previous firm</p>	<p>lawyer X acts for client A in dealings with B</p>  <p>lawyer Y, in X's firm, acts for client C in dispute with B</p> <p>A not told information about B that was learned in Y's dealings with C</p>

<sup>1</sup> This test has been cited by recent Australian authorities as the appropriate test to determine whether an obligation upon a lawyer as a fiduciary to avoid a conflict of interest has been fulfilled: *Mallesons Stephen Jaques v KPMG Peat Marwick* (1991) 4 WAR 357, 362; *National Mutual Holdings Pty Ltd v Sentry Corporation* (1989) 22 FCR 209, 229-30; *Farrow Mortgage Services Pty Ltd (in liq) v Mendall Properties Pty Ltd* [1995] 1 VR 1, 5; *Murray v Macquarie Bank* (1991) 33 FCR 46, 51; *Tbeakstone v McCann* (Unreported, Supreme Court of South Australia, DeBelle J, 27 February 1995) 4; *Carindale Country Club Estate Pty Ltd v Astill* (1993) 112 AIR 112, 118; *CI Industries Pty Ltd v Keeling* (Unreported, Supreme Court of New South Wales Abadee J 26 March 1997) 10; *Mytton's Ltd v Phillips Fox (a firm)* (Unreported, Supreme Court of Victoria, Coldrey J, 23 September 1997) 7. In *South Black Water Coal Ltd v McCullough Robertson* (Unreported, Supreme Court of Queensland, 8 May 1997), Muir J did not find it necessary to express a concluded view as to the appropriate test to apply

<sup>2</sup> (Unreported, Supreme Court of Victoria, Coldrey J, 23 September 1997).

<sup>3</sup> (Unreported, Supreme Court of Queensland, Muir J, 8 May 1997)

<sup>4</sup> (1997) 17 WAR 98

## CASE 1: *MYTTON'S LTD V PHILLIPS FOX (A FIRM)*

### Facts

In the early 1980s, Mytton developed a lightweight petrol tank for use in motor vehicles, the features of which gave Mytton a market advantage over its competitors. The design of the tank incorporated a multivalve single entry port system. Initially the valve was passed as suitable for its purpose by the Victorian Department of Labour and Industry. However, the valve was subsequently found to be defective. As a result, Mytton was forced to recall all of the cylinders it had sold throughout Australia.

In early 1985, Mytton notified its insurer of a possible claim for the cost of the product recall. In May 1985, a partner of Phillips Fox, S, was appointed by the insurer to advise what action the insurer ought to take in respect of the policy.

Another legal firm represented the insured, Mytton, and at no stage did Phillips Fox act for Mytton. In order for Phillips Fox to provide advice to Mytton's insurer, the law firm received various documents in relation to the valve recall from the insurer and from the claims assessor appointed by the insurer. However, there was never any verbal communication between Phillips Fox and Mytton. The advice provided by Phillips Fox to the insurer was to recommend that liability under the product recall insurance policy be denied.

Five years later, Mytton sued the State of Victoria seeking damages for the cost of the recall and loss of profits. The argument was that it was as a result of the Department of Labour and Industry pronouncing the valve fit for use in the cylinder that the installation and subsequent recall had occurred.

Until 1996, the Victorian Government Solicitor acted for the State. Then, the State retained a different partner from Phillips Fox to represent it in the action instituted by Mytton.

In 1997, S voluntarily and with the consent of his insurer client, provided to both parties those documents which could be relevant to the Mytton v State of Victoria proceedings.

Mytton subsequently sought to restrain Phillips Fox from representing the State. It alleged a conflict of interest in relation to S's role in respect of the original insurance claim when he had acted for Mytton's insurer.

### The Decision

Mytton successfully restrained Phillips Fox from acting on behalf on the State due to a conflict of interest.

*The plaintiff may not be a former client*

Phillips Fox had never acted on behalf of Mytton, the party seeking to restrain the legal representation of its opponents. On that basis, Phillips Fox sought to argue, *inter alia*, that there was no relevant relationship between Phillips Fox and Mytton that could give rise to a conflict between the firm's interests in advancing the case of the new client (the State) and the firm's duty to keep information given to it by a former client confidential — because Mytton was not the former client and there had never been any verbal communication between Phillips Fox and Mytton.

However, his Honour Coldrey J noted that recent authorities in both England and Australia<sup>5</sup> suggested that the principle of avoiding a conflict of interest and duty may be broader than the solicitor-client relationship, so as to protect prior 'quasi-clients' or indeed any person who gave information to a solicitor which was capable of being used to the giver's detriment.<sup>6</sup>

That broader principle applied in the instant case. Mytton knew that information it provided to the loss assessor was destined to be examined by Phillips Fox and its client insurer. The court's task was to ensure that information given by Mytton on trust in that way was not used in breach of that trust.<sup>7</sup> Although it was not clear to what use Phillips Fox had or would put the information, Coldrey J concluded that 'the trial process is a dynamic one and the capacity for misuse of confidential information is ongoing with the twists and turns of the litigation'.<sup>8</sup>

*No disqualifying delay by the plaintiff*

Phillips Fox also argued that Mytton had sat on its rights too long before applying to restrain Phillips Fox from acting for the State of Victoria. A period of five months elapsed between when Mytton discovered that documents were given by S to his co-partner who represented the State, and the application for removal. That was held not to constitute a disqualifying delay.<sup>9</sup>

In respect of this second point, the plaintiff seeking removal of the solicitors for an alleged conflict of interest was not so fortunate in the following case:

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<sup>5</sup> *In Re a Firm of Solicitors* [1992] 1 QB 959, 970; *Macquarie Bank Ltd v Myer* [1994] 1 VR 350, 351.

<sup>6</sup> (Unreported Supreme Court of Victoria, 23 September 1997) 3-4.

<sup>7</sup> *Ibid*.

<sup>8</sup> *Ibid* 6.

<sup>9</sup> *Ibid*.

CASE 2: *SOUTH BLACK WATER COAL LTD V  
McCULLOUGH ROBERTSON (A FIRM)*

**Facts**

South Black Water Coal Ltd ('South') sought an injunction restraining law firm McCullough Robertson ('McCullough') from acting on behalf of building contractors Thiess Contractors Pty Ltd ('Thiess').

Prior to being employed with McCullough as a partner, M was employed by another law firm Blake Dawson Waldron ('Blakes'). Whilst at Blakes, M acted on behalf of South in providing advice in relation to tender documents for a coal handling and processing plant for the Kenmare mine. M briefed counsel to advise in relation to the proposed tender documents, reviewed and commented upon the opinion, thereafter attended conferences with counsel and representatives of South and (after a period of some months during which he ceased to be involved with the Kenmare matter) briefly perused a letter of advice to South which had been prepared by another member of the firm. This last activity occurred only a few days before M left Blakes to join McCullough.

About 14 months after joining McCullough, M was requested by Thiess to become involved in Thiess' proposed claim against South in relation to the Kenmare project. According to the evidence, M gave consideration to a possible conflict of interests, concluded in good faith that none existed, and thereafter acted in the dispute on behalf of Thiess on an almost daily basis.<sup>10</sup> However, 11 months later, the solicitors for South raised, for the first time, a claim that McCullough was in a position of conflict.

South argued that M had placed himself in a position in which there was a significant possibility that his (continuing) duty to his former client South may conflict with his interest in advancing the interests of his new client Thiess.

**The Decision**

*A conflict imputed to the entire firm*

Muir J agreed that a conflict of interest existed.<sup>11</sup> Whilst the advice with which M had been involved at Blakes might have had more or less relevance as the issues in the action became further defined, Muir J considered that M possessed information confidential to South as a result of participating in the giving of advice to South prior to his leaving

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<sup>10</sup> (Unreported, Supreme Court of Queensland Muir J 8 May 1997) 7

<sup>11</sup> *Ibid* 4

Blakes Therefore, there was a significant possibility of conflict between duty and interest<sup>12</sup>

Further, citing the authority of Ipp J in *Mallesons Stephen Jaques v KPMG Peat Marwick* ('*Mallesons*'),<sup>13</sup> his Honour held that, as a partner in the defendant firm, M placed the firm in a similar position in respect of a conflict of duty and interest At the relevant page of *Mallesons* to which Muir J refers, Ipp J noted:

Very often clients will consult or retain a firm rather than a particular partner in it It is therefore, in my opinion incongruous to suggest that, in determining whether a conflict of interest may exist, the knowledge and duties of certain partners in a firm of several partners should be divorced from the knowledge and interests of other partners in the rest of the firm<sup>14</sup>

However, that did not conclude the matter

### *Acquiescence*

McCullough was permitted to continue to act for Thiess South had stood on its rights for too long, and so acquiesced in M's representation of Thiess Moreover, according to the evidence, South's representative stated on one occasion that M's representation of Thiess was not a problem at that time but that it might be if litigation ensued.

Bearing in mind that statement and the delay, Muir J concluded that South made a commercial decision to permit M to continue to advise Thiess on what was obviously a very substantial dispute and one which was likely to touch upon matters in respect of which M had previously been involved on behalf on South<sup>15</sup> Whatever words were used by South's representative, Muir J was satisfied that it was reasonable for Thiess to conclude that M and McCullough were free to continue to act for Thiess in the dispute and that the question of conflict had been resolved for practical purposes<sup>16</sup>

Further, South must have appreciated that there was some risk that in acting on behalf of Thiess, M would retain some residual memory of advice given or information obtained whilst employed at Blakes.<sup>17</sup>

Muir J concluded:

I do not accept that South Blackwater's desire to remove the defendant, and M, as Thiess's legal advisers is motivated by anything other than a desire to make the litigation as difficult and as uncomfortable as possible for Thiess<sup>18</sup>

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12 Ibid

13 (1991) 4 WAR 357, 374

14 Ibid.

15 (Unreported Supreme Court of Queensland, Muir J, 8 May 1997) 7

16 Ibid 2

17 Ibid 7

18 Ibid 8

By coincidence, only two months after Muir J cited with approval Ipp J's observations in *Mallesons* that one partner's knowledge should be imputed to the rest of the partnership, Ipp J had cause to reconsider that view in the following case.

**CASE 3: *UNIOIL INTERNATIONAL PTY LTD V DELOITTE TOUCHE TOHMATSU (A FIRM)***

**Facts**

Unioil International Pty Ltd and other companies ('the plaintiffs') considered making an investment in a group of companies, the UFI Group ('UFI'). The plaintiffs engaged the defendants Deloitte Touche Tohmatsu ('DDT') and Corrs Chambers Westgarth ('Corrs'), firms of accountants and lawyers respectively, to carry out a due diligence investigation into the financial position and business affairs of the UFI Group. Subsequently, following advice from the defendants, the plaintiffs bought shares in, and paid monies by way of loan to, the UFI Group totalling an aggregate sum of almost \$19 million. However, due to ongoing financial difficulties on the part of the Group, a liquidator was appointed.

Apart from \$25 000, the remainder of the plaintiffs' payments were lost. The plaintiffs sued both defendants for negligence, breach of contract and misleading and deceptive conduct. However, for the purposes of this casenote, the action of relevant interest was that instituted against the law firm for breach of fiduciary duty.

The due diligence investigation required Corrs' Perth office to rigorously pursue all relevant information about the UFI Group and report to the potential investor client.

On 22 September 1994, some time after the Perth office had been retained by the UFI Group, the Sydney office of Corrs was retained by the Building Services Corporation of New South Wales ('BSC') to act in a financial transaction between the BSC and UFI. In this respect, Ipp J noted that the partners carrying on practice at each particular office of Corrs (whether it be Corrs' Perth or Corrs' Sydney) constituted a separate partnership.<sup>19</sup>

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<sup>19</sup> (1997) 17 WAR 98, 100-1. Ipp J explained that although Corrs, as with many mega-firms, presented to the world at large the picture of a single national firm carrying on practice with offices in major cities of Australia, the rule against solicitors sharing profits with persons not admitted to practice in their particular State was an obstacle to the formation of a national partnership. Revenue earned at each city office remained with that profit centre, with the exception of a national bonus pool. However, if a client required work to be done interstate, all the resources of the respective offices would be put at the disposal of that client.

Corrs' Sydney discovered that UFI was facing a number of claims for breach of warranty for alleged defects in pools which UFI had manufactured. The function of the BSC, as statutory insurer, was to remedy defective building work and then recover those costs from the builder responsible. UFI could not pay to BSC the total rectification costs. Instead, BSC and UFI intended to enter into an arrangement whereby the outstanding rectification costs would be paid back by UFI over a three year trading period. It was in BSC's interests to keep confidential the extent of the warranty claims against UFI, so that the UFI Group's goodwill and viability could be visibly maintained over the three year period. Certainly, BSC did not want the public to lose confidence in UFI.<sup>20</sup>

Via an e-mail conflict search sent to all Corrs' offices throughout Australia, a partner of Corrs' Sydney, D, advised that he had received instructions from the BSC relating to 'UFI Pools Group and its holding company UFI Ltd' and asked that any conflicts be notified to him. Partner C from Corrs' Perth telephoned D and said that he was acting for an investor who was considering an investment in the UFI Group.

C did not become privy to all of the information learned by D from his discussions with the BSC. However, as a result of conversations between D, C and others, Ipp J concluded that C must have realised that:

- the transaction between UFI and BSC about which Corrs' Sydney had been consulted was a commercial financial transaction;<sup>21</sup>
- it involved finance provided by BSC to UFI in connection with warranty claims;<sup>22</sup>
- there was a serious question about the extent of the warranty claims against UFI;<sup>23</sup>
- it was possible that UFI might not honour its obligation under the transaction, in which case BSC might have to enforce its rights against UFI;<sup>24</sup> and
- BSC wished Corrs' Sydney to continue to act for it, but only on the basis that there was no information flow between Corrs' Sydney and Corrs' Perth.<sup>25</sup>

The matter was considered by Corrs to be highly sensitive, and within a very short time of Corrs' Sydney receiving the instructions from the BSC,

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20 Ibid 102

21 Ibid 103 C-D

22 Ibid

23 Ibid 104 C.

24 Ibid 103 C-D

25 Ibid 102 G

C and D agreed that Corrs' Sydney should not act for BSC. However, it was the retainer of the Perth office with which Ipp J was concerned

### **The Decision**

Ipp J held that the law firm had breached its fiduciary duty to the plaintiffs<sup>26</sup>

#### ***The first argument: a conflict of interest***

Regardless of the fact that there might not have been a partnership at law between the partners of Corrs' Sydney and Corrs' Perth, Ipp J considered that there was an identity of interest between them and their respective practices. For that reason, there was a real and sensible possibility that C would be tempted to deal with the BSC involvement in UFI in a way that was least embarrassing to Corrs' Sydney.<sup>27</sup>

Therefore, his Honour concluded that, through C, there was a conflict between Corrs' fiduciary duty to take means to protect the plaintiffs in the investment decision they were to make, and Corrs' Perth's interest in protecting Corrs' Sydney by refraining from making direct and vigorous enquiries of BSC.<sup>28</sup>

#### ***The second argument: a duty to disclose***

However, the plaintiffs were unable to prove the second breach of fiduciary duty which they alleged.

(a) *Not imputed knowledge — rebuttable presumption — effectively rebutted*

The argument was that any partner of Corrs (whether from the Perth or Sydney offices) was required to disclose to the plaintiffs any information which, in his or her opinion, was material to the due diligence investigation for which the plaintiffs had retained Corrs.

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<sup>26</sup> Ibid 106 After taking all relevant factors into account Ipp J considered that the responsibility for the plaintiffs damages inter se between DDI and Corrs should be apportioned 60% as regards DDI and 40% as regards Corrs. This apportionment, together with other matters associated with the award against DDI, were the subject of an appeal by DDI to the Full Court of the Supreme Court of Western Australia, which appeal was dismissed. However, the trial judge's finding that there was a conflict between C's fiduciary obligation to take appropriate measures to protect the plaintiffs, and his interest in protecting Corrs Sydney, was not the subject of appeal: *Deloitte Touche Tomatsu (a firm) v Unioil International Corporation Pty Ltd* (Unreported, Full Court of the Supreme Court of Western Australia, Malcolm CJ, Owen and Steytler JJ, 30 September 1998).

<sup>27</sup> Ibid 105 Ipp J noted that no partner in any of the Corrs offices would wish the Sydney office to lose the BSC as a client for whom Corrs Sydney had acted across a range of matters.

<sup>28</sup> Ibid



This argument did not depend upon the conduct of any member of the Perth office. Rather, it was predicated on the basis that D was a partner of Corrs; D learnt information from BSC relevant to the work that Corrs were doing for the plaintiffs; D's knowledge was to be imputed to each and every partner of the Corrs partnership; therefore, D's knowledge was that of the partnership; the partnership, through D, should have disclosed that advice to the plaintiffs or ceased acting for them.<sup>29</sup>

As Ipp J noted, the argument would fail at the outset if D was not a partner of the Corrs partnership which acted for the plaintiffs. However, for the purposes of the argument, and without having to decide the issue, his Honour was prepared to assume that D was a partner of the Corrs partnership acting for the plaintiffs.<sup>30</sup>

After reviewing his remarks made in *Mallesons* in October 1990, Ipp J noted that since that decision, the question of imputed knowledge had been examined by the Supreme Court of Canada in *MacDonald Estate v Martin*.<sup>31</sup> His Honour cited with approval the judgement of Sopinka J in which the latter said:

Some courts have applied the concept of imputed knowledge. This assumes that the knowledge of one member of the firm is the knowledge of all. If one lawyer cannot act, no member of the firm can act. This is a rule that has been applied by some law firms as their particular brand of ethics. While this is commendable and is to be encouraged, it is, in my opinion, an assumption which is unrealistic in the era of the mega-firm.<sup>32</sup>

Instead of an imputed knowledge approach, Ipp J endorsed Sopinka J's view that there is a strong inference or presumption that lawyers who work together share confidences (whereby the knowledge of one partner is to be regarded as the knowledge of his or her partner), but that the presumption is rebuttable by clear and convincing evidence that all reasonable measures have been taken to ensure that no disclosure will occur.<sup>33</sup>

The instant case provided a perfect example of effective rebuttal. On the evidence, it was apparent that D only made disclosure of the information he obtained from BSC to one partner, C. Also, that disclosure was only limited in extent. The knowledge of D could not be presumed to be the knowledge of all partners in the Corrs partnership.<sup>34</sup>

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<sup>29</sup> Ibid 106

<sup>30</sup> Ibid 107

<sup>31</sup> (1990) 77 DLR (4th) 249

<sup>32</sup> Ibid 268. Dickson CJC la Forest and Gonthier JJ agreed with the reasons of Sopinka J. The minority of the Supreme Court of Canada favoured a strict imputed knowledge of one partner's knowledge to the other members of the partnership.

<sup>33</sup> (1997) 17 WAR 98 108

<sup>34</sup> Ibid

(b) *Question whether 'the firm' owed fiduciary duty to plaintiffs left open*

Later in his judgement, Ipp J approached the question from another angle. His Honour noted that the partner of the firm who actually does the work for the client concerned owes fiduciary duties to the client. However, it was open to question whether every partner of the firm (including those who practice in other cities and are ignorant of the identity and interests of the co-partner's client) owed fiduciary duties to those clients merely because the firm was retained.<sup>35</sup> His Honour suggested that a fiduciary duty to disclose may not necessarily always apply to a solicitor who possesses knowledge that may be helpful to a client of his firm for whom he is not personally doing any work, but who is being represented by one of his partners.<sup>36</sup>

Ipp J noted with approval previous comments by Staughton LJ that, in the age of mega-firms, it 'would not be right to enlarge the law to that extent.'<sup>37</sup>

Therefore, it could not be shown that D owed any fiduciary duty to the plaintiffs for whom he did not act personally.

His Honour commented that 'the nature of fiduciary duties are determined by the exigencies of particular circumstances, and no fixed or absolute rule applies.'<sup>38</sup> On a fact-by-fact basis, it seems that two questions will be relevant under the *Unioil* approach:

1. It will be necessary to closely examine to what extent information was disseminated amongst the partnership members, and the extent of the information that was spread, by which time it is conclusive that the presumption of shared knowledge cannot be rebutted. In a given fact situation, this may require painstaking evidence as to how many partners knew precisely which information.
2. Quite apart from how many partners of the firm knew of what one partner was told, there is presumably a point at which the partner remote from the client has, in his or her possession, sufficient knowledge of the client of the co-partner so that the failure to disclose information might affect the manner in which the co-partner is able to represent the client. In *Unioil*, Ipp J emphasised that D's failure to disclose the information obtained from BSC had no bearing whatsoever on the integrity, zeal and efficiency with which C and Corrs' Perth were able to represent the plaintiffs.<sup>39</sup>

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35 Ibid 109

36 Ibid 110

37 *Re a Firm of Solicitors* [1992] 1 All ER 353, 365

38 (1997) 17 WAR 98 110

39 Ibid.

Indeed, D never knew the identity of the plaintiff clients, but merely that Corrs' Perth acted for a party who wished to take a stake in UFI.<sup>40</sup>

However, in a different fact scenario, either of these two points might be significant in determining whether partners 'in cities thousands of miles distant'<sup>41</sup> do indeed owe fiduciary duties to clients who have retained the legal services of the law firm.

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<sup>40</sup> This was confirmed in a filenote written by C on 26 September 1994

<sup>41</sup> To adopt a phrase of Ipp J at (1997) 17 WAR 98, 109