

## CONFLICTS OF DUTY: THE PERENNIAL LAWYERS’ TALE — A COMPARATIVE STUDY OF THE LAW IN ENGLAND AND AUSTRALIA

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*[This article compares the approaches taken by English and Australian courts to lawyers’ conflicts of duty. In particular, it examines the principles of law which govern an application seeking to restrain a lawyer from acting on behalf of client ‘B’ on the basis that the lawyer’s duty to ‘A’ (a present or former client) will be breached. The article will also examine preliminary and related matters, including: standing requirements, information barriers (such as Chinese walls) and the potential consequences of delay. There are three bases on which a court may restrain a lawyer from acting: misuse of a client’s confidential information; breach of a lawyer’s duty of loyalty; and the inherent jurisdiction of the court over its officers. This article discusses the divergence between English and Australian law regarding the availability of these grounds.]*

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It is of extreme public interest that no conduct should be permitted which is likely to prevent a litigant in a Court of justice from having his case tried free from all matter of prejudice.<sup>1</sup>

## I INTRODUCTION

Imagine you are a client of a lawyer and that you have been so, intermittently, for the last 20 years. The lawyer has prepared your conveyancing deeds and your will. Your certificates of title may be stored in the lawyer's office. The lawyer may have a power of attorney in relation to your personal affairs. You may have instructed the lawyer to serve letters of demand on recalcitrant business partners. You may have been a party to litigation and the lawyer counselled you, dealt with your opponent and appeared on your behalf. The lawyer has and continues to serve your interests faithfully. Now imagine that same lawyer serves a letter of demand on you in relation to a matter in which he or she had formerly acted on your behalf.

Such conduct is generally seen as inappropriate and unethical. Why? The answer resides in the nature of the relationship between lawyer and client. It is intimate — the client reposes trust and confidence in the lawyer. Indeed, the lawyer is in a fiduciary relationship with the client. More than that, of all the fiduciary relationships known to the law, the lawyer–client relationship is one of the most recognisable. The common law system of justice would not function without it. The public derives, in part, its confidence in the administration of justice from the fidelity of a lawyer to his or her client. It is for this reason that courts have required high standards of propriety from a lawyer.<sup>2</sup> Conflicts of duty threaten these standards. In *Alexander v Perpetual Trustees WA Ltd*, Davies AJA described conflicts of duty as ‘insidious thing[s]’.<sup>3</sup> They cloud the mind. Aspects of the lawyer's duty of care, which ought to be seen clearly and distinctly, are seen in a ‘hazy light’.<sup>4</sup>

<sup>1</sup> *Ex parte Bread Manufacturers Ltd; Re Truth & Sportsman Ltd* (1937) 37 SR (NSW) 242, 249 (Jordan CJ). See also *Baker v Campbell* (1983) 153 CLR 52, 115–16, where Deane J held: ‘the principle underlying legal professional privilege is that a person should be entitled to seek and obtain legal advice without the apprehension of being prejudiced by subsequent disclosure of confidential communications’.

<sup>2</sup> See *Myers v Elman* [1940] AC 282, 319 (Lord Wright): ‘the court has a right and duty to supervise the conduct of [lawyers], and visit with penalties any conduct of a [lawyer] which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally’. See also *Murcia & Associates (a firm) v Grey* (2001) 25 WAR 209, 213–14 (Steytler J); *Walsh v Law Society of New South Wales* (1999) 198 CLR 73, 96 (McHugh, Kirby and Callinan JJ).

<sup>3</sup> [2001] NSWCA 240 (Unreported, Stein JA, Davies and Ipp AJJA, 30 July 2001) [125].

<sup>4</sup> *Ibid.*

Lawyers have a fiduciary obligation to avoid ‘conflicts of duty’.<sup>5</sup> Conflicts arise when a lawyer who owes a duty to one client undertakes a similar duty towards another client<sup>6</sup> either simultaneously (‘present client conflict’)<sup>7</sup> or successively (‘former client conflict’).<sup>8</sup> This article will examine the grounds upon which courts in England and Australia will restrain a lawyer from acting where either conflict of duty is alleged.

When an injunction is sought to restrain a lawyer from acting for a party, the principles governing the situation vary depending upon whether the applicant is a present or former client.<sup>9</sup> There are three bases on which a court may grant an injunction: misuse of a client’s confidential information; breach of a lawyer’s fiduciary duty of loyalty; and the inherent jurisdiction of the court over its officers. In England, the jurisdiction of the court in present client conflicts is confined to upholding the lawyer’s duty of loyalty, while in former client conflicts it is confined to preventing the misuse of confidential client information. In Victoria, and some other parts of Australia, the jurisdiction of the court is not so confined<sup>10</sup> and all three jurisdictional bases are available in both present and former client conflicts. The speech of Lord Millett in the English case *Prince Jefri Bolkiah v KPMG (a firm)*<sup>11</sup> and the judgment of Brooking JA in the

<sup>5</sup> Conflicts of duty are often misdescribed as conflicts of interest. See *Spincode Pty Ltd v Look Software Pty Ltd* (2001) 4 VR 501, 513 fn 26 (Brooking JA) (‘*Spincode*’):

in view of the fact that ‘conflict of interest’ is ordinarily used to describe a clash between the interest of the fiduciary and the duty owed to the client, it seems preferable, with respect, to speak in the present connection, as Professor Finn and a number of other learned authors do, of conflict of duty with duty.

See also *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 198–9 (McHugh, Gummow, Hayne and Callinan JJ); *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1, 46–7 (Spigelman CJ, Sheller and Stein JJA); John Glover, ‘Conflicts of Interest, Conflicts of Duty and the Information Professional’ (2003) 23 *Adelaide Law Review* 215, 223; Andrew Mitchell, ‘Whose Side Are You on Anyway? Former Client Conflict of Interest’ (1998) 26 *Australian Business Law Review* 418, 418–19; Matt Connock, ‘Restraining Lawyers from Acting in the Face of a Conflict: Discussion and Advice in Australia’ (1995) 12 *Australian Bar Review* 244.

<sup>6</sup> See generally Charles Hollander and Simon Salzedo, *Conflicts of Interest and Chinese Walls* (2<sup>nd</sup> ed, 2004).

<sup>7</sup> This phrase is used throughout the article. It is not a term of art, but is used occasionally by commentators to describe this kind of conflict. For examples of such a conflict, see *Blackwell v Barroile Pty Ltd* (1994) 51 FCR 347, 359 (Davies and Lee JJ); *Wan v McDonald* (1992) 33 FCR 491, 511–13 (Burchett J) (which held that a lawyer should not act for two parties with different interests in the same conveyancing transaction).

<sup>8</sup> See *British American Tobacco Australian Services Ltd v Blanch* [2004] NSWSC 70 (Unreported, Young CJ in Eq, 20 February 2004) [79] (‘*BATAS v Blanch*’); *Spincode* (2001) 4 VR 501, 516 (Brooking JA). See also Paul Finn, ‘Professionals and Confidentiality’ (1992) 14 *Sydney Law Review* 317, 333 (citations omitted): ‘While it can have a number of variants, in its simplest form it involves a firm, having acted for a client in one retainer, later accepting a retainer from another client with an adverse interest in a matter related to that of the former retainer.’

<sup>9</sup> See *Photocure ASA v Queen’s University at Kingston* (2002) 56 IPR 86, 95 (Goldberg J) (‘*Photocure*’); *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1, 47–8 (Spigelman CJ, Sheller and Stein JJA).

<sup>10</sup> Lee Aitken, ‘Chinese Walls and Conflicts of Interest’ (1992) 18 *Monash University Law Review* 91, 91: ‘Any Australian court may choose from a smorgasbord of authority, absent a ruling of the High Court of Australia, or an intermediate appellate court.’ Interestingly, the judgment of an appellate court in *Spincode* has not, as predicted, unified Australian law: see below Parts IV, V. It appears only a judgment of the High Court of Australia will lead to such an outcome.

<sup>11</sup> [1999] 2 AC 222 (‘*Prince Jefri Bolkiah*’).

Victorian case *Spincode*<sup>12</sup> reflect the emerging divergence of the law in England and Australia. That divergence will be described and critically assessed in this article.

Part II discusses a number of preliminary matters, including whether barristers and solicitors can be treated similarly in conflict of duty cases, the attribution of knowledge to law firms and the standing of clients to bring an application seeking to restrain a lawyer. Part III sets out the legal and theoretical foundations of a lawyer's duty to avoid conflict. Part IV identifies the conditions precedent to the existence of both kinds of conflict. Parts V and VI describe, compare and critically assess the laws in Australia and England in relation to each kind of conflict. Finally, Part VII discusses a number of related matters, including client consent to conflict, information barriers and whether delay is capable of disentitling an applicant to restrain a lawyer from acting.

## II PRELIMINARY MATTERS

### A *Barrister v Solicitor*

For the purposes of this article, no distinction is drawn between a solicitor and a barrister — they are collectively referred to as 'lawyers'. This is because an application for an injunction against either a solicitor or a barrister is governed by the same principles of law.<sup>13</sup> Barristers and solicitors owe similar fiduciary duties of confidentiality and loyalty to their clients.<sup>14</sup> Courts often apply the same authority when considering applications to restrain either barrister or solicitor.<sup>15</sup> In *Australian Commercial Research & Development Ltd v Hampson*, Mackenzie J observed that there was 'nothing in any of the authorities ... to suggest that any difference exists.'<sup>16</sup> Similarly, in *Re a Firm of Solicitors*, Lightman J observed that '[t]he same principles plainly should and do apply in both cases'.<sup>17</sup> Indeed, the law may be stricter in relation to barristers.<sup>18</sup> It should

<sup>12</sup> (2001) 4 VR 501.

<sup>13</sup> *Sent v John Fairfax Publication Pty Ltd* [2002] VSC 429 (Unreported, Nettle J, 7 October 2002) [33], [105]–[106] ('*Sent v Fairfax*'), where no distinction was drawn between the barrister and solicitor. They were collectively referred to as 'legal practitioner[s]': at [33].

<sup>14</sup> Janine Griffiths-Baker, *Serving Two Masters: Conflicts of Interest in the Modern Law Firm* (2002) 53. See also Bar Council of England and Wales, *Code of Conduct* (8<sup>th</sup> ed, 2004) [303(a)] which emphasises the fiduciary relationship as follows:

A barrister ... must promote and protect fearlessly and by all proper and lawful means the lay client's best interests and do so without regard to his own interests or to any consequences to himself or to any other person (including any professional client or other intermediary or another barrister) ...

<sup>15</sup> *Bowen v Stott* [2004] WASC 94 (Unreported, Hasluck J, 7 May 2004) [1], [66]; *Sent v Fairfax* [2002] VSC 429 (Unreported, Nettle J, 7 October 2002) [33], [105]–[106]; *Christie v Wilson* [1999] 1 All ER 545, 546–7 (Stuart-Smith LJ); *Watson v Watson* (Unreported, Supreme Court of New South Wales, Santow J, 25 May 1998) 4; *Theakstone v McCann* [1996] ANZ ConvR 1, 4 (Debelle J). Cf *Caruso v Tartaglia* [2002] VSC 91 (Unreported, Byrne J, 14 March 2002) [9]; *Mintel International Group Ltd v Mintel (Australia) Pty Ltd* (2000) 181 ALR 78, 86–8 (Heerey J) ('*Mintel*'); *Grimwade v Meagher* [1995] 1 VR 446; *Uncle Toby's Co Pty Ltd v Trevor Jones Steel Fabrications Pty Ltd (in liq)* (Unreported, Supreme Court of Victoria, Batt J, 12 October 1995) 26.

<sup>16</sup> [1991] 1 Qd R 508, 515. See also Connock, above n 5, 250–1.

<sup>17</sup> [1997] Ch 1, 9.

be noted that barristers, unlike solicitors, may not form partnerships and are effectively sole practitioners.<sup>19</sup> This means that when an application is made seeking to restrain a barrister, no secondary issue arises as to whether a law firm should also be restrained.<sup>20</sup>

#### B *Law Firm v Individual Lawyer — What Are the Rules of Attribution?*

Both an individual lawyer and a law firm are capable of acting on behalf of a client. Thus, each is capable of being restrained for having a conflict of duty.<sup>21</sup> The primary issue for a court will be whether an individual lawyer should be restrained.<sup>22</sup> The secondary issue will be whether an individual lawyer restrained by a court is capable of ‘infecting’ his or her law firm. The extent of the infection has traditionally been determined by the application of the doctrine of imputed knowledge, which provides that the knowledge of one partner, including possession of a client’s confidential information, is imputed to the other partners within the firm.

The application of the doctrine to law firms can be traced back to *Davies v Clough*, where it was held that ‘if two solicitors are in partnership, and are carrying on a suit as partners, if it is right to restrain one of them, the other, of necessity, cannot carry it on; because the act of one partner is in law the act of both.’<sup>23</sup> Similarly, in *R v O’Halloran; Ex parte Hamer*, Hodges J observed that ‘each partner is the agent of all the other partners to do any act in the course of the partnership business and within its scope; an act so done by one member is the act of the other members.’<sup>24</sup> The imputation of knowledge is said to be justified by the ‘danger of inadvertent disclosure of confidences inherent in the

<sup>18</sup> Aitken, ‘Chinese Walls and Conflicts of Interest’, above n 10, 91 fn 2 (emphasis in original): ‘This approach is harsher than the present position concerning solicitors and looks to the *appearance* of conflict, not the substance’. See also *Nangus Pty Ltd v Charles Donovan Pty Ltd (in liq)* [1989] VR 184, 185, where Young CJ held: ‘The general rule undoubtedly is that counsel ought not to appear for two clients whose interests may conflict’. The use of the words ‘may conflict’ suggests that the rule for barristers may be stricter than it is for solicitors.

<sup>19</sup> See Bar Council of England and Wales, above n 14, [205]; Griffiths-Baker, above n 14, 52.

<sup>20</sup> An argument that barristers’ chambers are no different to solicitors’ firms in relation to the imputation of knowledge was dismissed in *Laker Airways Inc v FLS Aerospace Ltd* [1999] 2 Lloyd’s Rep 45, 53, where Rix J held that: ‘Since ... barristers are independent self-employed practitioners, it seems to me that if an applicant wished to complain because of instructions given to two members of the same chambers on either side of the case, the burden would lie on him’.

<sup>21</sup> The assumption is made, for the purpose of this article, that a law firm is structured by way of partnership. See Finn, ‘Professionals and Confidentiality’, above n 8, 333; P D Finn, ‘Conflicts of Interest and Professionals’ (Paper presented at the Legal Research Foundation Seminar on Professional Responsibility, University of Auckland, 28–29 May 1987) 33: ‘A person who engages the services of a partner acting as such engages the service of the whole firm and not merely of the persons who actually render the service.’

<sup>22</sup> Mitchell, ‘Whose Side Are You on Anyway?’, above n 5, 425.

<sup>23</sup> (1837) 8 Sim 262, 268; 59 ER 105, 107 (Shadwell V-C). See also R M Garratt and A S Stavrianou, ‘Solicitors — Duty Not to Act against Former Client — “Chinese Wall”’ (1991) 65 *Australian Law Journal* 229, 230.

<sup>24</sup> [1913] VLR 116, 117, where Hodges J also stated that: ‘I do not think it is possible to get away from the outright, almost universal, character of the agency of partners’. For a consideration of the imputation principle in Scotland, see Janice H Webster, *Professional Ethics and Practice for Scottish Solicitors* (3<sup>rd</sup> ed, 1996) 12: ‘For the purposes of professional practice it is not possible for a partner in a firm to have a client who is not deemed also to be a client of all his partners’.

everyday interchange of ideas and discussion of problems amongst law partners' and the concern to avoid 'even the appearance of impropriety'.<sup>25</sup> Partners in a law firm are thought to be so intimately acquainted that they can be expected to share confidences and secrets with each other in the ordinary course of legal business.<sup>26</sup> Further, economic interdependence may be expected to result in the disclosure of confidences which could assist the firm's clients.<sup>27</sup>

There is, however, a lingering issue of whether the application of the doctrinal presumption is rebuttable as a matter of law. Traditionally, United States courts have adopted a strict approach and held the presumption to be irrebuttable.<sup>28</sup> English and Australian courts have, at times, adopted a similarly strict approach.<sup>29</sup> However, in *Unioil International Pty Ltd v Deloitte Touche Tohmatsu [No 2]*,<sup>30</sup> Ipp J noted that an irrebuttable presumption had been specifically rejected by the majority of the Supreme Court of Canada in *MacDonald Estate v Martin*<sup>31</sup> and that, to the contrary, a rebuttable presumption arose in

<sup>25</sup> *National Mutual Holdings Pty Ltd v Sentry Corporation* (1989) 22 FCR 209, 227 (Gummow J). See also *D & J Constructions Pty Ltd v Head* (1987) 9 NSWLR 118, 122–3 (Bryson J); *In the Marriage of Thevenaz* (1986) 11 Fam LR 95, 98 (Frederico J); Finn, 'Professionals and Confidentiality', above n 8, 338.

<sup>26</sup> Comment, 'Developments in the Law: Conflicts of Interest in the Legal Profession' (1981) 94 *Harvard Law Review* 1244, 1355.

<sup>27</sup> Marc Steinberg and Timothy Sharpe, 'Attorney Conflicts of Interest: The Need for a Coherent Framework' (1990) 66 *Notre Dame Law Review* 1, 18.

<sup>28</sup> See *ibid* 11; Randall Bateman, 'Return to the Ethics as a Standard for Attorney Disqualification: Attempting Consistency in Motions for Disqualification by the Use of Chinese Walls' (1995) 33 *Duquesne Law Review* 249, 254. With respect to Canadian practice, see, eg, Cory J's dissent in *MacDonald Estate v Martin* [1990] 3 SCR 1235, 1266:

the problem more frequently arises when a lawyer, who has received confidential information, joins a firm that is acting for those opposing the interests of the former client. In such a situation there should be an irrebuttable presumption that lawyers who work together share each other's confidences with the result that a knowledge of confidential matters is imputed to other members of the firm.

<sup>29</sup> In *Mallesons Stephen Jaques v KPMG Peat Marwick* (1990) 4 WAR 357, 374 ('*Mallesons v KPMG*'), Ipp J said the following:

The partners of a firm of [lawyers] band together to obtain all the financial and other advantages of a partnership. A united and quasi-corporate front is presented to the world under the name by which the firm practises. ... Very often clients will consult or retain a firm rather than a particular partner in it. It is therefore ... 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, and, solely for that purpose, those other partners should be regarded, in effect, as separate and independent entities.

In similar terms, in *Blackwell v Barroile Pty Ltd* (1994) 51 FCR 347, 360, Davies and Lee JJ said that '[a] firm is in no better position than a sole practitioner if it purports to act for separate clients whose interests are in contention.' See also *Prince Jefri Bolkiah* [1999] 2 AC 222, 234, where Lord Millett observed that a 'fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position.' See also *Re a Firm of Solicitors* [1997] Ch 1, 10–12 (Lightman J).

<sup>30</sup> (1997) 17 WAR 89 ('*Unioil v Deloitte*').

<sup>31</sup> [1990] 3 SCR 1235, 1261 (Sopinka J):

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.

Australian law.<sup>32</sup> Further, certain commentators have suggested that the application of the doctrine is increasingly unnecessary.<sup>33</sup> These views are given expression by the dissent of Staughton LJ in *Re a Firm of Solicitors*.<sup>34</sup> His Lordship stated:

I cannot detect ... 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 ... The [lawyers] 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.<sup>35</sup>

The above criticism has particular force in relation to large firms and the movement of partners amongst them.<sup>36</sup> There is little doubt that if the presumption were irrebuttable, the movement of a small number of partners amongst large firms would quickly result in all being disqualified. However, the countervailing view is that the presumption is longstanding in partnership law.<sup>37</sup> Its rationale is derived from the traditionally close association amongst partners and, importantly, their joint and several liability. As noted by Professor Paul Finn,

[t]he orthodoxy is that, special agreement apart, a person who engages the services of a partner engages the services of the partnership and not merely of the person who actually renders the service. The client's disclosure is to the partnership and the consequential duty of secrecy is owed by the partnership.<sup>38</sup>

Furthermore, in *David Lee & Co (Lincoln) Ltd v Coward Chance (a firm)*, Browne-Wilkinson V-C observed that 'prima facie in a firm information does

<sup>32</sup> *Unioil v Deloitte* (1997) 17 WAR 89, 110–11. On the facts of the case, the presumption was rebutted. It should be noted that Ipp J considered that his remarks in *Mallesons v KPMG* (1990) 4 WAR 357 were too broadly stated: at 108. See also Lee Aitken, "'Chinese Walls", Fiduciary Duties and Intra-Firm Conflicts — A Pan-Australian Conspectus' (2000) 19 *Australian Bar Review* 116, 130.

<sup>33</sup> For a detailed criticism of the imputation principle, see Chris Edmonds, 'Trusting Lawyers with Confidence — Conflicting Realities (A Review of the Test and Principles Applying to Lawyers' Conflicts of Interests)' (1997) 16 *Australian Bar Review* 222. See also F M B Reynolds, 'Notes: Solicitors and Conflict of Duties' (1991) 107 *Law Quarterly Review* 536, 537: 'the old rules as to imputation of knowledge between partners may well be inadequate to modern conditions.'

<sup>34</sup> [1992] 1 QB 959.

<sup>35</sup> *Ibid* 973. This passage was approved by Ipp J in *Unioil v Deloitte* (1997) 17 WAR 98, 110–11.

<sup>36</sup> See generally Andrew D Mitchell, 'Chinese Walls in Brunei: *Prince Jefri Bolkiah v KPMG*' (1999) 22 *University of New South Wales Law Journal* 243, 253; Mitchell, 'Whose Side Are You on Anyway?', above n 5, 430; Jeannie Paterson, 'Conflicts of Interest and Confidential Information' (1997) 71(11) *Law Society Journal* 46, 48; Stephen Donaghue, 'Acting against a Former Client: Reforming a Misconceived Disqualification Standard' (1995) 1 *Newcastle Law Review* 11, 30.

<sup>37</sup> See, eg, *Partnership Act 1890*, 53 & 54 Vict, c 39, s 16, which provides: 'Notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.' But see *Campbell v McCreath* 1975 SC 81, 85 where Lord Stott rejected an argument that this meant that anything known by one partner about a client could be treated as known by other partners of the firm.

<sup>38</sup> Paul Finn, 'Fiduciary Law and the Modern Commercial World' in Ewan McKendrick (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (1992) 7, 29.

move'.<sup>39</sup> The balance of authority in Australia,<sup>40</sup> although perhaps not in England,<sup>41</sup> is that the presumption is rebuttable by the lawyer. However, the presumption does not apply where new partners join a firm.<sup>42</sup> This exception in relation to migratory partners has been justified on the basis that it is 'easier to screen a single lawyer not previously associated with the firm than a number of lawyers who represented a former client' and that a presumption, without exception, would lead to inappropriate restrictions 'on the mobility of [lawyers] between law firms'.<sup>43</sup>

While the law in England does not appear to have embraced the notion of a rebuttable presumption, it has adopted a shift in the evidential burden of proof.<sup>44</sup> In any event, both approaches achieve the same result. Once the client has established that confidential information has been imparted to his or her lawyer, by reason of the presumption that information moves within a firm, the burden then falls on the lawyer to prove that effective measures would prevent disclosure of confidential client information within and outside the firm.

Separately, it is not clear whether the doctrine extends beyond partners of law firms. Although this will not be discussed further in this article, it does raise the following issues. Should knowledge of employee lawyers or nonlegal staff<sup>45</sup> be

<sup>39</sup> [1991] Ch 259, 270.

<sup>40</sup> *Mark Foys Pty Ltd v TVSN (Pacific) Ltd* (2000) 178 ALR 322, 338 (Conti J); *Pradhan v Eastside Day Surgery Pty Ltd* [1999] SASC 256 (Unreported, Doyle CJ, Bleby and Prior JJ, 18 June 1999) [45] (Bleby J); *Unioil v Deloitte* (1997) 17 WAR 98, 110–11 (Ipp J); G E Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand* (2<sup>nd</sup> ed, 2001) 227, where he notes: 'The modern cases, at least in Australia and England, approach the issue via a rebuttable presumption.'

<sup>41</sup> See Hollander and Salzedo, above n 6, 111:

[*Prince Jefri Bolkiah*] seems largely to have resolved the issue so far as [England] is concerned. Because [present] client conflicts are concerned with conflict not confidentiality, attribution of knowledge does not feature as an issue in such cases: if there is a [present] client conflict the firm cannot act at all without the consent of both clients. The problem is a former client conflict issue.

This point is best understood after reading below Parts V and VI.

<sup>42</sup> *Wagdy Hanna & Associates Pty Ltd v National Library of Australia* (2004) 155 ACTR 39, 41–2, 48 (Higgins CJ); *Durban Roodepoort Deep Ltd v Reilly and Featherby (as administrators)* [2004] WASC 269 (Unreported, Le Miere J, 17 December 2004) [19]–[20], [86]–[87]; *Photocure* (2002) 56 IPR 86, 98, 100 (Goldberg J); *Bureau Interprofessionnel des Vins de Bourgogne v Red Earth Nominees Pty Ltd (t/as Taltarni Vineyards)* [2002] FCA 588 (Unreported, Ryan J, 9 May 2002) [34] ('*Bureau Interprofessionnel*'); *Newman v Phillips Fox* (1999) 21 WAR 309, 316–17 (Steytler J).

<sup>43</sup> Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand*, above n 40, 230: 'There may be some cause to contend that the presumption of disqualification ought not to be as strong where the conflict stems from a migratory lawyer.'

<sup>44</sup> See below Parts VI(C)(1) and VII(A)(2) where it is suggested that the shift in the burden of proof is consistent with the application of the presumption and should be adopted in those parts of Australia which have not yet done so.

<sup>45</sup> In England and Australia it is unclear whether the doctrine is applicable to 'nonlegal' employees of law firms, for instance, legal secretaries or law clerks. See Ysaiah Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (4<sup>th</sup> ed, 2005) 410–11; Mitchell, 'Whose Side Are You on Anyway?', above n 5, 428; Irvin Schein, 'Legal Secretaries and the Conflict of Interest Rule' (1992) 14 *Advocates' Quarterly* 81, 83. In the United States, courts have disqualified firms because of confidential information obtained by paralegals (see *Re Complex Asbestos Litigation*, 283 Cal Rptr 732 (1991)) and law students (see *Allen v Academic Games Leagues of America Inc*, 831 F Supp 785 (D Cal CD, 1993)). In Canada, see *Ocelot Energy Inc v Jans* [1998] 8 WWR 708; *J-Star Industries Inc v Berg Equipment Co (Canada) Ltd* [1992] 3 CF 639.



attributed to the firm? Should knowledge be imputed where there is an association of otherwise independent law firms<sup>46</sup> or association of legal and accounting practices?<sup>47</sup> Further, should knowledge be attributed amongst barristers within the same set of chambers?<sup>48</sup>

### C Standing — Is It Confined to Clients?

The basic starting proposition is that only clients have standing to bring an application seeking to restrain a lawyer from acting. A client will usually have a retainer, which is an agreement with the lawyer for the provision of legal services.<sup>49</sup> In *Gordon v Minter Ellison Morris Fletcher*, Hedigan J held that the law firm in that case had not acted for the party seeking the injunction, despite certain letters from the law firm to a third party indicating that it was so acting.<sup>50</sup> Although this would usually be sufficient evidence establishing the lawyer–client relationship, the Court observed that all the parties knew the law firm was not ‘truly representing and advancing the arguments’ of the applicant. This case demonstrates that courts will look to the substance of the relationship in order to determine whether the requisite features of a lawyer–client relationship are established.

<sup>46</sup> See *Photocure* (2002) 56 IPR 86, 88 (Goldberg J) (association of a law firm and patent attorneys); Aitken, ‘Chinese Walls and Conflicts of Interest’, above n 10, 113: ‘The matter is still an open one in Australia ... it is in relation to ... associations that the major problems concerning conflict are likely to arise in the future.’ See generally *Manville Canada Inc v Ladner Downs* (1992) 88 DLR (4<sup>th</sup>) 208.

<sup>47</sup> See *Mark Foys Pty Ltd v TVSN (Pacific) Ltd* (2000) 178 ALR 322, 334–5 (Conti J). In that case, the applicant was a client of PriceWaterhouseCoopers (‘PWC’), an accounting firm, and claimed that PWC Legal (which was in ‘association’ with PWC) should be restrained from acting against it. The case was argued on the basis that confidential information held by PWC should be imputed to PWC Legal. Conti J rejected this argument on the basis that ‘[t]he existence of associations between partnerships and companies, whether operating in the same or complementary fields of endeavour, obviously does not import entitlement, without more, to access by one partnership or company to the confidential information of another’: at 335.

<sup>48</sup> See *Laker Airways Inc v FLS Aerospace Ltd* [1999] 2 Lloyd’s Rep 45, 53–4, where Rix J rejected an objection on the grounds that the barrister acting for the opponent came from the same chambers as the arbitrator. Cf Janet O’Sullivan, ‘Lawyers, Conflicts of Interest and Chinese Walls’ (2000) 16 *Professional Negligence* 88, 99:

The reality is that barristers in chambers share clerical and secretarial staff, premises and, often, a computer network. Professional, informal and social contact may well be more likely between barristers in a small set of chambers, than between solicitors or forensic accountants in a large, departmentalised firm.

<sup>49</sup> Like other agreements, the terms of the retainer may be express or implied. See *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1, 48–52 (Spigelman CJ, Sheller and Stein JJA) for a more detailed discussion of the meaning of ‘retainer’.

<sup>50</sup> (Unreported, Supreme Court of Victoria, Hedigan J, 31 August 1993) 17. In a rather complicated factual scenario, Minter Ellison Morris Fletcher was retained by BMW Finance in relation to a mortgage it had over certain assets. BMW Finance’s mortgage was ranked third behind two mortgages in favour of Pyramid Building Society which had been placed into administration. Separately, the mortgagee had certain funds on credit with Pyramid Building Society. The mortgagee agreed to assign his claims in respect of the credit funds to BMW Finance which in turn sought to offset the credit funds against an amount it owed to Pyramid Building Society. The administrator of Pyramid Building Society refused because, in part, the credit funds were held in the mortgagee’s name and not BMW Finance’s. It was on this limited basis that Minter Ellison Morris Fletcher (as the lawyers for BMW Finance) procured the mortgagee’s consent to write to the administrator seeking the payment of the credit funds which were held in his name.

Where a lawyer is retained by an entity, the duties are owed to that entity as it is the client.<sup>51</sup> The duties are not owed to any individual officer of the entity, if it is a company.<sup>52</sup> This does not mean, however, that the lawyer can act free of any duty when dealing with an officer of an entity. The lawyer's duty of loyalty to the entity will require the lawyer to maintain the trust and confidence of the entity's officers in order to facilitate open and effective channels of communication.<sup>53</sup> Indeed, the lawyer generally acts pursuant to the direction of the managing agents of the entity. Also, duties owed to the entity, as a general rule, entail protection of the interests of individuals within the entity. Nevertheless, for the purposes of an application for an injunction on the grounds of conflict of duty, typically only a client, namely the entity, will have standing to restrain a lawyer. In rare instances, however, the client's officers will be considered as the client.<sup>54</sup>

Furthermore, it was observed in *Mytton's Ltd v Phillips Fox (a firm)* that authority in England and Australia suggested that the principle of avoiding a conflict of duty may be broader than the lawyer–client relationship, so as to protect 'quasi-clients' or indeed any person who gave information to a lawyer which was capable of being used to the giver's detriment.<sup>55</sup> Perhaps the clearest illustration of this point is found in *Village Roadshow Ltd v Blake Dawson Waldron*.<sup>56</sup> In that case, the law firm was acting for Permanent Trustee Co Ltd (a trustee company) in relation to a scheme of company arrangement. By that arrangement, Village Roadshow Ltd was proposing to buy back a certain class of its shares. The law firm, which had acted and continued to act for Permanent Trustee Co Ltd, began to act for certain shareholders of Village Roadshow Ltd who sought to challenge the scheme of company arrangement. Although Village

<sup>51</sup> For instance, in litigation the client is the party for whom the lawyer is entered on the record. That person is not necessarily the same person as the person who is responsible for the lawyer's remuneration. See LexisNexis Butterworths, *Halsbury's Laws of England*, vol 44 (at 7 March 2006) 4 Solicitor's Obligations towards His Client, '3 Solicitor and Client' [148]. See also *Groom v Crocker* [1939] 1 KB 194, 227–8 (MacKinnon LJ); *Re Crocker* [1936] Ch 696, 701 (Clauson J); *Adams v London Improved Motor Coach Builders* [1921] 1 KB 495, 500 (Bankes LJ).

<sup>52</sup> Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand*, above n 40, 186–7.

<sup>53</sup> See below Part III(B).

<sup>54</sup> *Macquarie Bank v Myer* [1994] 1 VR 350, 359 (Marks J): 'The protection afforded to the client has sometimes been extended to one who, though not strictly speaking the client, might said to be virtually in the same position through his association with the one who was, strictly speaking, the client.' This case concerned company directors. See also *Re a Firm of Solicitors* [1992] 1 QB 959, 971 (Staughton LJ) where a related company was given standing. See further New South Wales Bar Association, *New South Wales Barristers' Rules* (2000) r 15; Bar Association of Queensland, *2004 Barristers Rule* (2004) r 14, which defines 'client' as including 'those officers, servants or agents of a client which is not a natural person who are responsible for or involved in giving instructions on behalf of the client'. See also Hollander and Salzedo, above n 6, 20–1 for a discussion of company groups, partnerships and unincorporated associations as clients.

<sup>55</sup> (Unreported, Supreme Court of Victoria, Coldrey J, 23 September 1997) 5 (citations omitted):  
Whilst Ipp J [in *Mallesons v KPMG*] spoke in terms of a [lawyer–client] relationship, it is clear that the concept is a broader one. In *Re a Firm of Solicitors* [1992] 1 QB 959 at 970, it was regarded as encompassing persons who might be regarded as 'informal or quasi-clients'.  
See also Rachael Mulheron, 'Confidentiality: Solicitors' Conflicts of Duty and Interest' (1999) 21(9) *Law Society Bulletin (South Australia)* 34.

<sup>56</sup> [2004] Aust Torts Reports ¶81-726 ('*Village v BDW*').

Roadshow Ltd was not a client of the law firm, the court allowed it to bring an application seeking to restrain the law firm from acting on behalf of the shareholders. It appears that the basis for this finding was that the two companies, Permanent Trustee Co Ltd and Village Roadshow Ltd, had similar interests in upholding the scheme of company arrangement and, on that basis, one or the other was entitled to apply to the court seeking to restrain the law firm from acting.

Applications made by parties with adverse interests to the ‘true’ client are, however, viewed with some scepticism by courts. In *Tricontinental Corporation Ltd v Holding Redlich*, Mandie J observed that ‘[i]t is a serious matter to prevent a party from retaining the legal representative of its choice, particularly upon the application not of a former client but of an adverse party.’<sup>57</sup> There is some scope, however, for non-clients with adverse interests to bring an application seeking to restrain a lawyer from acting. In *Bowen v Stott*, a non-client sought to restrain a lawyer from acting because the lawyer was seeking to plead that the non-client’s claim had been settled.<sup>58</sup> The lawyer had apparently been involved in drafting and negotiating the terms of settlement. Hasluck J held that it was undesirable that the lawyer continue to act as he was likely to be called to give evidence.<sup>59</sup> It was irrelevant that the party bringing the application was a non-client with an adverse interest. Separately, there is a suggestion in *D & J Constructions Pty Ltd v Head*, that an application made by a client as opposed to a non-client may be afforded wider protection by the law.<sup>60</sup> However, this aspect of the judgment does not accord with established authority. Any application seeking to restrain a lawyer will invariably raise the preliminary issue of whether the party bringing the application has standing, but once that issue is resolved it is clear that the principles of law which go to the jurisdiction and discharge of the power by the court are in no way affected by the status of the party bringing the application.<sup>61</sup>

An extreme example of a non-client having standing is found in *Grimwade v Meagher*.<sup>62</sup> In that case, the non-client, Mr Grimwade, sought to restrain counsel, Mr Meagher, from acting against him in relation to a civil claim. Mr Meagher had previously acted against Mr Grimwade as the prosecutor in a

<sup>57</sup> (Unreported, Supreme Court of Victoria, Mandie J, 22 December 1994) 9. See also *Kalenik v Apostolidis* [2005] VSC 27 (Unreported, Hansen J, 18 February 2005) 17; *Mitchell v Pattern Holdings Pty Ltd* [2000] NSWSC 1015 (Unreported, Bergin J, 7 November 2000) [21]–[28].

<sup>58</sup> [2004] WASC 94 (Unreported, Hasluck J, 7 May 2004) [1]–[2], [9]–[21], [62], [65].

<sup>59</sup> *Ibid* [65].

<sup>60</sup> (1987) 9 NSWLR 118, 123, where Bryson J commented that ‘when as here there is no confidential information available and there never was a relationship of [lawyer] and client with any partner the appearance of the matter is not a basis for the court to assume control over the retainer.’

<sup>61</sup> This sentiment is found in *Re a Firm of Solicitors* (Unreported, Queen’s Bench Division, Evans J, 28 February 1991) 4:

It seems to me that that same high standard of confidentiality applies not only to information which the [lawyer] receives from the client for the purposes of his retainer but it also includes information which he received from third parties for the purposes of that retainer. I doubt very much if any [lawyer] would regard himself as being under any lower or slighter obligation of confidentiality with regard to information acquired for the client from third parties than he would do with regard to information acquired by [the lawyer] from the client himself.

<sup>62</sup> [1995] 1 VR 446.

related criminal case. That case had been acrimonious and the Court of Appeal had overturned Mr Grimwade's earlier conviction, criticising the conduct of the prosecution. Mr Grimwade was concerned that Mr Meagher would seek to justify his conduct of the prosecution in the civil proceedings. Despite the fact that Mr Grimwade was a non-client with an interest adverse to that of the real client, the court was nevertheless persuaded to exercise its inherent jurisdiction over its officers because of the apprehension that Mr Meagher would lack objectivity due to his prior involvement in the prosecution of Mr Grimwade. This case should, however, be approached with some caution. Mandie J described the facts of the case as 'unique, extraordinary and highly exceptional'.<sup>63</sup> It would appear that the usual standing requirements, set out above, are more flexibly applied when the court's inherent jurisdiction over its officers is invoked.<sup>64</sup>

In *Macquarie Bank v Myer*, Marks J observed that the principal task of the court in conflicts of duty cases is 'to ensure that information given on trust ... is not used in breach of that trust.'<sup>65</sup> His Honour observed that, '[a]s a general rule, it might be expected that this kind of communication will occur where there exists a relationship of [lawyer] and client.'<sup>66</sup> His Honour did not decide that question finally, but rather indicated that it was necessary 'that there be something in the relationship or nature of the communication ... which attracts that element of trust which requires protection.'<sup>67</sup>

### III THE LEGAL AND THEORETICAL FOUNDATIONS OF A LAWYER'S DUTY TO AVOID CONFLICT

In Australia and England, the duties of a lawyer to their client arise both in equity and at common law. At common law, a lawyer's retainer<sup>68</sup> imposes an obligation to be skilful and careful.<sup>69</sup> Failure to fulfil this obligation may lead to liability in contract,<sup>70</sup> or in tort for negligence.<sup>71</sup> In addition, the client must be informed of everything which the lawyer knows will be of assistance to the client

<sup>63</sup> Ibid 454. Distinguished in *Mitchell v Pattern Holdings Pty Ltd* [2000] NSWSC 1015 (Unreported, Bergin J, 7 November 2000) [33] because of the exceptional facts.

<sup>64</sup> See below Part III(C) for discussion of the court's inherent jurisdiction over its officers.

<sup>65</sup> [1994] 1 VR 350, 352. Followed in *Mytton's Ltd v Phillips Fox* (Unreported, Supreme Court of Victoria, Coldrey J, 23 September 1997) 5.

<sup>66</sup> *Macquarie Bank v Myer* [1994] 1 VR 350, 352.

<sup>67</sup> Ibid. The protection requirement was applied in *CI Industries Pty Ltd v Keeling* (Unreported, Supreme Court of New South Wales, Abadee J, 26 March 1997) 36, although *Macquarie Bank v Myer* was not cited in the judgment.

<sup>68</sup> *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1, 48–52 (Spigelman CJ, Sheller and Stein JJA):

'Retainer' is a word used to describe a contract between the [lawyer] and the client for the provision of legal services by the [lawyer] for a fee and must be proved like any other contract. ... [There is a] necessity for the Court to look at each retainer to decide the party or parties by which instructions were given, and the terms thereof.

<sup>69</sup> See generally Roger Billins, *Solicitors' Duties and Liabilities* (1999) ch 4.

<sup>70</sup> See, eg, *Groom v Crocker* [1939] 1 KB 194, 222 (Scott LJ).

<sup>71</sup> See, eg, *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp (a firm)* [1979] Ch 384, 417 (Oliver J). This article does not address the consequences that flow from a breach of a lawyer's duty of care.

in relation to matters within the lawyer's retainer.<sup>72</sup> In *Spector v Ageda*, Megarry J observed:

[a lawyer] 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 to act for the client and at the same time withhold from him any relevant knowledge that he has ...<sup>73</sup>

It is rare, however, for the retainer to deal directly with a lawyer's conflict of duty.<sup>74</sup> Nevertheless, the retainer may contain a limitation on the lawyer's duty to disclose confidential information obtained from previous clients. While such limitations may be accepted by courts as valid contractual clauses,<sup>75</sup> the possibility of disclosure, regardless of contractual compulsion, has meant that courts have placed little weight on contractual limitations on disclosure in the context of disqualification applications.<sup>76</sup>

In equity, the relationship of lawyer and client is recognised as a fiduciary relationship and carries with it obligations to act with absolute fairness and openness towards the client.<sup>77</sup> Gillard J observed that:

As a general proposition the minimum duties which are owed are first, that a fiduciary must not make a personal profit from his position [apart from the fees

<sup>72</sup> *BATAS v Blanch* [2004] NSWSC 70 (Unreported, Young CJ in Eq, 20 February 2004); *Safecare Australia Pty Ltd v Maxwell* [1999] VSC 535 (Unreported, Gillard J, 14 December 1999) [55]–[57]; *O'Reilly v Law Society of New South Wales* (1988) 24 NSWLR 204, 213–15 (Mahoney JA); *Law Society of New South Wales v Harvey* [1976] 2 NSWLR 154, 170 (Street CJ).

<sup>73</sup> [1973] Ch 30, 48. See also Law Society of England and Wales, *The Guide to the Professional Conduct of Solicitors* (8<sup>th</sup> ed, 1999) [16.01]: 'The duty of confidentiality applies to information about a client's affairs irrespective of the source of the information'; Law Commission of England and Wales, *Fiduciary Duties and Regulatory Rules*, Consultation Paper No 124 (1992) 161: 'A customer is entitled to a duty of loyalty from a firm, which requires it to put at its customer's disposal all information in its possession which is relevant to the discharge of the obligations that it has assumed.' See further Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand*, above n 40, 151–6; *Moody v Cox* [1917] 2 Ch 71, 80 (Lord Cozens-Hardy MR); *Tyrell v Bank of London* (1862) 10 HLC 26, 39–44; 11 ER 934, 939–41 (Lord Westbury LC). There is, however, conflicting authority in English law. A detailed discussion of a lawyer's duty of disclosure is beyond the scope of this article: see *Hilton v Barker Booth & Eastwood (a firm)* [2005] 1 All ER 651, 662–4 (Lord Walker); *Mortgage Express Ltd v Bowerman & Partners (a firm)* [1996] 2 All ER 836, 841–4 (Bingham MR), 844–6 (Millett LJ); Hollander and Salzedo, above n 6, 87–108.

<sup>74</sup> *Oceanic Life Ltd v HIH Casualty & General Insurance Ltd* (1999) 10 ANZ Insurance Cas ¶61-438, 74 976 (Austin J).

<sup>75</sup> *Fruehauf Finance Corporation Pty Ltd v Feez Ruthning (a firm)* [1991] 1 Qd R 558, 571 (Lee J).

<sup>76</sup> *Farrow Mortgage Services Pty Ltd (in liq) v Mendall Properties Pty Ltd* [1995] 1 VR 1, 8 (Hayne J); *Mallesons v KPMG* (1990) 4 WAR 357, 371 (Ipp J). See also Mitchell, 'Whose Side Are You Anyway?', above n 5, 421. Further, it should be noted that the retainer may be 'execution only' (particularly in lender–borrower cases) which may limit the lawyer's exposure to conflicts of duty: *Bristol & West Building Society v Baden Barnes Groves & Co (a firm)* [2000] Lloyd's Rep PN 788, 790–2 (Chadwick J); *Mortgage Express Ltd v Bowerman & Partners (a firm)* [1996] 2 All ER 836, 841–2 (Bingham MR); *Bristol & West Building Society v May May & Merrimans (a firm)* [1996] 2 All ER 801, 813 (Chadwick J); Charles Hollander, 'Conflicts of Interest and the Duty to Disclose Information' (2004) 23 *Civil Justice Quarterly* 257, 260–4.

<sup>77</sup> *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579, 587 (Gleeson CJ); *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, 89 (Richardson J); *Law Society of New South Wales v Harvey* [1976] 2 NSWLR 154, 169–70 (Street CJ).

for his services] and secondly, he must not allow personal interest and duty to conflict.<sup>78</sup>

A lawyer's fiduciary obligation is determined by a court of equity and not by the standards of the professional body,<sup>79</sup> although the same conduct may amount to both a breach of fiduciary obligation and professional misconduct.<sup>80</sup> The fiduciary duty of a lawyer to a client can come into existence despite the absence of an express or formal retainer where there is the requisite degree of trust and confidence<sup>81</sup> and may continue after the retainer has been terminated.<sup>82</sup>

The remainder of this Part sets out the three grounds on which courts in England and Australia have restrained lawyers from acting in conflict of duty situations.

#### A Duty of Confidentiality

The *Oxford Dictionary of English* defines the word 'confidential' as 'intended to be kept secret' and 'entrusted with private or restricted information.'<sup>83</sup> The obligation of confidentiality has long been recognised as a critical feature of the lawyer-client relationship.<sup>84</sup> Indeed, when the lawyer's advice is sought, communications between lawyer and client are often presumed to be confidential.<sup>85</sup> In *Rakusen v Ellis, Munday & Clarke*, Fletcher Moulton LJ observed that the duty of confidentiality is particularly onerous in relation to lawyers.<sup>86</sup> That is

<sup>78</sup> *World Medical Manufacturing Corporation v Phillips Ormonde & Fitzpatrick Lawyers (a firm)* [2000] VSC 196 (Unreported, Gillard J, 18 May 2000) [259].

<sup>79</sup> *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, 92 (Richardson J):

Now the ethical standard set by the professional body concerned is not to be taken as the measure of a practitioner's fiduciary obligation in equity to his client ... But that insistence on obtaining the prior consent of both parties in every case before acting in the transaction reflects a peer recognition of the importance of disclosure.

See also *Everingham v Ontario* (1992) 88 DLR (4<sup>th</sup>) 755, 761–2 (Callaghan CJOC, Hartt and Campbell JJ). Cf *Uncle Toby's Co Pty Ltd v Trevor Jones Steel Fabrications Pty Ltd (in liq)* (Unreported, Supreme Court of Victoria, Batt J, 12 October 1995) 30. For reasons of brevity this article has not set out the professional conduct rules in England and Australia.

<sup>80</sup> *Law Society of New South Wales v Moulton* [1981] 2 NSWLR 736; *Law Society of New South Wales v Harvey* [1976] 2 NSWLR 154.

<sup>81</sup> *Day v Mead* [1987] 2 NZLR 443, 459, where Somers J said: '[this] case is one in which although there was no formal or express retainer nevertheless the existence of a retainer in relation to [certain activities] is to be inferred. That such a contract may be implied seems obvious'. See also LexisNexis Butterworths, *Halsbury's Laws of England*, above n 51, vol 44 (at 7 March 2006) 4 Solicitor's Obligations towards His Client, '3 Solicitor and Client' [103].

<sup>82</sup> *McMaster v Byrne* [1952] 1 All ER 1362, 1368 (Lord Cohen). However, since the judgment of the House of Lords in *Prince Jefri Bolkiah* [1999] 2 AC 222, the law in England (and also New South Wales) does not recognise the continuation of fiduciary obligations after the termination of a lawyer's retainer. There is conflicting authority on this point — see below Part VI.

<sup>83</sup> Catherine Soanes and Angus Stevenson (eds), *Oxford Dictionary of English* (2<sup>nd</sup> ed, 2003) 363.

<sup>84</sup> Rosemary Pattenden, *The Law of Professional-Client Confidentiality: Regulating the Disclosure of Confidential Personal Information* (2003) 143–4. See also *A-G (UK) v Observer Ltd* [1990] 1 AC 109, 177 (Donaldson MR).

<sup>85</sup> *Minter (Pauper) v Priest* [1930] AC 558, 581, where Lord Atkin held that: 'It is I think apparent that if the communication passes for the purpose of getting legal advice it must be deemed confidential.'

<sup>86</sup> [1912] 1 Ch 831, 840–1 ('*Rakusen*'). See also Andrew Boon and Jennifer Levin, *The Ethics and Conduct of Lawyers in England and Wales* (1999) 248: 'Lawyer confidentiality is sometimes justified on the more fundamental basis that it safeguards both access to justice and the protection of individual legal rights', citing *R v Derby Magistrates Court; Ex parte B* [1996] AC 487.

because the confidential character of the lawyer–client relationship is ‘in the eyes of the law the very highest.’<sup>87</sup> Further, the court ‘can fix a standard of behaviour of its officers which is higher than it would be practicable to exact from persons in other types of confidential relations.’<sup>88</sup>

Whether founded in contract<sup>89</sup> or equity,<sup>90</sup> the duty to preserve confidentiality is unqualified. It is a duty to keep the information confidential,<sup>91</sup> not merely to take all reasonable steps to do so. Moreover, it is not only a prohibition against communication to third parties; it is a duty not to misuse confidential information without the consent of the client.<sup>92</sup> The client cannot be protected completely from accidental or inadvertent disclosure. However, they are entitled to protection from avoidable risk, which includes protection from the increased risk of the information being used to their prejudice, ‘arising from the acceptance of instructions to act for another client with an adverse interest in a matter to which the information is or may be relevant.’<sup>93</sup>

Before the information will be recognised as confidential, it ‘must be identified with precision and not merely in global terms.’<sup>94</sup> This is because a court

<sup>87</sup> *Rakusen* [1912] 1 Ch 831, 840 (Fletcher Moulton LJ).

<sup>88</sup> *Ibid.*

<sup>89</sup> It is an implied term of a lawyer’s contract of retainer that the client’s affairs will be kept secret: see, eg, *BATAS v Blanch* [2004] NSWSC 70 (Unreported, Young CJ in Eq, 20 February 2004) [43]; *Unioil v Deloitte* (1997) 17 WAR 98, 108 (Ipp J); *Crowley v Murphy* (1981) 34 ALR 496, 517 (Lockhart J); *Parry-Jones v Law Society* [1969] 1 Ch 1, 7 (Lord Denning MR).

<sup>90</sup> There is a ‘parallel’ duty of confidence imposed by the fiduciary relationship between the lawyer and the client. See *BATAS v Blanch* [2004] NSWSC 70 (Unreported, Young CJ in Eq, 20 February 2004) [43]; *National Mutual Holdings Pty Ltd v Sentry Corporation* (1989) 22 FCR 209, 229 (Gummow J); *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96 (Mason J).

<sup>91</sup> The duty is broadly framed to encompass ‘all communications made by the client about his affairs, and information learnt directly or indirectly about the client, in the course of the professional relationship’: *Unioil v Deloitte* (1997) 17 WAR 98, 108 (Ipp J). See also *Re a Firm of Solicitors* [1992] 1 QB 959, 970 (Parker LJ). See also *Mallesons v KPMG* (1990) 4 WAR 357, 362–9 (Ipp J). However, not everything that passes between lawyer and client will be confidential. In *Re a Firm of Solicitors* [1997] Ch 1, 9–10, Lightman J said:

the law is concerned with the protection of information which (a) was originally communicated in confidence, (b) at the date of the later proposed retainer is still confidential and may reasonably be considered remembered or capable, on the memory being triggered, of being recalled and (c) relevant to the subject matter of the subsequent proposed retainer.

In similar terms, see *D & J Constructions Pty Ltd v Head* (1987) 9 NSWLR 118, 124 (Bryson J).

<sup>92</sup> It is a prohibition against using or causing the use of such information by persons otherwise than for the client’s benefit.

<sup>93</sup> *Prince Jefri Bolkiah* [1999] 2 AC 222, 235–6 (Lord Millett).

<sup>94</sup> *Carindale Country Club Estate Pty Ltd v Astill* (1993) 42 FCR 307, 314 (Drummond J) (‘*Carindale*’), discussing *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434, 443 (Gummow J); *O’Brien v Komisaroff* (1982) 150 CLR 310, 325–7 (Mason J). See *Mancini v Mancini* [1999] NSWSC 800 (Unreported, Bryson J, 6 August 1999) [7]:

A case about confidential information cannot be nebulous. Confidential information which once existed may no longer be confidential; it may no longer be available although it was communicated in the past; it may not be material to any use which might now be proposed to be made of information. Without specificity a claim to protection cannot be defended or decided on any fair procedural basis, and a general allegation of the kind put forward here to the effect that from the nature of the past legal business confidential information must have been communicated should not in my opinion be upheld.

See also *Durban Roodepoort Deep Ltd v Reilly and Featherby (as administrators)* [2004] WASC 269 (Unreported, Le Miere J, 17 December 2004) [80]; *Belan v Casey* [2002] NSWSC 58 (Unreported, Young CJ in Eq, 4 February 2002) [23]; *Oceanic Life Ltd v HIH Casualty & General*

must be able to frame a clear injunction if relief against misuse of confidential information is to be granted.<sup>95</sup> Perhaps of equal significance is the observation of Marks J in *Independent Management Resources Pty Ltd v Brown*, where his Honour said that:

the more general the description of the information which a plaintiff seeks to protect, the more difficult it is for the court to satisfy itself that information so described was imparted or received by a defendant in circumstances which give rise to an obligation of confidence.<sup>96</sup>

It is, however, important to bear in mind that the need for precision is a principle of law that should be applied flexibly.<sup>97</sup> In *Village v BDW*, Byrne J observed that ‘given the relationship of lawyer and client and the ambit of professional confidence of which professional privilege is a manifestation, the Court should ... not be slow to accept the existence of confidential information.’<sup>98</sup> The degree of particularity of the confidential information must depend on all of the circumstances of the case.<sup>99</sup> Often it cannot be described for fear of disclosure.<sup>100</sup> Indeed, lawyers take notes, form views and opinions of clients and observe things that the client may have forgotten or overlooked. In a number of Australian cases, certain factors have been held to be sufficient to establish the confidential nature of the information, including the circumstances of the retainer, the nature of the legal work and the lawyer’s knowledge of the client’s approach to dispute resolution or commercial negotiation.<sup>101</sup> In *Yunghanns v Elfic Ltd*, Gillard J said:

In this regard, the relationship between [lawyer] and client may be such that the [lawyer] learns a great deal about his client, his strengths, his weaknesses, his

*Insurance Ltd* (1999) 10 ANZ Insurance Cas ¶61-438, 74 971 (Austin J); *Caruso v Tartaglia* [2002] VSC 91 (Unreported, Byrne J, 14 March 2002) [11].

<sup>95</sup> *Bureau Interprofessionel* [2002] FCA 588 (Unreported, Ryan J, 9 May 2002) [26]; *Carindale* (1993) 42 FCR 307, 314–15 (Drummond J).

<sup>96</sup> [1987] VR 605, 609.

<sup>97</sup> *Sent v Fairfax* [2002] VSC 429 (Unreported, Nettle J, 7 October 2002) [67].

<sup>98</sup> [2004] Aust Torts Reports ¶81-726, 65 338.

<sup>99</sup> See *Re a Firm of Solicitors* [1997] Ch 1, 9–10, where Lightman J observed that the degree of particularity would depend on the facts:

[Often] identification of the nature of the matter on which the [lawyer] was instructed, the length of the period of original retainer and the date of the proposed fresh retainer and the nature of the subject matter for practical purposes will be sufficient to establish the possession by the [lawyer] of relevant confidential information.

<sup>100</sup> *Village v BDW* [2004] Aust Torts Reports ¶81-726, 65 338 (Byrne J): ‘It may be that such a requirement would defeat the very purpose of the duty of confidentiality by disclosing to the court and to the other party the information in question and its significance.’ It should be noted, however, that courts are accustomed to receiving evidence which may be confidential and putting in place appropriate safeguards designed to preserve the confidentiality of such information. See also *Re a Firm of Solicitors* (Unreported, Queen’s Bench Division, Evans J, 28 February 1991) 4: ‘it is sufficient for the Plaintiffs’ evidence to identify the confidential information without setting it out in terms.’

<sup>101</sup> *Nasr v Vihervaara* (2005) 91 SASR 222, 230 (Doyle CJ); *BATAS v Blanch* [2004] NSWSC 70 (Unreported, Young CJ in Eq, 20 February 2004) [113]; *Wagdy Hanna & Associates Pty Ltd v National Library of Australia* (2004) 155 ACTR 39, 48 (Higgins CJ); *Village v BDW* [2004] Aust Torts Reports ¶81-726, 65 338 (Byrne J); *Photocure* (2002) 56 IPR 86, 91–2 (Goldberg J); *Sent v Fairfax* [2002] VSC 429 (Unreported, Nettle J, 7 October 2002) [69]. Cf *Mintel* (2000) 181 ALR 78, 88 (Heerey J).



honesty or lack thereof, his reaction to crisis, pressure or tension, his attitude to litigation and settling cases and his tactics. These are factors which I would call the ‘getting to know you’ factors. The overall opinion formed by a [lawyer] of his client as a result of his contact may in the circumstances amount to confidential information that should not be disclosed or used against the client.<sup>102</sup>

Although this aspect of the law appears settled in Australia, it is unclear whether English courts will adopt this line of authority and characterise the ‘getting to know you’ factors as confidential information capable of restraining a lawyer from acting. English commentators have expressed some reservation and there appears to be a dearth of authority<sup>103</sup> on this particular point in English law. In any event, some caution should be applied in relation to this line of jurisprudence.<sup>104</sup> The description of the ‘getting to know you’ factors is, at this stage, relatively imprecise and susceptible to differing views. It is suggested that the factors should be confined to ‘impressions’ obtained by a lawyer of the client’s approach to litigation or, in the case of non-contentious matters, commercial negotiation. Such impressions will only meet the necessary level of particularity of confidential information if it can be established that the lawyer and the client have had a long course of dealing which has enabled the lawyer to form lasting, accurate and useful impressions.<sup>105</sup> An illustration of this point is found in *Bureau Interprofessionel*, where Ryan J observed that any impressions which the lawyer had formed of his former client had become less useful because of a significant lapse of time from when the lawyer had previously acted for the former client.<sup>106</sup>

### B *Fiduciary Duty of Loyalty*

Equity imposes upon fiduciaries duties of the utmost good faith and the highest standards, emphasising undivided loyalty and the avoidance of conflicts of interest and/or duty.<sup>107</sup> Lawyers, as a recognised professional class, are in a

<sup>102</sup> (Unreported, Supreme Court of Victoria, Gillard J, 3 July 1998) 10–11.

<sup>103</sup> See Hollander and Salzedo, above n 6, 126:

It is unlikely that the English courts will go as far as the Australian courts in the sort of information they are willing to protect. ... [T]here has been to date no support for treating more nebulous subjective factors ... as confidential information, still less to suggest that it is sufficient to rely on the ‘getting to know you’ factors.

<sup>104</sup> See *Mintel* (2000) 181 ALR 78, 88 (Heerey J), where his Honour applied the ‘getting to know you’ factors but held that they should not be construed too literally. This case concerned impressions formed by counsel of his client in mediation. Counsel later acted against the former client and it was claimed that counsel had gotten to know the client and possessed his confidential information. His Honour held that the relationship was fleeting and counsel’s impression of his client was not sufficient to constitute confidential information. Arguably, this judgment is instructive of the limits to the application of the ‘getting to know you’ factors. Followed in *Nasr v Vihervaara* (2005) 91 SASR 222, 230 (Doyle CJ).

<sup>105</sup> *Mintel* (2000) 181 ALR 78, 88 (Heerey J). His Honour, speaking of the limited application of the ‘getting to know you’ factors to barristers, pithily said: ‘The cab rank rule works both ways. The driver is obliged to accept the fare, but the fare does not buy the service of the driver beyond the stipulated journey’: at 88.

<sup>106</sup> [2002] FCA 588 (Unreported, Ryan J, 9 May 2002) [32].

<sup>107</sup> For a discussion of the interplay between the duties of confidentiality and loyalty, see G E Dal Pont, ‘Conflicts of Interest: The Interplay between Fiduciary and Confidentiality Law’ [2002] *Australian Mining and Petroleum Law Association Yearbook* 583; Pattenden, above n 84, 165–72.

fiduciary relationship with their clients.<sup>108</sup> Moreover, ‘the relationship between client and [lawyer] is one of the most important fiduciary relationships known to the law’.<sup>109</sup> ‘The distinguishing obligation of a fiduciary is the duty of loyalty.’<sup>110</sup> The principal is entitled to the single-minded loyalty of his or her fiduciary.<sup>111</sup> A lawyer’s duty to his or her client is absolute and must be undivided. The principle has been described as ‘inflexible’<sup>112</sup> and ‘fundamental’.<sup>113</sup>

In *Spincode*,<sup>114</sup> Brooking JA traced the phrase back to 1928 when Cardozo CJ in *Meinhard v Salmon* spoke of the rule of undivided loyalty affecting those bound by fiduciary ties.<sup>115</sup> Professor Finn said the following in relation to the effect of the duty:

Loyalty’s effect is two fold. First, if the fiduciary is being remunerated by either or both of the parties, the ‘conflict of duty interest’ theme in the fiduciary’s obligation requires him to disclose to each client that he is being remunerated by the other. Secondly, much more importantly, until each client agrees to the contrary, or unless there is a legally acknowledged custom to the contrary, each client is entitled to, and is entitled to assume that he has, the undivided loyalty of the fiduciary he has engaged. The rule is simple and inexorable: ‘Fully informed consent apart, an agent cannot lawfully place himself in a position in which he owes a duty to another which is inconsistent with his duty to his principal.’<sup>116</sup>

<sup>108</sup> *Maguire v Makaronis* (1997) 188 CLR 449, 463 (Brennan CJ, Gaudron, McHugh and Gummow JJ); *Clark Boyce v Mouat* [1994] 1 AC 428, 437 (Lord Jauncey); *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96 (Mason J). See also John Glover, *Commercial Equity — Fiduciary Relationships* (1995) 32; O’Sullivan, above n 48, 88.

<sup>109</sup> *Mallesons v KPMG* (1990) 4 WAR 357, 361 (Ipp J). See also *CI Industries Pty Ltd v Keeling* (Unreported, Supreme Court of New South Wales, Abadee J, 26 March 1997) 35; *National Mutual Holdings Pty Ltd v Sentry Corporation* (1989) 22 FCR 209, 229 (Gummow J), where his Honour commented that ‘even among fiduciaries [lawyers] stand in a special position.’

<sup>110</sup> *Bristol & West Building Society v Mothew* [1998] Ch 1, 18 (Millett LJ). For an example of scepticism about the utility of this characterisation, see Glover, *Commercial Equity*, above n 108, 142: ‘the expression “duty of loyalty” denotes little more than a duty to obey duty — which is a pleonasm. ... Nevertheless, the loyalty idea is still in vogue.’

<sup>111</sup> This core liability has several facets. A fiduciary must act in good faith; he or she must not make a profit out of his or her fiduciary position; he or she must not place himself or herself in a position where his or her duty and interest may conflict; he or she must not act for his or her own benefit or for the benefit of a third person without the informed consent of his or her principal: *Chan v Zacharia* (1984) 154 CLR 178, 198–9 (Deane J).

<sup>112</sup> *Birtchnell v Equity Trustees, Executors & Agency Co Ltd* (1929) 42 CLR 384, 408 (Dixon J), citing *Parker v McKenna* (1874) LR 10 Ch App 96, 124 (James LJ).

<sup>113</sup> *Boardman v Phipps* [1967] 2 AC 46, 123 (Lord Upjohn).

<sup>114</sup> (2001) 4 VR 501, 515 fn 36 (Brooking JA).

<sup>115</sup> 164 NE 545, 546 (NY, 1928):

Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty ...

<sup>116</sup> Finn, ‘Fiduciary Law and the Modern Commercial World’, above n 38, 24 (citations omitted). See also Charles Harpum, ‘Fiduciary Obligations and Fiduciary Powers — Where Are We Going?’ in Peter Birks (ed), *Privacy and Loyalty* (1997) 145, 147.

In other words, a lawyer should not erect a legal edifice on behalf of one client and then seek to dismantle it by acting for another client.<sup>117</sup> To do so is to subvert the lawyer's duty of loyalty to the earlier client.

### C Administration of Justice<sup>118</sup>

In *Davies v Clough*, Shadwell V-C said:

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 [lawyers] 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.<sup>119</sup>

A lawyer's status as an officer of the court<sup>120</sup> serves to distinguish a lawyer from the ordinary fiduciary.<sup>121</sup> This distinction is reflected in the importance courts attach to the legal profession's propriety. High standards of propriety enhance public confidence in the administration of justice. The appearance that a lawyer can readily change sides is 'subversive to the appearance that justice is being done'.<sup>122</sup> In *Commissioner for Corporate Affairs v Harvey*, Marks J observed that:

the Court sets its face against giving audience to legal representatives who are unable to assure the Court of a singular interest. It is the purity of interest in the adversaries before the Court that gives the fundamental utility and credence there is in the system.<sup>123</sup>

Hence, in determining whether to disqualify a lawyer, the court may consider whether the continued representation would be subversive to the appearance of loyalty and therefore detrimental to public confidence in the legal system. The

<sup>117</sup> Counsel made this submission in *Village v BDW* [2004] Aust Torts Reports ¶81-726, 65 339 (Byrne J). It is suggested that this is an apt description of the lawyer's duty of loyalty.

<sup>118</sup> For a detailed discussion of the duties owed by lawyers to the court, including the avoidance of conflict of duty, see generally Justice D A Ipp, 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63.

<sup>119</sup> (1837) 8 Sim 262, 267; 59 ER 105, 106-7.

<sup>120</sup> See Ipp, above n 118, 66:

In England the generally accepted view is that while solicitors are officers of the court, barristers are not. ... [see *Rondel v Worsley* [1969] 1 AC 191 (Lord Upjohn)] This is based on the fact that, in England, the function of disciplining barristers is not directly in the hands of the courts, but is left to the Inns of Court ... and the Bar Council. ... [In any event] both barristers and solicitors owe like duties to the court.

See also *Ridehalgh v Horsefield* [1994] Ch 205, 231 (Bingham MR); *Wallersteiner v Moir* [No 2] [1975] QB 373, 402 (Buckley LJ); *Rondel v Worsley* [1969] 1 AC 191, 227 (Lord Reid). In Australia, no such distinction is made between barristers and solicitors. Both are regarded as officers of the court and owe like duties: see *R v Lavery* [No 2] (1979) 20 SASR 430, 430 (Wells J), 431 (Walter J), 468 (White J).

<sup>121</sup> *Carindale* (1993) 42 FCR 307, 311 (Drummond J).

<sup>122</sup> *D & J Constructions Pty Ltd v Head* (1987) 9 NSWLR 118, 123-4 (Bryson J): '[courts should take] careful measures to secure not only that justice is done but also that it is apparent that it is done, an appearance which would not survive any general impression that lawyers can readily change sides.'

<sup>123</sup> [1980] VR 669, 762.

concern is that ‘justice [should] not only be done but [should] appear to be done’.<sup>124</sup>

In *Murray v Macquarie Bank*, Spender J observed that the integrity of the legal profession and the perception of that integrity by the public is in large measure a consequence of the fidelity which lawyers show to their client.<sup>125</sup> Conduct which has a tendency to jeopardise that perception should therefore be prevented.

The underlying principle is that the Court has a right and duty to supervise the conduct of [lawyers], and visit with penalties any conduct of a [lawyer] which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally ...<sup>126</sup>

Justice Ipp, writing extra-curially, has observed that the ‘circumstances which may give rise to breaches of duties to the Court are infinite’<sup>127</sup> but, in the context of conflicts of duty, are likely to arise where a lawyer attempts to act for clients whose financial or personal interests are in opposition to those of the lawyer. The enquiry will principally focus on whether the lawyer is able to act with the necessary level of objectivity and independence required by the court of its officers.

#### IV CONDITIONS PRECEDENT

An application seeking to restrain a lawyer invariably has two elements. The first will set out the jurisdictional bases available to the court and the second, the principles of law which condition the discharge of the court’s power. Both elements are resolved by reference to the nature of the conflict. In other words, where present client conflict is asserted the court will generally have the widest possible jurisdiction and the strictest approach to the discharge of its power. Both of these elements are discussed in detail in below Parts V and VI. The following addresses the second element — the principles of law which condition the discharge of the court’s power. Although issues of jurisdiction and proper discharge of power are often determined by the nature of the conflict and, importantly, are different for each kind of conflict, it is possible to discern common principles of law that govern the discharge of power regardless of

<sup>124</sup> *MacDonald Estate v Martin* [1990] 3 SCR 1235, 1265 (Cory J). See also *In the Marriage of Gagliano* (1989) 12 Fam LR 843, 848–9 (Renaud J); *In the Marriage of Magro* (1988) 12 Fam LR 770, 774 (Rourke J); *In the Marriage of Thevenaz* (1986) 11 Fam LR 95, 98 (Frederico J). See also *G v International Christian Mission Inc* (1995) 125 DLR (4<sup>th</sup>) 712, 717–21 (Matthews JA).

<sup>125</sup> (1991) 33 FCR 46, 48–9.

<sup>126</sup> *Myers v Elman* [1940] AC 282, 319 (Lord Wright). See also *Murcia & Associates (a firm) v Grey* (2001) 25 WAR 209.

<sup>127</sup> Ipp, above n 118, 64. See also *Myers v Elman* [1940] AC 282, 319 (Lord Wright): ‘It is impossible to enumerate the various contingencies which may call into operation the exercise of this jurisdiction.’ Ipp notes, however, at 64–5, that

[i]t is rare for the breach of a such [sic] duty to form the basis of an independent cause of action; proceedings are seldom brought specifically for the purpose of making a claim grounded on the breach of such duties. There is, however, no shortage of judicial pronouncements concerning them. These are usually made in the course of litigation involving other issues, when judges are required to determine whether lawyers have complied with the standards of conduct required by the courts.

whether the conflict of duty involves a present or former client conflict. For convenience, they are described here as ‘conditions precedent’ although strictly speaking, they relate to the second element.

Common to each kind of conflict, whether present or former client conflict, is that the matters which underlie an injunction application must be the same or closely related and that the clients must have adverse interests. These requirements, described in this article as ‘connecting factors’, are often overlooked in commentaries on this subject. This may be because courts in England and Australia have described the connecting factors in different ways. It appears the language describing the connection is not settled in either England or Australia. In *Spincode*, Brooking JA described the connecting factors in the following terms: ‘By “inconsistent” I mean only that the [lawyer] who formerly acted for one client in the same [or closely related] matter now acts in that matter for a client with an interest adverse to that of the former client.’<sup>128</sup> In *Re a Firm of Solicitors*, Lightman J referred to the connecting factors as ‘acting against the interests’ of the other client and that the subject matter of each retainer must have ‘relevan[ce]’ to the other.<sup>129</sup>

The following passage from *Prince Jefri Bolkiah* suggests that, in English law, the connecting factors may be unnecessary in present client conflicts: ‘a fiduciary cannot act at the same time both for and against the same client ... A [lawyer] cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest.’<sup>130</sup> The first sentence, if taken literally, would preclude a lawyer from ever accepting instructions for and against the same client at the same time, notwithstanding that the two instructions might be wholly unrelated — one might be an employment dispute and the other might be in respect of a landlord and tenant matter. Alternatively, it would preclude a lawyer from prosecuting and defending criminal cases at the same time.<sup>131</sup> The City of London Law Society took the view that Lord Millett did not intend for the above passage to be taken literally and should be understood as ‘referring to opposing interests in the same matter’.<sup>132</sup> However, in *Marks & Spencer plc v Freshfields Bruckhaus Deringer*, an argument that Lord Millett’s comments should be read as limited to where the conflict related to the ‘same matter’ was rejected.<sup>133</sup> The Court’s rejection of the connecting factor was not based on the view that a connection between the two matters should not exist but rather that the formulation of the City of London Law Society was too narrow. The Court accepted that there had to be ‘some degree of relationship’ between

<sup>128</sup> (2001) 4 VR 501, 522.

<sup>129</sup> [1997] Ch 1, 9–10.

<sup>130</sup> [1999] 2 AC 222, 234 (Lord Millett). It is noteworthy that there is no uncertainty regarding the requirement that the parties’ interests must be opposite or adverse.

<sup>131</sup> Hollander and Salzedo, above n 6, 29.

<sup>132</sup> City of London Law Society, *Review of Conflict Rules* (2000) 4. The City of London Law Society also states: ‘we are not aware of any other similar finding or dicta at law ... if this is the law we would urge strongly that it be changed’: at 4–5.

<sup>133</sup> [2004] 3 All ER 773, 777 (Lawrence Collins J): ‘I accept there must be some reasonable relationship between the two [transactions], but they do not, in my judgment, have to be the same.’

the matters.<sup>134</sup> Thus, the weight of authority in both England and Australia supports the view that a connection is necessary, although the language is not settled.

Separately, certain commentators have suggested that the ‘getting to know you’ factors in *Yunghanns v Elfic Ltd*<sup>135</sup> may have enlarged the notion of confidential information to such a degree that it may be unnecessary that the matters be related.<sup>136</sup> This view is mistaken. In *Yunghanns v Elfic Ltd*, Gillard J observed that the earlier matters were ‘relevant to and essential background to’ the matter in which the firm was now seeking to act.<sup>137</sup> His Honour also held that there was a real and sensible risk that the confidential information would be used ‘contrary to the interests’ of the former client.<sup>138</sup> This case reinforces, rather than diminishes, the requirements that: there must be a connection between the two underlying matters (they must be the same or closely related); and that the parties’ interests must be adverse to each other, before a court should exercise its jurisdiction to restrain a lawyer from acting. This point is further reinforced by the judgment of Mandie J in *Tricontinental Corporation Ltd v Holding Redlich*.<sup>139</sup> In that case, his Honour was troubled by the lawyer’s ‘knowledge of the negotiating moves’ of the party bringing the application but refused the application on the basis that the matters had ‘negligible relevance’ to each other.<sup>140</sup> Similarly, in *Mintel*, Heerey J applied the ‘getting to know you’ factors set out in *Yunghanns v Elfic Ltd* but held that ‘I am quite satisfied that ... there was no confidential information disclosed ... which had any relevance or potential relevance to the present proceeding.’<sup>141</sup>

#### *A Same or Closely Related Matters*

It has been observed that, regardless of the nature of conflict, the matters which subsist in the alleged conflict must be the ‘same or closely related’.<sup>142</sup>

<sup>134</sup> See Hollander and Salzedo, above n 6, 31: ‘although there is room for much debate about what precisely is meant by “some reasonable relationship” the test seems appropriate.’ It should also be noted that similar phrasing is being adopted by the Law Society of England and Wales in its new draft conflict rules which were expected to come into force in 2005: Law Society of England and Wales, *The Law Society’s Code of Conduct and the Recognised Bodies Regulations* (2004) 34.

<sup>135</sup> (Unreported, Supreme Court of Victoria, Gillard J, 3 July 1998) 10.

<sup>136</sup> Hollander and Salzedo, above n 6, 30 (citations omitted): ‘the Australian courts have often taken a broader view than in England of what constitutes confidential information and one can see that an extended acquaintance with the client could easily lead to a claim that there was a risk of misuse even in an unrelated matter’.

<sup>137</sup> (Unreported, Supreme Court of Victoria, Gillard J, 3 July 1998) 27.

<sup>138</sup> *Ibid.*

<sup>139</sup> (Unreported, Supreme Court of Victoria, Mandie J, 22 December 1994).

<sup>140</sup> *Ibid.* 9. This is one of the ‘getting to know you’ factors: *Yunghanns v Elfic Ltd* (Unreported, Supreme Court of Victoria, Gillard J, 3 July 1998) 10.

<sup>141</sup> (2000) 181 ALR 78, 88.

<sup>142</sup> *Spincode* (2001) 4 VR 501, 522 (Brooking JA). See also *Village v BDW* [2004] Aust Torts Reports ¶81-726, 65 339 (Byrne J). See further *Macquarie Bank v Myer* [1994] 1 VR 350, 359 (Marks J): ‘Obviously the court will not readily countenance a [lawyer] who has acted for one client accepting a retainer from another to act against that former client in the same or in a related matter’. Cf *Westend Entertainment Centre Pty Ltd v Equity Trustees Ltd* [2000] V ConvR ¶54-619, 64 429 (Mandie J): ‘That principle [the duty of loyalty] is of particular application in

Courts have used different language to describe this connecting factor and it is far from clear whether the formulation of this requirement is settled. If there were a spectrum, on one end would be the requirement that the matters must be the ‘same’ (absent a requirement that they be ‘related’) and on the other end, the requirement that the matters must merely have ‘relevance’ to one another. The former would constrict the supervision of the law in conflict situations while the latter would broaden it. The words ‘same or closely related’ would perhaps fall in the middle of the spectrum. It is important to note, however, that ‘[q]uestions of “the same matter” and “closely related matter” may sometimes be problematic. But in the end they are questions of fact and degree.’<sup>143</sup> In *Village v BDW*, Byrne J observed that the ‘question[s] should not be determined by the taking of fine distinctions. The principle which underlies [them] requires an examination of the substance of the relationship.’<sup>144</sup>

Examples of the judicial insistence that there must be some form of connection between the underlying matters abound in the law.<sup>145</sup> In *Australian Liquor Marketers Pty Ltd v Tasman Liquor Traders Pty Ltd*,<sup>146</sup> a firm acting in a preference action in Queensland for recovery of a small debt on behalf of a client was also instructed in proceedings in Victoria against the same client where it was alleged that the client had repudiated a business sale agreement. Habersberger J held that the two cases were ‘truly unrelated’ and consequently refused to restrain the firm from acting in the Victorian proceedings.<sup>147</sup> Similarly, in *Waiviata Pty Ltd v New Millennium Publications Pty Ltd*, Sundberg J observed that ‘[t]here [was] no satisfactory basis on which it could be said that the present

cases where a solicitor seeks to act against a former client in litigation arising out of or in relation to the same subject-matter. This case does not involve that aspect.’ To the extent that this passage suggests that it is unnecessary that the matters be the same or closely related, it is submitted that it has been effectively rejected by the Court of Appeal in *Spincode* and should not be followed.

<sup>143</sup> *Sent v Fairfax* [2002] VSC 429 (Unreported, Nettle J, 7 October 2002) [108].

<sup>144</sup> [2004] Aust Torts Reports ¶81-726, 65 339.

<sup>145</sup> In relation to confidential information, see, eg, *Nasr v Vihervaara* (2005) 91 SASR 222, 229–30 (Doyle CJ); *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2005] NSWSC 550 (Unreported, Bergin J, 20 June 2005) [30]; *Newman v Phillips Fox* (1999) 21 WAR 309, 314–15 (Steytler J); *Re a Firm of Solicitors* [1997] Ch 1, 10 (Lightman J); *CI Industries Pty Ltd v Keeling* (Unreported, Supreme Court of New South Wales, Abadee J, 26 March 1997) 34; *Re a Firm of Solicitors* [1992] 1 QB 959, 973–4 (Staughton LJ). See also *D & J Constructions Pty Ltd v Head* (1987) 9 NSWLR 118, 122 (Bryson J):

Where confidential information has been communicated by a client to a [lawyer] and is relevant to litigation in which that client is now engaged and is still available to the [lawyer], the court should take a cautious approach to any proposal that it should allow the [lawyer] to act against that client.

Although this observation might be confined to the relatedness of ‘confidential information’ it is submitted that the principle of ‘relatedness’ or ‘connecting factor’ is not so confined, but extends to the exercise of the court’s jurisdiction in relation to the duty of loyalty and administration of justice.

<sup>146</sup> [2002] VSC 324 (Unreported, Habersberger J, 14 August 2002).

<sup>147</sup> *Ibid* [26]. His Honour also stated at [25] (citations omitted) that:  
in every case involving an application to restrain a [lawyer] from acting, it is a question of balancing the competing considerations — one party’s right to be represented by [lawyers] of its choosing against another party’s right not to have its (former) [lawyers] acting against it in the same or substantially the same proceeding.

The use of the words ‘same or substantially the same’ in the latter part of the sentence suggests that his Honour preferred this form of connection.

proceeding is the same or closely related to matters in [the earlier proceeding]'.<sup>148</sup> In *Uncle Toby's Co Pty Ltd v Trevor Jones Steel Fabrications Pty Ltd (in liq)*, Batt J held that the original matter must 'relate' to the new matter before a court would issue a restraining order.<sup>149</sup> In *Corporate Systems Publishing Pty Ltd v Lingard*, Jenkins J observed that the matters must be the same or related.<sup>150</sup> His Honour did not, however, qualify the second element to 'closely' related matters. In *Boyce t/as Hunt & Hunt Lawyers v Goodyear Australia Ltd*, Priestley AP described the connection in the following way: 'In general where a [lawyer] has acted for a client in a matter, the [lawyer] should not act against that client in a later matter involving a factual substratum having any significant overlap with the factual substratum in the earlier matter.'<sup>151</sup> In *Fordham v Legal Practitioners' Complaints Committee*, Malcolm CJ observed that:

the rule not only prevents the use of knowledge or information gained from the client during the course of a retainer, but also prevents the assumption of a position hostile to the client concerning the same matter. ... [T]he extension to any related matter is both logical and consistent with the public policy which gives rise to the duty of professional loyalty. In the context of loyalty it is the establishment of the hostile relationship against the ... client in relation to the same or a related matter which is the breach of professional duty.<sup>152</sup>

The judgments referred to above show that this connecting factor is not limited to either of the two kinds of conflict or any one of the three jurisdictional bases. The requirement is one of general application. Although it appears that the form of the connection has not been settled, the words used in *Spincode*<sup>153</sup> seem to strike an appropriate balance.

### B *Adverse Interests*

In addition to the above requirement, the parties must also have 'adverse' or 'opposing' interests. This aspect of the law in England and Australia is fairly clear. Both the House of Lords in *Prince Jefri Bolkiah*<sup>154</sup> and the Court of Appeal in *Spincode*<sup>155</sup> observed that the parties' interests must be adverse. In identifying adverse or opposing interests, analogy may be drawn with the self-interested conduct of contracting parties.<sup>156</sup> Satisfaction of the requirement that the parties' interests must be adverse or opposing does not appear to be particularly onerous. It may even be more appropriate to cast the requirement in negative terms. For

<sup>148</sup> [2002] FCA 98 (Unreported, Sundberg J, 15 February 2002) [9].

<sup>149</sup> (Unreported, Supreme Court of Victoria, Batt J, 12 October 1995) 23.

<sup>150</sup> [2004] WASC 24 (Unreported, Jenkins J, 24 February 2004) [35].

<sup>151</sup> (Unreported, New South Wales Court of Appeal, Priestley AP, 16 September 1996) 7.

<sup>152</sup> (1997) 18 WAR 467, 489–90. See also at 490 (Franklyn J), 490 (Wheeler J). See also *Gugiatti v City of Stirling* (2002) 25 WAR 349, 351 (Templeman J), where his Honour adopted the observation of the Victorian Court of Appeal and said: 'In other words, if a [lawyer] adopts a hostile position against a former client in the same or a related matter he should be restrained from acting'.

<sup>153</sup> (2001) 4 VR 501.

<sup>154</sup> [1999] 2 AC 222, 234, 236 (Lord Millett).

<sup>155</sup> (2001) 4 VR 501, 522 (Brooking JA).

<sup>156</sup> Hollander and Salzedo, above n 6, 31.



instance, does the relationship between the parties represent an ‘identity of interest[s]’<sup>157</sup> sufficient to negate a claim that they are opposite or adverse? An example of an identity of interests may be joint-venture partners, assuming that the relationship has not broken down.

In *Re Baron Investments (Holdings) Ltd (in liq); Halstuk v Venvil*,<sup>158</sup> Pumfrey J refused to disqualify a firm of lawyers acting for a liquidator of an insolvent company despite the fact that they were also acting for two of the principal creditors. Although this was, prima facie, an instance of present client conflict, his Honour held that there was no conflict between the interests of the company and the creditors.<sup>159</sup> In other words, their interests were not adverse or opposite.<sup>160</sup> Similarly, in *Australian Liquor Marketers Pty Ltd v Tasman Liquor Traders Pty Ltd*, Habersberger J said ‘one cannot conclude that there has been a breach of the duty of loyalty by a [lawyer] acting for two clients without examining the extent to which, if at all, the interests of the two clients are adverse to each other.’<sup>161</sup> Although his Honour was speaking specifically of the duty of loyalty, this observation is equally applicable to the other jurisdictional limbs.

Perhaps the clearest illustration of the requirement that the parties’ interests must be adverse to each other is found in *Murray v Macquarie Bank Ltd*.<sup>162</sup> In that case, a lawyer had been acting for an employer and employee in an action brought by a third party. The employee, unhappy with the lawyer’s representation, terminated his retainer with the lawyer and retained separate lawyers. The employee then sought to restrain his former lawyer from continuing to act on behalf of his employer on the basis that there was a risk his confidential information may be misused. Spender J observed that there was no conflict of duty because the employer’s and employee’s interests were not ‘adverse’ to each other.<sup>163</sup>

## V PRESENT CLIENT CONFLICT

At the outset, it should be noted that a decision by a court to restrain a lawyer from acting is not premised upon any finding of culpable conduct on the

<sup>157</sup> Dal Pont, *Lawyers’ Professional Responsibility in Australia and New Zealand*, above n 40, 181. He also commented that: ‘Where there are many parties to a proceeding, and the parties have a common interest, a common grievance and seek common relief, they may be represented by one of the parties to the record in a *representative* or *class* action’: at 181 fn 2 (emphasis in original). See also *Carnie v Esanda Finance Corporation Ltd* (1995) 182 CLR 398, 403–4 (Mason CJ, Deane and Dawson JJ); *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, 90 (Richardson J); *Duke of Bedford v Ellis* [1901] AC 1, 22–3 (Lord Brampton).

<sup>158</sup> [2000] 1 BCLC 272.

<sup>159</sup> *Ibid* 279: ‘The rule is that a [lawyer] cannot act for two clients with opposing interests.’ The English Court of Appeal subsequently refused the applicants leave to appeal: *Halstuk v Venvil* (Unreported, Court of Appeal, Chadwick LJ, 26 October 1999).

<sup>160</sup> The various court rules in England and Australia touch on the precondition. See, eg, *Federal Court Rules 1979* (Cth) O 45 r 2, which provides that: ‘Where a [lawyer] or his partner acts as [lawyer] for any party to any proceeding ... that [lawyer] shall not, without the leave of the Court, act for any other party to the proceedings not in the same interest.’

<sup>161</sup> [2002] VSC 324 (Unreported, Habersberger J, 14 August 2002) [25].

<sup>162</sup> (1991) 33 FCR 46.

<sup>163</sup> *Ibid* 55. See also *Carindale* (1993) 42 FCR 307, 311–12 (Drummond J).

lawyer's part.<sup>164</sup> The general and strict rule, in the context of present client conflict, is that a lawyer must not act for clients simultaneously because of the 'inescapable conflict of interest' inherent in the situation.<sup>165</sup> All of the jurisdictional bases referred to in Part III, which include the risk of misuse of confidential information, duty of loyalty and the administration of justice, are available in present client conflicts. Any one or combination of the above can form the basis of an application seeking to restrain a lawyer from acting. It appears, however, that the jurisdictional limb most often invoked is the lawyer's duty of loyalty. This may be because a claim based on the breach of the lawyer's duty of loyalty is relatively easy to sustain in present client conflicts. Once it is established that the lawyer is presently acting for two or more clients in matters which are the same or closely related, and that their interests are adverse, then a court will readily issue an injunction because of the unavoidable prospect of the lawyer breaching their duty of loyalty to one or more of the clients. Moreover, the jurisdiction of the court in England may be confined to this basis.<sup>166</sup> In *Prince Jefri Bolkiah*, Lord Millett said:

It is otherwise when the court's intervention is sought by an existing client, for a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation.<sup>167</sup>

What then did Lord Millett mean by the phrase, 'inescapable conflict of interest'? We get a clue by the reference to 'fiduciary' in the preceding text. The reference suggests that the jurisdiction of the court is based in equity with the full panoply of fiduciary obligations owing, including the duty of loyalty. What is not clear, however, is why the duty of confidentiality which is also capable of being an equitable obligation did not also apply. There can be no doubt that lawyers owe a duty of confidentiality during the term of their retainer. The

<sup>164</sup> *Black v Taylor* [1993] 3 NZLR 403, 412 (Richardson J): 'it is a protection for the parties and for the wider interests of justice'. This rationale was applied in *Grimwade v Meagher* [1995] 1 VR 446, 451 (Mandie J).

<sup>165</sup> Aitken, "Chinese Walls", *Fiduciary Duties and Intra-Firm Conflicts*, above n 32, 118: 'In such a case, the [lawyer] may not act because of the inescapable conflict of interest inherent in the situation.'

<sup>166</sup> In Scotland, the law is similarly strict although the jurisdictional constraints evident in English law are absent. See *Dunlop's Trustees v Farquharson* 1956 SLT 16, 17 (Lord Guthrie), citing J Henderson Begg, *A Treatise on the Law of Scotland Relating to Law Agents* (2<sup>nd</sup> ed, 1883) 337: "A law agent ought on no account to attempt to act for parties with conflicting interests. Thus he cannot be employed on both sides of a law-suit." That rule applies whether the dispute is one of fact or a question of law'. Note that in Scottish law, if a lawyer is successfully restrained from acting because of his conflict of duty, the court may order the lawyer to pay the client's costs thrown away for having to engage other lawyers. See also *Law Society of Scotland v J* 1991 SLT 662, 664 (Hope LP), a case where the Court of Sessions conducted a judicial review of a decision by the professional body dealing with conflict of duty.

<sup>167</sup> [1999] 2 AC 222, 234–5. This view is supported in G E Dal Pont and D R C Chalmers, *Equity and Trusts in Australia* (3<sup>rd</sup> ed, 2004) 105, where it was stated that the proscription against acting for two or more clients in these circumstances simply reflects the fiduciary notion of undivided loyalty.

existence of the contractual term and/or equitable obligation gives rise to a cause of action for which the court has power to issue an injunction.<sup>168</sup> It is, therefore, unclear on what basis the possible misuse of confidential information could be denied as a jurisdictional basis. Although the House of Lords expressly disavowed confidentiality as a jurisdictional base for restraining a lawyer from acting in present client conflicts,<sup>169</sup> it appears this aspect of the reasoning has been honoured, at least in Australia, more in its breach than its observance.<sup>170</sup> The better view is that the jurisdiction of the court to restrain a lawyer (at least where present client conflict is alleged) is not limited in the manner suggested in *Prince Jefri Bolkiah* but rather a number of jurisdictional bases are available upon which a lawyer may be restrained.

Turning now to the principles of law which condition the discharge of the court's power, it has already been mentioned above that the court's equitable jurisdiction (the duty of loyalty) is most frequently invoked in relation to this kind of conflict.<sup>171</sup> The court will discharge its power if it is satisfied that the lawyer's duty of loyalty to one client is unavoidably jeopardised by the lawyer's duty to another client. The 'inescapable nature of the conflict' is invariably emphasised. The court will readily issue an injunction in these circumstances and the applicant or plaintiff need do no more than set out the fact that the lawyer is presently acting for two or more clients in relation to matters which are the same or closely related and that the clients' interests are adverse.<sup>172</sup> In other words, a lawyer having erected a legal edifice on behalf of a client will be restrained from acting for another client who seeks to dismantle it.<sup>173</sup>

A lawyer may, however, seek to terminate their retainer to avoid the onerous rules that apply in relation to present client conflict. As will be seen below, lawyers resisting an attempt to restrain them from acting on behalf of a client may seek to draw a strategic advantage from a termination of their retainer. Different and arguably more favourable principles of law apply in former client conflict situations (particularly under the English approach).

## VI FORMER CLIENT CONFLICT

The ability of a court to restrain lawyers from acting against former clients is well-established and can be traced back to 1815 in the English case of *Earl*

<sup>168</sup> See Glover, *Commercial Equity*, above n 108, 207–8. Glover recognised 'confidentiality' as a jurisdictional base but noted that it takes a 'subordinate place' in present client conflict. While no explanation is given for this statement, it may be inferred that, in practice, the cases are decided on the basis of 'inescapable conflict' although other jurisdictional bases might exist.

<sup>169</sup> *Prince Jefri Bolkiah* [1999] 2 AC 222, 243 (Lord Millett).

<sup>170</sup> See *Village v BDW* [2004] Aust Torts Reports ¶81-726, 65 338 (Byrne J). Although this case was decided on the basis of the lawyer's breach of the duty of loyalty, the court considered the duty of confidentiality and there was no suggestion that the duty of confidentiality was not available as a jurisdictional base.

<sup>171</sup> See above Part III(B).

<sup>172</sup> The principles of law which govern the discharge of the court's power in relation to the duty of confidentiality and administration of justice are set out above in Parts III(B) and (C).

<sup>173</sup> See above n 117 and accompanying text.

*Cholmondeley v Lord Clinton*.<sup>174</sup> In that case, Earl Cholmondeley brought a suit against Lord Clinton to recover certain estates in Devon and Cornwall. Seymour & Montriou, a law firm, acted for Lord Clinton in the action. After the matter had been on foot for some time the lawyers dissolved their partnership, and one of them commenced acting for Earl Cholmondeley. The court held that a lawyer not having been discharged by the party for whom he was acting, but having discharged himself, was not at liberty to become a lawyer for the opposite party in the same cause. In 1821, Lord Eldon LC (who delivered the judgment in *Earl Cholmondeley v Lord Clinton*) said of the case:

There the gentleman who had been concerned for Lord Clinton discharged himself and went over to the other side. It appeared to me, and to all the Judges, that nothing could be more dangerous than to permit a [lawyer] employed by A in a cause between him and B, to leave A while still willing to retain him, and enter into the service of B.<sup>175</sup>

The range of bases which may comprise an exercise of the jurisdiction of the court were succinctly set out by Austin J in *Oceanic Life Ltd v HIH Casualty & General Insurance Ltd*.<sup>176</sup> His Honour noted:

a surprisingly large number of principles may be brought into play. The relevant principles may include the law of contract, the law of fiduciary duty, the law which protects confidential information, the law with respect to legal professional privilege, the law with respect to the [lawyer's] duty to the Court and the court's discretion to supervise the conduct of its officers, and ethical principles developed and applied by a professional disciplinary body.<sup>177</sup>

Despite the range of jurisdictional bases which might have been available, Lord Millett observed in *Prince Jefri Bolkiah* that the jurisdiction of the court was confined to the protection of a client's confidential information. In *Spincode*, Brooking JA disagreed with this view. The following two sections of this Part set out, in detail, the speech of Lord Millett and the conflicting judgment of Brooking JA. The remainder of this Part will then thread together the fractured jurisprudence, particularly in Australia, and set out two main approaches which, for convenience, have been described as the 'English' and 'Victorian' approaches. In a nutshell, the English approach, unlike the Victorian one, does not recognise the availability of fiduciary law (reflected by the duty of loyalty) and the court's supervisory jurisdiction (reflected by the administration of justice) as a basis for intervening in former client conflicts.

<sup>174</sup> (1815) 19 Ves Jr 261; 34 ER 515. See also Aitken, "Chinese Walls", Fiduciary Duties and Intra-Firm Conflicts, above n 32, 117.

<sup>175</sup> *Beer v Ward* (1821) Jac 77, 82; 37 ER 779, 781. See also *Bricheno v Thorp* (1821) Jac 300, 301; 37 ER 864, 865 (Lord Eldon LC).

<sup>176</sup> (1999) 10 ANZ Insurance Cas ¶61-438.

<sup>177</sup> *Ibid* 74 975.

## A Prince Jefri Bolkiah v KPMG (a firm)

The defendant firm, KPMG, was employed as the auditor of the core assets of the Brunei Investment Agency ('BIA')<sup>178</sup> and to provide the Brunei Government with money management services.<sup>179</sup> The plaintiff, Prince Jefri Bolkiah, had been the chairperson of the BIA until his removal in 1998. For a period of 18 months Prince Jefri, acting in his personal capacity, retained KPMG to act for him and one of his companies in private litigation.<sup>180</sup> KPMG provided Prince Jefri with extensive litigation support services of the sort usually provided by lawyers. In so doing, KPMG was entrusted with or acquired extensive confidential information about Prince Jefri's financial affairs.<sup>181</sup>

Subsequent to Prince Jefri's dismissal as chairperson of the BIA, the Brunei Government commenced an investigation into the conduct of the affairs of the BIA, including the destination and present location of money which had been transferred from the BIA's funds while Prince Jefri was the chairperson.<sup>182</sup> The Brunei Government sought to retain KPMG to assist in the investigation. KPMG took the view that it could accept the instructions because it had ceased to act for Prince Jefri more than two months previously; hence he was no longer a client. However, aware of the possibility of a conflict of interest because the investigation was likely to be adverse to Prince Jefri's interests and the firm possessed confidential information relating to his financial affairs, the firm erected an information barrier.<sup>183</sup>

Prince Jefri, who had not been informed by KPMG of its instructions and whose consent had not been sought,<sup>184</sup> was granted an injunction by Pumfrey J

<sup>178</sup> The BIA was established to hold and manage the general reserve fund of the Brunei Government and its external assets.

<sup>179</sup> *Prince Jefri Bolkiah* [1999] 2 AC 222, 228 (Lord Millett).

<sup>180</sup> *Ibid* 229 (Lord Millett):

[KPMG's litigation support team] investigated the facts, interviewed the witnesses with or without solicitors being present, searched for documents, took part in conferences, including telephone conferences, with counsel and in the absence of [lawyers], drafted subpoenas, reviewed draft pleadings and prepared ideas for cross-examination. They took instructions and obtained information directly from Prince Jefri's own staff without the intervention of [lawyers].

The litigation involved no apparent conflict between the interests of Prince Jefri and BIA.

<sup>181</sup> *Ibid* (Lord Millett):

In particular they became privy to a substantial volume of information concerning the identity of his assets, their location, the legal structure of their ownership, the identity and structure of corporate and other vehicles used by Prince Jefri to hold assets, and the manner and financing of their purchase.

<sup>182</sup> *Ibid* 231 (Lord Millett): '[It was not simply an audit but involved] the tracing and recovery of assets and might well lead to civil and even criminal proceedings against Prince Jefri.'

<sup>183</sup> Otherwise known as a 'Chinese wall': see below Part VII(A)(2). See *ibid* 231–2, where Lord Millett discussed the salient features of the Chinese wall in this case. First, the selection of KPMG staff was intended to ensure that nobody who possessed confidential information about Prince Jefri would work on the investigation. KPMG's solicitors interviewed personnel who were working on the investigation to ensure that none knew of Prince Jefri's confidential information and those staff swore affidavits of ignorance. Secondly, preventative measures were put in place to ensure that Prince Jefri's confidential information would not become available to KPMG personnel involved in the investigation. These included physical separation and the quarantining of electronically stored information. See below Part VII(A)(2) for a detailed discussion of information barriers.

<sup>184</sup> *Ibid* 231 (Lord Millett).

restraining KPMG from continuing to work on the investigation.<sup>185</sup> KPMG successfully appealed to the Court of Appeal, which discharged the injunction on the grounds that KPMG was only obliged to make reasonable efforts to protect Prince Jefri's confidential information and that, balancing the competing interests, the precautions taken by the firm meant that there was no real or appreciable risk that the confidential information would be disclosed.<sup>186</sup> Prince Jefri appealed to the House of Lords.

The House of Lords allowed the appeal, the leading judgment being given by Lord Millett (with whom the remainder of the House concurred). Lord Millett began his speech by observing that the House of Lords had not previously dealt with this issue. The leading authority in England had been the judgment of the Court of Appeal in *Rakusen*.<sup>187</sup> In that case, the Court held that there was no 'absolute' impediment to one partner in a two-person firm taking instructions against a client who had, unbeknownst to him, previously consulted the other partner about the same litigation. His Lordship observed that the case was authority for two propositions:

- (i) that there is no absolute rule of law in England that a [lawyer] may not act in litigation against a former client; and (ii) that the [lawyer] may be restrained from acting if such a restriction is necessary to avoid a significant risk of the disclosure or misuse of confidential information belonging to the former client.<sup>188</sup>

Lord Millett observed that, like a lawyer, an accountant providing litigation support services owed a continuing professional duty to his or her former clients following the termination of the lawyer-client relationship. The content of this duty is to preserve the confidentiality of information imparted during the relationship. The duty was unqualified and required the accountant to keep the information confidential, not merely to take all reasonable steps to do so.<sup>189</sup> In

<sup>185</sup> *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 1 BCLC 1. Pumfrey J held that KPMG had an honest intention not to disclose any confidential information. His Honour concluded, however, that Chinese walls were not well adapted to deal with a disclosure that was 'accidental, inadvertent or negligent' and that a former client should not be exposed to the risk of such a disclosure unless some powerful reason compelled it: at 18.

<sup>186</sup> *Ibid* 19. The Court of Appeal, by majority comprising Lord Woolf MR and Otton LJ, favoured the approach adopted by the Court of Appeal of New Zealand in *Russell McVeagh McKenzie Bartleet & Co v Tower Corporation* [1998] 3 NZLR 641. Rather tellingly Lord Woolf MR held that: 'To continue an injunction would be to set an unrealistic standard for the protection of confidential information which would create impediments in the way large international firms conduct their practice which are not justified': *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 1 BCLC 1, 32.

<sup>187</sup> [1912] 1 Ch 831. See Aitken, "'Chinese Walls", *Fiduciary Duties and Intra-Firm Conflicts*', above n 32, 120.

<sup>188</sup> *Prince Jefri Bolkiah* [1999] 2 AC 222, 234.

<sup>189</sup> *Ibid* 235–6 (Lord Millett):

The former client cannot be protected completely from accidental or inadvertent disclosure. But he is entitled to prevent his former [lawyer] from exposing him to any avoidable risk; and this includes the increased risk of the use of the information to his prejudice arising from the acceptance of instructions to act for another client with an adverse interest in a matter to which the information is or may be relevant.

this regard, *Rakusen* was overruled.<sup>190</sup> His Lordship then observed that the former client bore the onus of proving that the lawyer possessed and continues to possess his or her confidential information and that the lawyer is proposing to act for another client with an adverse interest in a matter to which the information might be relevant. If this was proven, the onus then shifted to the lawyer to prove that effective measures had been taken to ensure that there was no risk of disclosure of the client's confidential information.<sup>191</sup> His Lordship held that KPMG had failed to discharge the heavy burden of establishing that there was no risk of disclosure of Prince Jefri's confidential information.

#### B Spincode Pty Ltd v Look Software Pty Ltd

In *Spincode*,<sup>192</sup> a firm of lawyers had been acting on behalf of the plaintiff company, Spincode Pty Ltd, since its incorporation when a dispute arose amongst its shareholders. Despite an initial denial, the firm accepted that while it had continued to act on behalf of the company, it was also providing advice to two of the shareholders in relation to their dispute with other shareholders.<sup>193</sup> The firm then acted on behalf of one of the shareholders in an application seeking to wind up the company.

The trial judge, Warren J, granted an injunction restraining the firm from acting or continuing to act in the matter. Her Honour found that confidential information had been obtained by the firm and that information was relevant to the subsequent action against the company. Her Honour concluded that not only had the firm failed to show that there was no real risk of misuse of confidential information, but that the company had shown a 'real and sensible possibility' of that misuse.<sup>194</sup> The firm appealed to the Victorian Court of Appeal.

In the leading judgment, Brooking JA agreed with Warren J regarding the misuse of confidential information. The appeal could have been dismissed on this basis alone.<sup>195</sup> However, his Honour then considered the 'wider question' of

<sup>190</sup> Ibid 236 (Lord Millett). See also Aitken, "Chinese Walls", *Fiduciary Duties and Intra-Firm Conflicts*, above n 32, 121 (citations omitted):

Lord Millett accepted the criticisms made of [*Rakusen*] for a number of reasons. First, it imposed an unfair burden on the former client because it 'exposes him to a potential and avoidable risk to which he has not consented, and fails to give him a sufficient assurance that his confidence will be respected.' Secondly, 'it also exposes the solicitor to a degree of uncertainty which could inhibit him in his dealings with the second client when he cannot be sure that he has correctly identified the source of his information'.

<sup>191</sup> *Prince Jefri Bolkiah* [1999] 2 AC 222, 237: 'It goes without saying that the risk must be a real one, and not merely fanciful or theoretical. But it need not be substantial.' Lord Millett observed that the test had been formulated in this way by Lightman J in *Re a Firm of Solicitors* [1997] Ch 1 (possibly derived from the judgment of Drummond J in *Carindale* (1993) 42 FCR 307).

<sup>192</sup> (2001) 4 VR 501.

<sup>193</sup> Ibid 506–8 (Brooking JA).

<sup>194</sup> *Spincode Pty Ltd v Look Software Pty Ltd* [2001] VSC 287 (Unreported, Warren J, 17 August 2001) [38]. Her Honour did so after referring to the tests in *Prince Jefri Bolkiah* [1999] 2 AC 222 (in relation to the first limb, the lawyer had failed to show no real risk of the misuse of confidential information) and *Farrow Mortgage Services Pty Ltd (in liq) v Mendall Properties Pty Ltd* [1995] 1 VR 1, 8 (Hayne J) (in relation to the second limb, the client had shown a 'real and sensible possibility' of misuse).

<sup>195</sup> *Spincode* (2001) 4 VR 501, 508 (Brooking JA): 'There is no reason to doubt the correctness of her Honour's view'.

whether the danger that confidential information would be misused was the only basis upon which the court could restrain a lawyer from acting.<sup>196</sup> His Honour held that it was not, and that there were two other jurisdictional bases, which included the fiduciary duty of loyalty and the proper administration of justice. Brooking JA was critical of the position taken by the House of Lords in *Prince Jefri Bolkiah*. His Honour said:

In their Lordships' view, the duty of loyalty perishes along with the retainer from which it sprang, the only survivor being that aspect of the duty which protects confidential information. Once the retainer has gone the '[lawyer] has no obligation to defend and advance the interests of his former client.' ... But why should we not say that 'loyalty' imposes an abiding negative obligation not to act against the former client in the same matter? The wider view, and the one which commends itself to me as fair and just, is that the equitable obligation of 'loyalty' is not observed by a [lawyer] who acts against a former client in the same matter.<sup>197</sup>

His Honour went on to say:

But if this result cannot be achieved as a matter of equitable obligation why should not the law impose, and the court enforce, an obligation arising otherwise than in equity? ... A possible approach would be to say that it was an implied term of the contract of retainer between the [lawyer] and the company in the present case that the [lawyer] would not act against the company in the dispute in relation to which they had been retained by it. But I need not pursue this, since in my view a negative equitable obligation arose ...<sup>198</sup>

The other members of the Court also dismissed the appeal, though they appeared to do so on the narrower basis involving confidential information. Chernov JA did not consider it necessary to decide but observed that Brooking JA had made a 'compelling case'<sup>199</sup> and Ormiston JA did not express an opinion.<sup>200</sup>

<sup>196</sup> *Ibid*:

But the judge did not found herself on this alone and so her judgment raises a much wider question. Strictly, we need not consider that question. It would be enough to say that the decision below can be supported, on the most narrow view of the law, as resting on confidential information and its possible misuse. But I take the opportunity to consider the wider question.

It is clear, from this comment, that the remainder of his Honour's reasons for judgment were obiter dicta as they were not dispositive of the case. This does not, however, diminish the persuasiveness of the judgment.

<sup>197</sup> *Ibid* 522 (citations omitted).

<sup>198</sup> *Ibid* (citations omitted). His Honour also commented: 'I have in mind, not a term attached by the law as an incident of every contract of retainer between a [lawyer] and a client, but a term implied in fact, answering the requirements of *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 at 282-3': at 522 fn 54.

<sup>199</sup> *Ibid* 526:

It is not necessary to decide for the purposes of this appeal whether there is an absolute obligation on [lawyers] not to act against their former clients in the same or substantially the same proceeding, although, if I may say so with respect, the learned judgment of Brooking JA makes a compelling case for such a view.

<sup>200</sup> *Ibid* 525:

In my opinion, essentially for the reasons [Brooking JA] puts forward as necessary for his decision, I would dismiss the appeal. I would like to have been able to reach a conclusion also on the other aspects raised in his judgment, especially the principle of fiduciary 'loyalty' and the precise obligation owed by [lawyers] to former clients. Those aspects do raise, however,



Furthermore, Nettle J observed in *Sent v Fairfax*<sup>201</sup> that Brooking JA made a ‘compelling case’. His Honour noted that it accorded with the weight of authority in Canada and New Zealand, and also with equitable principle.<sup>202</sup> Tellingly, his Honour observed that

none of the judges that have refused to follow Brooking JA’s observations have directed themselves to an analysis of the principle of the kind his Honour undertook.

If it was necessary to make a choice about the matter, I would respectfully choose to follow Brooking JA’s analysis in *Spincode*.<sup>203</sup>

However, as noted by Nettle J, ‘[i]t must be accepted that Brooking JA’s observations appear to take the law further than it has thus far been held to go in England or New South Wales.’<sup>204</sup> The following Part of this article considers the current divergence between the laws in Australia and England.

### *C The Jurisprudence — Drawing the Common Threads Together*

Certain incidents of the lawyer–client relationship survive the formal termination of the retainer. The issue to be considered here is what precisely survives the termination and what other jurisdictional bases might exist to give courts the power to restrain a lawyer from acting in the context of former client conflict. The various bases, whatever they may be, are certainly narrower than those that are available in cases of present client conflict. The reasons for this are obvious. A lawyer presently retained by a client will owe obligations to that client which do not continue after the termination of the retainer. The first and most obvious class of duties will be those duties contained in the retainer itself. The jurisdictional bases available in the context of former client conflict are discussed below.

#### 1 *Confidential Information*

Dealing first with the uncontroversial, it is widely accepted that the duty of confidentiality survives the termination of the retainer.<sup>205</sup> The persistence of the duty of confidentiality is a well-established rule in England and Australia.

issues only touched upon in argument ... If I had had the luxury of further time to consider them, I may have reached agreement with Brooking JA on each of those aspects ...

<sup>201</sup> [2002] VSC 429 (Unreported, Nettle J, 7 October 2002) [103]–[104].

<sup>202</sup> *Ibid* [103].

<sup>203</sup> *Ibid* [103]–[104] (citations omitted).

<sup>204</sup> *Ibid* [101] (citations omitted).

<sup>205</sup> *Prince Jefri Bolkiah* [1999] 2 AC 222, 236–7 (Lord Millett); *Spincode* (2001) 4 VR 501, 508 (Brooking JA); *Belan v Casey* [2002] NSWSC 58 (Unreported, Young CJ in Eq, 4 February 2002) [21]; *Photocure* (2002) 56 IPR 86, 95 (Goldberg J).

In Victoria and certain other Australian jurisdictions, a court will restrain a lawyer from continuing to act for a party to litigation or a transaction if:<sup>206</sup>

- 1 a ‘reasonable observer’,<sup>207</sup> informed of the facts, might reasonably anticipate a danger of misuse of confidential information of a client; and
- 2 there is a ‘real and sensible possibility’<sup>208</sup> that the interest of the lawyer in advancing the case in the litigation or transaction might conflict with the lawyer’s duty to keep that information confidential and to refrain from using it to the detriment of the client.<sup>209</sup>

In England and certain Australian jurisdictions,<sup>210</sup> a similar order will be made unless the court is satisfied that there is ‘no risk of disclosure’.<sup>211</sup> ‘[T]he risk

<sup>206</sup> See *Village v BDW* [2004] Aust Torts Reports ¶81-726, 65 338 (Byrne J); *Sent v Fairfax* [2002] VSC 429 (Unreported, Nettle J, 7 October 2002) [33]; *Farrow Mortgage Services Pty Ltd (in liq) v Mendall Properties Pty Ltd* [1995] 1 VR 1, 8–9 (Hayne J). This formulation has also been used in Federal Court jurisprudence, see *Photocure* (2002) 56 IPR 86, 104 (Goldberg J); *Carindale* (1993) 42 FCR 307, 312 (Drummond J).

<sup>207</sup> The ‘reasonable observer’ requirement is a means of factoring in the public interest and safeguarding the appearance of justice. In so doing, it avoids the obstacles inherent in an enquiry into a lawyer’s actual knowledge and conduct. Importantly, although there is no premise that the observer be legally trained, he or she must be a person ‘capable of rational assessment’ (see *In the Marriage of Gagliano* (1989) 12 Fam LR 843, 849 (Renaud J) and ‘who knows and is prepared to understand the facts’ (see *D & J Constructions Pty Ltd v Head* (1987) 9 NSWLR 118, 123 (Bryson J)). The adoption of a reasonable observer as the relevant perspective has the advantage that ‘an over sensitivity on the part of the objector would be excluded and that public confidence in the process of litigation would not be undermined’: *Re a Firm of Solicitors* [1992] 1 QB 959, 969 (Parker LJ). See also *Gugiatti v City of Stirling* (2002) 25 WAR 349, 352 (Templeman J).

<sup>208</sup> *Kalenik v Apostolidis* [2005] VSC 27 (Unreported, Hansen J, 18 February 2005) 16; *Spincode* (2001) 4 VR 501, 508 (Brooking JA); *Mullins v Rothschild* (2001) 120 A Crim R 574, 578 (Cox CJ); *Mitchell v Pattern Holdings Pty Ltd* [2000] NSWSC 1015 (Unreported, Bergin J, 7 November 2000) [40]; *Watson v Watson* (Unreported, Supreme Court of New South Wales, Santow J, 25 May 1998) 12; *Farrow Mortgage Services Pty Ltd (in liq) v Mendall Properties Pty Ltd* [1995] 1 VR 1, 5, 8 (Hayne J); *Tricontinental Corporation Ltd v Holding Redlich* (Unreported, Supreme Court of Victoria, Mandie J, 22 December 1994) 5; *Murray v Macquarie Bank Ltd* (1991) 33 FCR 46, 51 (Spender J); *Mallesons v KPMG* (1990) 4 WAR 357, 362–3 (Ipp J).

<sup>209</sup> Some decisions suggest that former clients in criminal and family law cases might face a lower threshold for establishing communication of such information. This may be explained on the basis of the special importance that justice be seen to be done in criminal cases, and that the nature of the information disclosed in family law cases may be prima facie confidential and personal. See generally Edmonds, above n 33, 232. See also Mitchell, ‘Whose Side Are You on Anyway?’, above n 5, 426; Donaghue, above n 36, 22; Connock, above n 5, 244; Aitken, ‘Chinese Walls and Conflicts of Interest’, above n 10, 106–8. Cf *In the Marriage of Gagliano* (1989) 12 Fam LR 843, 848–9 (Renaud J).

<sup>210</sup> The English formulation in relation to the duty of confidentiality appears to have been followed in New South Wales: *BATAS v Blanch* [2004] NSWSC 70 (Unreported, Young CJ in Eq, 20 February 2004) [70], [129]; *Belan v Casey* [2002] NSWSC 58 (Unreported, Young CJ in Eq, 29 February 2002) [21]; *Colonial Portfolio Services Ltd v Nissen* (2000) 35 ACSR 673, 697 (Rolfe J). Cf *Mitchell v Pattern Holdings Pty Ltd* [2000] NSWSC 1015 (Unreported, Bergin J, 7 November 2000) [40]; *D & J Constructions Pty Ltd v Head* (1987) 9 NSWLR 118, 122–3 (Bryson J). The English formulation was referred to, but not expressly adopted in the Australian Capital Territory: *Wagdy Hanna & Associates Pty Ltd v National Library of Australia* (2004) 155 ACTR 39, 41, 48 (Higgins CJ). While it was also followed in South Australia in *Pradhan v Eastside Day Surgery Pty Ltd* [1999] SASC 256 (Unreported, Doyle CJ, Prior and Bleby JJ, 18 June 1999) [51] (Bleby J), more recently the same court in *NASR v Vihervaara* (2005) 91 SASR 222, 229 (Doyle CJ) adopted *Carindale* (1993) 42 FCR 307 (which is described here as the Victorian approach) as the appropriate test and referred extensively to *Spincode*.

must be a real one, and not merely fanciful or theoretical. But it need not be substantial.<sup>212</sup>

Although the English and Victorian formulations operate similarly,<sup>213</sup> there are subtle differences that have profound implications for the onus of proof. The Victorian approach appears to follow the traditional method that the party bringing the claim bears the onus of proving the claim on the balance of probabilities. However, the English approach introduces a reversal of the onus of proof at the third stage of its formulation.<sup>214</sup> The applicant bears the onus of proving the first two stages, which are:

- 1 that the lawyer is in possession of information which is confidential to the client and to the disclosure of which the client has not consented; and
- 2 that the information is, or may be, relevant to another matter in which the lawyer has been retained and that the other matter is adverse to the interests of the client.

Although the burden of proof is on the applicant, the burden is not a heavy one. Stage 1 may readily be inferred and stage 2 will often be obvious.<sup>215</sup> Once the client has established the first two stages, the evidential burden shifts to the lawyer, who must show that there is no risk that the confidential information will come into the possession of those acting for the other party.<sup>216</sup> In *Colonial Portfolio Services Ltd v Nissen*, Rolfe J observed that '[t]he weight of authorities since *Prince Jefri Bolkiah* supports the test therein stated, the onus being on the

<sup>211</sup> The English formulation before *Prince Jefri Bolkiah* included stage 1 as set out in the Victorian formulation: *Re a Firm of Solicitors* [1992] 1 QB 959, 969 (Parker LJ). The House of Lords appears to have dispensed with that requirement in *Prince Jefri Bolkiah* [1999] 2 AC 222, 236–7 (Lord Millett).

<sup>212</sup> *Prince Jefri Bolkiah* [1999] 2 AC 222, 237 (Lord Millett). The House of Lords at 236–7 expressly referred to Finn, 'Conflicts of Interest and Professionals', above n 21, and two Australian judgments: *Carindale* (1993) 42 FCR 307; *National Mutual Holdings Pty Ltd v Sentry Corporation* (1989) 22 FCR 209. The House of Lords appeared to adopt the former judgment: *Prince Jefri Bolkiah* [1999] 2 AC 222, 237 (Lord Millett).

<sup>213</sup> See *Newman v Phillips Fox* (1999) 21 WAR 309, 322 (Steytler J): 'There is in my opinion little practical difference between [the English] test and the test adopted in such cases as *Mallesons and Farrow Mortgage Services*.' This observation was followed in *Bureau Interprofessional* [2002] FCA 588 (Unreported, Ryan J, 9 May 2002) [47].

<sup>214</sup> This approach may have originated in Canada: see *MacDonald Estate v Martin* [1990] 3 SCR 1235, 1260–1 (Sopinka J). See also *Re a Firm of Solicitors* [2000] 1 Lloyd's Rep 31, 34 (Walker J); *Re a Firm of Solicitors* [1997] Ch 1, 11 (Lightman J); *David Lee & Co (Lincoln) Ltd v Coward Chance (a firm)* [1991] Ch 259, 270 (Browne-Wilkinson V-C).

<sup>215</sup> *Prince Jefri Bolkiah* [1999] 2 AC 222, 235 (Lord Millett). The House of Lords did not consider it necessary to introduce presumptions, rebuttable or otherwise, in relation to stages 1 and 2.

<sup>216</sup> *Re a Firm of Solicitors* [1997] Ch 1, 11 (Lightman J); *Prince Jefri Bolkiah* [1999] 2 AC 222, 237 (Lord Millett). Cf Justice P W Young, 'Recent Cases' (1999) 73 *Australian Law Journal* 174, 177: 'Communication of information rather than its misuse is the relevant apprehension.'

recipient to prove the absence of the defined risk.<sup>217</sup> Indeed, the reversal of the onus of proof appears to have been widely adopted in New South Wales,<sup>218</sup> South Australia,<sup>219</sup> Western Australia<sup>220</sup> and the Federal Court.<sup>221</sup>

It is also possible that the reversal of the onus of proof has now been adopted in Victoria. In *Village v BDW*, Byrne J observed that the Court of Appeal in *Spincode* appeared to adopt that part of the judgment in *Prince Jefri Bolkiah* which reversed the onus of proof.<sup>222</sup> However, this is far from certain. Although Brooking JA referred to the failure of the '[lawyer] to show [at trial] that there was no real risk of misuse of confidential information',<sup>223</sup> nowhere in the judgment did his Honour expressly adopt the shift in the onus of proof or disprove prior authority holding otherwise. As a result, this aspect of the judgment in *Spincode* leaves open the question and, absent contrary authority, the judgment of Hayne J in *Farrow Mortgage Services Pty Ltd (in liq) v Mendall Properties Pty Ltd* applying the traditional onus of proof,<sup>224</sup> represents the current state of the law in Victoria. Nevertheless, it is suggested later in this article that a shift in the evidential burden of proof may be appropriate, particularly when a lawyer seeks to rely on an information barrier to demonstrate that there is no risk of misusing confidential information.<sup>225</sup>

There are two other bases, although not uniformly accepted in Australia (and certainly not in England), that confer jurisdiction on a court to deal with an application seeking to restrain a lawyer from acting. They are the duty of loyalty and the court's inherent power over its officers. The availability of these jurisdic-

<sup>217</sup> (2000) 35 ACSR 673, 697. In *World Medical Manufacturing Corporation v Phillips Ormonde & Fitzpatrick Lawyers (a firm)* [2000] VSC 196 (Unreported, Gillard J, 18 May 2000) [115]–[116], Gillard J observed:

This statement concerning the risk goes further in my opinion than what Hayne J said in *Farrow Mortgage*. Lord Millett is placing an onus upon the confidante in that if the court is satisfied that confidential information has been imparted which could be adverse to the interests of the former client then it should grant the injunction unless it is satisfied that there is no real risk of disclosure.

Hayne J in my opinion puts the onus upon the plaintiff seeking the injunction ...

<sup>218</sup> See, eg, *BATAS v Blanch* [2004] NSWSC 70 (Unreported, Young CJ in Eq, 20 February 2004) [70], [129]; *Belan v Casey* [2002] NSWSC 58 (Unreported, Young CJ in Eq, 29 February 2002) [21]; *Colonial Portfolio Services Ltd v Nissen* (2000) 35 ACSR 673, 697 (Rolfe J).

<sup>219</sup> *Pradhan v Eastside Day Surgery Pty Ltd* [1999] SASC 256 (Unreported, Doyle CJ, Bleby and Prior JJ, 18 June 1999) [52] (Bleby J). Cf *Nasr v Vihervaara* (2005) 91 SASR 222, 228–9 (Doyle CJ), where the court preferred the approach taken in *Carindale* (1993) 42 FCR 307 and referred extensively to *Spincode* but did not expressly disapprove of the earlier case in *Pradhan v Eastside Day Surgery Pty Ltd* [1999] SASC 256 (Unreported, Doyle CJ, Bleby and Prior JJ, 18 June 1999).

<sup>220</sup> See *Durban Roodepoort Deep Ltd v Reilly and Featherby (as administrators)* [2004] WASC 269 (Unreported, Le Miere J, 17 December 2004) [95]; *Anton v PKB Veterinary Supplies Pty Ltd* [2004] Aust Torts Reports ¶81-750, 65 819 (Simmonds J).

<sup>221</sup> The Federal Court also appears to have adopted the reversal of the onus of proof but has retained much of the language which was used to describe confidential information which, for convenience, is described as the Victorian approach: see *Photocure* (2002) 56 IPR 86, 103–4 (Goldberg J).

<sup>222</sup> [2004] Aust Torts Reports ¶81-726, 65 338, referring to *Spincode* (2001) 4 VR 501, 508 (Brooking JA).

<sup>223</sup> *Spincode* (2001) 4 VR 501, 508 (citations omitted).

<sup>224</sup> [1995] 1 VR 1, 4–5.

<sup>225</sup> See below Part VII(A)(2).

tional bases in former client conflicts is controversial, though they are widely accepted in present client conflicts. There appear to be two separate and distinct lines of authority which have found favour in Australia and England.

## 2 *The English Approach*

In England, the courts have held that breach of the lawyer's duty of confidentiality is the sole basis for disqualification. In *Rakusen*, Buckley LJ said '[t]he whole basis of the jurisdiction to grant [an] injunction is that there exists ... may exist, or may be reasonably anticipated to exist, a danger of a breach of that which is a duty ... not to communicate confidential information'.<sup>226</sup> Although the House of Lords in *Prince Jefri Bolkiah* disapproved of the stringency of the test in *Rakusen*, the Court of Appeal's reasoning in relation to jurisdiction was not overruled.

Indeed, the House of Lords in *Prince Jefri Bolkiah* stated in unambiguous terms that it considered the risk of misuse of confidential information as the 'sole' basis upon which a lawyer could be restrained from acting in former client conflicts. The following was said:

The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between [lawyer] and client comes to an end with the termination of the retainer. Thereafter the [lawyer] has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.<sup>227</sup>

The above formulation has since been followed in *Attorney-General (UK) v Blake*.<sup>228</sup> Lord Woolf MR, giving the judgment of the Court of Appeal, observed that '[English courts] do not recognise the concept of a fiduciary obligation which continues notwithstanding the determination of the particular relationship which gives rise to it.'<sup>229</sup> His Lordship went on to observe that '[e]quity does not demand a duty of undivided loyalty from a former employee to his former employer'.<sup>230</sup> Although this case concerned the fiduciary duties owed by an employee as opposed to a lawyer, it is clear that the judgment has wider reach. It is authority for the proposition that, under English law, there is little or no scope for the continuation of the duty of loyalty beyond the conclusion of the lawyer-client relationship. That is because the duty of loyalty is derived from that relationship. Lord Woolf MR observed that the equitable duty of confidentiality, on the other hand, would survive the termination of the fiduciary relationship because it was not derived from that relationship.<sup>231</sup>

<sup>226</sup> [1912] 1 Ch 831, 845.

<sup>227</sup> *Prince Jefri Bolkiah* [1999] 2 AC 222, 235 (Lord Millett). It should be noted that the House of Lords disposed of the issue of whether there are other jurisdictional bases available in former client conflicts without discussing it at any length.

<sup>228</sup> [1998] Ch 439. The Court of Appeal judgment was varied by the House of Lords on other grounds: *A-G (UK) v Blake* [2001] 1 AC 268.

<sup>229</sup> *A-G (UK) v Blake* [1998] Ch 439, 453.

<sup>230</sup> *Ibid.*

<sup>231</sup> *Ibid* 454.

It appears the English approach has also been applied, at least in part, in some Australian cases.<sup>232</sup> In *Belan v Casey*, Young CJ in Eq observed that ‘*Prince Jefri Bolkiah* has been followed on almost every occasion ... except in Victoria.’<sup>233</sup> However, his Honour went on to observe that some authorities ‘pay lip service to *Prince Jefri Bolkiah* yet continue to flirt with the ideas of conflict mentioned in some of the pre [*Prince Jefri Bolkiah*] authorities.’<sup>234</sup> Indeed, the adoption of *Prince Jefri Bolkiah* in Australian jurisprudence is often confined to Lord Millett’s observations in relation to confidential information. While some Australian courts have also adopted Lord Millett’s observations that purport to limit the availability of the duty of loyalty in former client conflicts, it is clear many continue to recognise the court’s inherent jurisdiction over its officers.<sup>235</sup>

An illustration of the ‘flirting’ mentioned by Young CJ in Eq is found in the judgment of Bergin J in *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd*,<sup>236</sup> a case which was ironically decided after the above comments were made by Young CJ in Eq. In that case, Bergin J carefully considered *Prince Jefri Bolkiah* and *Spincode* and ultimately followed the former in relation to the duty of loyalty, but considered and applied Victorian jurisprudence in relation to the court’s inherent jurisdiction over its officers (a finding which is incompatible with the narrow jurisdictional base set out in *Prince Jefri Bolkiah*).<sup>237</sup>

Some commentators have observed that the English approach has now been applied in most Australian courts.<sup>238</sup> Arguably, one cannot be so certain of this when one considers the nature of the application and the jurisprudence in support of the Victorian approach.

<sup>232</sup> See *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2005] NSWSC 550 (Unreported, Bergin J, 20 June 2005) [54]; *BATAS v Blanch* [2004] NSWSC 70 (Unreported, Young CJ in Eq, 20 February 2004) [115]; *Photocure* (2002) 56 IPR 86, 98; *Bureau Interprofessionnel* [2002] FCA 588 (Unreported, Ryan J, 9 May 2002) [18]; *Belan v Casey* [2002] NSWSC 58 (Unreported, Young CJ, 4 February 2002) [18], [21]; *Flanagan v Pioneer Permanent Building Society Ltd* [2002] QSC 346 (Unreported, Dutney J, 22 October 2002) [10]; *Mark Foys Pty Ltd v TVSN (Pacific) Ltd* (2000) 178 ALR 322, 330–1 (Conti J); *A v Law Society of Tasmania* (2001) 10 Tas R 152, 165 (Underwood J); *Colonial Portfolio Services Ltd v Nissen* (2000) 35 ACSR 673, 697 (Rolfe J); *World Medical Manufacturing Corporation v Phillips Ormonde & Fitzpatrick Lawyers (a firm)* [2000] VSC 196 (Unreported, Gillard J, 18 May 2000) [120] (though this case has been effectively overruled by *Spincode*); *Pradhan v Eastside Day Surgery Pty Ltd* [1999] SASC 256 (Unreported, Doyle CJ, Bleby and Prior JJ, 18 June 1999) [51] (Bleby J); *Newman v Phillips Fox* (1999) 21 WAR 309, 315 (Steytler J).

<sup>233</sup> [2002] NSWSC 58 (Unreported, Young CJ in Eq, 4 February 2002) [18].

<sup>234</sup> *Ibid* [20].

<sup>235</sup> See below Part VI(C)(3).

<sup>236</sup> [2005] NSWSC 550 (Unreported, Bergin J, 20 June 2005).

<sup>237</sup> See also *Kallinicos v Hunt* [2005] NSWSC 1181 (Unreported, Brereton J, 22 November 2005) [49]; *Pott v Jones Mitchell* [2004] 2 Qd R 298, 304 (McMurdo J); *Newman v Phillips Fox* (1999) 21 WAR 309, 316 (Steytler J). These cases are discussed later in more detail: see below Part VI(C)(3)(b).

<sup>238</sup> Hollander and Salzedo, above n 6, 85–6. For reasons which will become apparent in the next Part, the author disagrees with their view.

### 3 The Victorian Approach

In *Spincode*, Brooking JA made the following observation in relation to the law in Australia and England:

How, then, do matters stand? I think it must be accepted that Australian law has diverged from that of England and that the danger of misuse of confidential information is not the sole touchstone for intervention where a [lawyer] acts against a former client. That danger can and usually will warrant intervention, but it is not the only ground. There are two other possible bases for an interdict.<sup>239</sup>

Under the Victorian approach, in addition to the protection of confidential information, a court may restrain a lawyer from acting against a former client on the basis of a lawyer's fiduciary duty of loyalty (although more narrowly framed than that available in cases of present client conflict) and their status as officers of the court. In *Spincode*, Brooking JA observed that *Earl Cholmondeley v Lord Clinton*<sup>240</sup> and the other old English cases said 'nothing' about the preservation of confidential information being the only basis for the jurisdiction of the court to restrain a lawyer from acting.<sup>241</sup> His Honour observed that the cases turned on whether a lawyer terminated the retainer and then proceeded to act for another party with an adverse interest.<sup>242</sup> After reviewing *Rakusen*,<sup>243</sup> his Honour said:

One cannot say with confidence what Lord Eldon [was] intending to lay down in *Cholmondeley v Clinton*. In particular, it is not possible to say with confidence what the significance was thought to be of the [lawyers'] having discharged themselves or whether *Cholmondeley v Clinton*, at all events as subsequently explained by Lord Eldon, is to be regarded as based on the danger of the misuse of confidential information.<sup>244</sup>

The following two sub-sections of this article discuss the jurisdictional bases recognised under the Victorian (but not the English) approach. It will be ob-

<sup>239</sup> (2001) 4 VR 501, 521–2. See also *CI Industries Pty Ltd v Keeling* (Unreported, Supreme Court of New South Wales, Abadee J, 26 March 1997) 25: 'a [lawyer's] duty to a former client goes beyond disclosing confidential information.'

<sup>240</sup> (1815) 19 Ves Jr 261; 34 ER 515.

<sup>241</sup> (2001) 4 VR 501, 508–11. His Honour also reviewed the following old English cases: *Beer v Ward* (1821) Jac 77; 37 ER 779; *Bricheno v Thorp* (1821) Jac 300; 37 ER 864; *Hutchins v Hutchins* (1825) 1 Hog 315; 34 RR 234; *Johnson v Marriott* (1833) 2 C&M 183; 149 ER 725; *Griffiths v Griffiths* (1843) 2 Hare 587; 67 ER 242; *Parratt v Parratt* (1843) 2 De G&Sm 258; 64 ER 116; *Re Holmes* (1877) 25 WR 603; *Little v Kingswood Collieries Co* (1882) 20 Ch D 733. In *Re Holmes*, reference was made to 'private information': (1877) 25 WR 603, 604 (Viscount Hall V-C). The courts tended to consider this immaterial and did not address the jeopardy of confidential information being disclosed. See also *Holdsworth v M R Anderson & Associates Pty Ltd* (Unreported, Supreme Court of Victoria, Phillips J, 26 August 1994) 20: 'the Vice Chancellor did not see the existence of ... confidential information, if any, as critical to his decision.'

<sup>242</sup> *Spincode* (2001) 4 VR 501, 511: 'This seems to suggest that the fact that the [lawyer] had discharged himself was relevant but not conclusive.'

<sup>243</sup> [1912] 1 Ch 831.

<sup>244</sup> *Spincode* (2001) 4 VR 501, 511. His Honour referred to P D Finn, *Fiduciary Obligations* (1977) 139 and *Fruehauf Finance Corporation Pty Ltd v Feez Ruthning (a firm)* [1991] 1 Qd R 558, 570 (Lee J), which suggested that *Earl Cholmondeley v Lord Clinton* [1815] 19 Ves Jr 261; 34 ER 515 did not depend on confidential information. Rather, his Honour suggested that a rule is established that courts will restrain a lawyer if he discharges himself for the purpose of acting for the opponent: *Spincode* (2001) 4 VR 501, 511 fn 16.

served that Australian law on the subject is unsettled. Some Australian courts have preferred the English approach<sup>245</sup> (as noted above) while others have preferred all, or parts of, the Victorian approach (discussed below).<sup>246</sup>

(a) *The Availability of the Duty of Loyalty after Termination of Retainer*

The duty of loyalty is a recognised jurisdictional basis for the grant of an injunction under the Victorian formulation. The thrust of the Victorian approach is that the fiduciary duty of loyalty does not come to an end upon the termination of the lawyer's retainer. In *Spincode*, Brooking JA observed that there were a number of examples of fiduciary obligations having an 'effect enduring beyond' the termination of the retainer.<sup>247</sup> The cases tended to restrain fiduciaries from competing with clients after their resignation. An analogy was drawn with the position of trustees, another class of fiduciary, and the continuation of their fiduciary duties post-termination. Brooking JA held, by analogy, that the duty of loyalty operates to prevent lawyers from resigning their fiduciary position to avoid a conflict of duty.<sup>248</sup> Therefore, the duty of loyalty applicable in present client conflicts may be limited, though Brooking JA did not prefer this limitation.<sup>249</sup>

In Victoria, a number of judgments have followed *Spincode*. In *McVeigh v Linen House Pty Ltd*, Batt JA observed:

The authorities establish that a court will restrain a [lawyer] from acting for a litigant not only in order to prevent disclosure of confidences of a client or former client, but also to ensure that the [lawyer's] duty of loyalty to the former client is respected, notwithstanding termination of the retainer, and to uphold as a matter of public policy the special relationship of [lawyer] and client.<sup>250</sup>

<sup>245</sup> See above Part VI(C)(2).

<sup>246</sup> See Dal Pont, 'Conflicts of Interest', above n 107, 596: 'The extent to which [the English approach] translates into Australian law is, however, unclear.'

<sup>247</sup> (2001) 4 VR 501, 522–4. Brooking JA referred to P D Finn, 'The Fiduciary Principle' in T G Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 1, 1–3 and the following cases: *Hudson's Bay Co v McClocklin* [1986] 5 WWR 29; *Green v Bestobell Industries Pty Ltd* [1982] WAR 1; *Canadian Aero Services Ltd v O'Malley* [1974] SCR 592; *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162.

<sup>248</sup> Analogy was drawn with the following statement in *Gould v O'Carroll* [1964] NSW 803, 805 (Jacobs J):

It is my view that the basis of the rule that a trustee cannot retire for the purpose of effecting a transaction between himself and the trust is twofold. First, in the ordinary case, the fact that he retires in order to effect that purpose means that the decision to effect that purpose has been taken during the period of his trusteeship when he was actually performing the duties of a trustee; in other words the decision to deal with the trust is his own. Secondly, the trustee who has been actively managing the trust has all the advantage of the information and knowledge which comes to him as trustee and which he should use in no way for his own benefit, but purely for the benefit of the beneficiaries.

<sup>249</sup> *Spincode* (2001) 4 VR 501, 525:

But I should be sorry to think, and reluctant to hold, that whether a [lawyer's] fiduciary duty of loyalty stood in the way of acting against a former client in the same matter depended on whether the [lawyer] had, in Lord Eldon's words, 'discharged himself'. If there is such a requirement, it is met in this case. But I would deny the existence of the requirement.

<sup>250</sup> [1999] 3 VR 394, 398. See also *Village v BDW* [2004] Aust Torts Reports ¶81-726, 65 338 (Byrne J). Although *Village v BDW* concerned present client conflict, the court applied the principles set out in *Spincode*.



In *Australian Liquor Marketers Pty Ltd v Tasman Liquor Traders Pty Ltd*, Habersberger J observed that the principle of law that ‘a [lawyer] owes a duty of loyalty to his or her client is now well established.’<sup>251</sup>

A number of other Australian jurisdictions have also recognised the availability of this basis.<sup>252</sup> In the Federal Court, it has been held that the lawyer’s duty of loyalty ‘cannot be treated as extinguished by the mere termination of the ... retainer’,<sup>253</sup> particularly when the lawyer seeks to act against a former client in the same matter in which he or she had previously acted.<sup>254</sup> In *Waiviata Pty Ltd v New Millennium Publications Pty Ltd*,<sup>255</sup> Sundberg J set out extracts from both *Spincode* and *Prince Jefri Bolkiah* and noted that the Victorian approach advocated ‘[a] more expansive view of ... the Court’s jurisdiction’.<sup>256</sup> Although his Honour did not appear to express a final view, his Honour did observe that ‘[i]t may be that an unusual case could arise when there is no threatened misuse of confidential information and no breach of the [lawyer’s] duty of loyalty, yet it is appropriate to grant relief’.<sup>257</sup> This observation seems to suggest that his Honour recognises, at least, the persistence of the duty of loyalty in former client conflicts.

Even in New South Wales (perhaps the state most willing to adopt the English approach), Young CJ in Eq observed in *BATAS v Blanch*, that ‘[i]t may be that there are some exceptional cases where equity will give relief in favour of a former client where there is no confidential information present.’<sup>258</sup> However, his Honour did not explore this point any further.

<sup>251</sup> [2002] VSC 324 (Unreported, Habersberger J, 14 August 2002) [14]. His Honour made this comment citing the authorities referred to in *Spincode* (2001) 4 VR 501, 515 fn 36 (Brooking JA). It does not appear that Habersberger J was referring to the substantial jurisprudence, collectively referred to as the English approach in this article, which does not support this view.

<sup>252</sup> See *Corporate Systems Publishing Pty Ltd v Lingard* [2004] WASC 24 (Unreported, Jenkins J, 24 February 2004) 13; *Holborow v Macdonald Rudder* [2002] WASC 265 (Unreported, Heenan J, 15 November 2002) 17–18; *Fordham v Legal Practitioners’ Complaints Committee* (1997) 18 WAR 467, 480 (Malcolm CJ). See also *Nasr v Vihervaara* (2005) 91 SASR 222, 229, 230–1, where Doyle CJ referred extensively to *Spincode* (although he did not expressly adopt the Victorian approach) and did not refer, at all, to earlier authority in the same court in *Pradhan v Eastside Day Surgery Pty Ltd* [1999] SASC 256 (Unreported, Doyle CJ, Prior and Bleby JJ, 18 June 1999) [48], [50] (Bleby J), which had adopted *Prince Jefri Bolkiah*.

<sup>253</sup> *Wan v McDonald* (1992) 33 FCR 491, 513 (Burchett J). See also the following comment: ‘In my opinion, it could only be in a rare and very special case ... that a [lawyer] could properly be permitted to act against his former client, whether or not any real question of the use of confidential information could arise’: at 513. Cf *Mintel* (2000) 181 ALR 78, 87–8 (Heerey J).

<sup>254</sup> This observation was expressly approved by the Victorian Court of Appeal, in *McVeigh v Linen House Pty Ltd* [1999] 3 VR 394, 398 (Batt JA). See also *Holdsworth v M R Anderson & Associates Pty Ltd* (Unreported, Supreme Court of Victoria, Phillips J, 26 August 1994) 23.

<sup>255</sup> [2002] FCA 98 (Unreported, Sundberg J, 15 February 2002).

<sup>256</sup> *Ibid* [8].

<sup>257</sup> *Ibid* [10].

<sup>258</sup> [2004] NSWSC 70 (Unreported, Young CJ in Eq, 20 February 2004) [112]. His Honour also considered whether there should be another exception to *Prince Jefri Bolkiah* in the situation where there are only a small number of lawyers who are experts in a certain area. His Honour said: ‘I have given this proposition considerable thought. My conclusion is that the principle may in some extreme case mean that no injunction will be granted, but in this and most cases, it is not sufficiently strong to prevent the order being made’: at [144].

In addition, it appears that the Victorian approach is consistent with Canadian law. In *R v Speid*,<sup>259</sup> for example, a partner of the law firm acted for a person, Ms Nugent, who had been charged with murder. Ms Nugent later pleaded guilty to manslaughter. She assisted the police and consequently another person was charged with the murder. A different partner of the law firm, who had assisted in relation to Ms Nugent's matter, commenced acting for the other person charged with the murder. Ms Nugent objected to the law firm so acting because she was likely to be the principal witness for the prosecution and her testimony was likely to be tested by defence counsel. Dubin JA, with whom Martin and Robins JJA agreed, observed that a lawyer's duty of loyalty did not 'cease when the [lawyer's] services had been terminated.'<sup>260</sup> On this basis, the law firm was restrained from acting for the other person accused of murder.

Further, an analogy may be drawn with the law in Australia and England which holds that a director will owe certain fiduciary duties despite the conclusion of the relationship which brought the fiduciary duties into being.<sup>261</sup> Although 'it is not wise to generalise at all in this area for, as is often pointed out, the existence and scope of fiduciary obligations must always be assessed in the particular context in which they are claimed to arise',<sup>262</sup> the most frequent situation giving rise to the continuation of fiduciary duties, in the context of directorships, appears to be corporate opportunities which a director seeks to exploit after resignation from the company.

Some commentators have been critical of the Victorian approach.<sup>263</sup> Implicit in these criticisms is the view that the termination of the retainer is synonymous with the conclusion of the fiduciary relationship. This view is incorrect. Whilst the termination of the retainer may be evidence of the conclusion of the fiduciary

<sup>259</sup> (1983) 3 DLR (4<sup>th</sup>) 246. See also *Stewart v Canadian Broadcasting Association* (1997) 150 DLR (4<sup>th</sup>) 24. Counsel who had acted for a defendant in the sentencing and appeal stages of his criminal trial took part years later in a television programme featuring the case. The former client took issue and claimed that counsel had breached his fiduciary duty by participating in the programme without his permission. The claim was not based on confidential information because the facts were in the public domain. Macdonald J held that although the retainer had come to an end the defendant owed a continuing fiduciary duty which meant that he was not entitled to attract business to himself in a manner that was adverse to the client: (1997) 150 DLR (4<sup>th</sup>) 24, 160–3.

<sup>260</sup> *R v Speid* (1983) 3 DLR (4<sup>th</sup>) 246, 250.

<sup>261</sup> See *Edmonds v Donovan* [2005] VSCA 27 (Unreported, Winneke P, Charles and Phillips JJA, 22 February 2005) [57]–[58] (Phillips JA); *Lord Corporation Pty Ltd v Green* (1991) 22 NSWLR 532, 543–4 (Cohen J); *Addstead Pty Ltd (in liq) v Liddan Pty Ltd* (1997) 70 SASR 21, 43–4 (Perry J); *Colour Control Centre Pty Ltd v Ty* (1996) 39 AILR ¶5-058, 4319 (Santow J); *Green v Bestobell Industries Pty Ltd* [1982] WAR 1, 19 (Kennedy J). Cf *Natural Extracts Pty Ltd v Stotter* (1997) 24 ACSR 110, 138 (Hill J); *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162. See also New Zealand and Canadian law on this subject: *Pacifica Shipping Co Ltd v Andersen* [1986] 2 NZLR 328, 334, 338 (Davison CJ); *Hudson's Bay Co v McClocklin* [1986] 5 WWR 29, 32–4 (Jewers J); *Canadian Aero Service Ltd v O'Malley* [1974] SCR 592, 607 (Laskin J).

<sup>262</sup> *Edmonds v Donovan* [2005] VSCA 27 (Unreported, Winneke P, Charles and Phillips JJA, 22 February 2005) [58] (Phillips JA).

<sup>263</sup> See, eg, Dal Pont, 'Conflicts of Interest', above n 107, 600–1: 'To suggest that [fiduciary duties] may come to an end for some purposes, but not for others ... is to draw a line which, I submit, is not defensible.'

relationship, it will not be conclusive evidence thereof.<sup>264</sup> There will be circumstances where the fiduciary relationship, including the duty of loyalty, will persist regardless of the termination of the retainer.<sup>265</sup> The critical *indicia* will be whether the relationship of trust and confidence continues. On occasion, the fiduciary relationship may continue post-termination of the retainer.<sup>266</sup> Some commentators have expressed qualified support for this view.<sup>267</sup>

Even if it is conceded that termination of the retainer brings to an end the relationship which first brought the fiduciary duties into being,<sup>268</sup> a person under a fiduciary obligation cannot avoid the requirement to account to the person to whom the fiduciary duties are owed by resigning their position.<sup>269</sup> The prospect of mischief would otherwise be intolerable.<sup>270</sup> If it were permitted with no consequence, it is not inconceivable that lawyers would terminate their retainer<sup>271</sup> upon any allegation of conflict of duty, in the knowledge that this would severely restrict the jurisdictional bases upon which an injunction may be

<sup>264</sup> A lawyer's fiduciary obligations to his or her client are not contingent on the existence of an express retainer. See *Maxwell v Chittick* (Unreported, New South Wales Court of Appeal, Mahoney, Priestley and Powell JJA, 23 August 1994) 6 (Mahoney JA); *Day v Mead* [1987] 2 NZLR 443, 459 (Somers J).

<sup>265</sup> See *Longstaff v Birtles* [2002] 1 WLR 470, 471 (Mummery LJ):

[A fiduciary] duty may endure beyond the termination of the retainer which initially formed the professional relationship of [lawyer] and client ... The source of the duty is not the retainer itself, but all the circumstances (including the retainer) creating a relationship of trust and confidence, from which flow obligations of loyalty and transparency.

See also *Demerara Bauxite Co Ltd v Hubbard* [1923] AC 673, 675–6 (Lord Parmoor).

<sup>266</sup> Hollander and Salzedo, above n 6, 15: 'It is perfectly possible that in such cases [where the lawyer provides services accepted by the client after the termination of the retainer] it will be held that a fiduciary relationship exists.'

<sup>267</sup> See, eg, *ibid* 79:

It is difficult to imagine that the English courts will in standard conflict cases seek to impose a fiduciary relationship after the termination of the retainer, but it is also clear that there is recent authority in [England] which recognises that at least in some cases there may be a continuing relationship of trust and confidence between [lawyer] and client which will justify the court in imposing fiduciary obligations on the [lawyer] even after termination of the retainer.

<sup>268</sup> Generally, fiduciary obligations do not survive the end of a fiduciary relationship: *Prince Jefri Bolkiah* [1999] 2 AC 222, 235 (Lord Millett); *A-G (UK) v Blake* [1998] Ch 439, 453–5 (Lord Woolf MR); R P Meagher, J D Heydon and M J Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (4<sup>th</sup> ed, 2002) 161–2.

<sup>269</sup> See *Addstead Pty Ltd (in liq) v Liddan Pty Ltd* (1997) 70 SASR 21. See especially Debelle J at 59:

The fact that he resigned as a director shortly before the moneys were received does not avail him. His resignation from his directorships was an ill-advised attempt to avoid his obligations as a director. In the particular circumstances of this case, the fiduciary duties continued notwithstanding his resignation.

See also *Industrial Development Consultants Ltd v Cooley* [1972] 2 All ER 162.

<sup>270</sup> See J K Maxton, 'Contract and Fiduciary Obligation' (1997) 11 *Journal of Contract Law* 222, 229 (emphasis in original):

Whether fiduciary norms arise from contract or are otherwise imposed they may, generally, be restricted by agreement. This does not mean that fiduciary norms are in essence contractual. In some situations the whole point of fiduciary doctrine is its ability to override contractual stipulations. ... In some relationships, usually those based on status, policy seems to demand that certain fiduciary norms may not be the subject of contractual negotiation.

<sup>271</sup> Where a lawyer is retained to act in litigation, the law implies a contract to conduct the action to an end. The lawyer cannot terminate the retainer without reasonable notice and for good cause, but the client can. See *Young v Robson Rhodes (a firm)* [1999] 3 All ER 524, 532 (Laddie J); *Underwood, Son, & Piper v Lewis* [1894] 2 QB 306, 310–12 (Lord Esher MR).

granted against them.<sup>272</sup> Fiduciary obligations owed by a lawyer may endure beyond the formal conclusion of the relationship which first brought those duties into being,<sup>273</sup> though the circumstances of each case need to be considered to determine whether the duties are still owed.<sup>274</sup>

The preferable approach is that postulated in *Spincode*.<sup>275</sup> If a lawyer terminates the retainer for the purpose of acting for the opponent, or seeks to act against a former client in the same or a closely related matter, the duty of loyalty should persist beyond termination of the retainer.<sup>276</sup> The jurisdiction of the court should not be confined, in these circumstances, to the protection of confidential client information. There will be instances where the court is not satisfied that confidential information has been imparted or that there is a risk of its disclosure, and yet the circumstances of the case may still warrant judicial intervention.<sup>277</sup> For instance, in *Holdsworth v M R Anderson & Associates Pty Ltd*,<sup>278</sup> the lawyer had acted for joint-venture parties in relation to a financing arrangement. The lawyer then proceeded to act for one of the parties in a dispute over the terms of the joint venture which it was contended had been altered by the financing arrangement. The court was not satisfied that any confidential information had been imparted in relation to the financing arrangement as the information which had been provided was publicly available, but nevertheless restrained the law firm from acting.<sup>279</sup> Particularly repugnant to the court was the fact that the lawyer had previously acted for the client in the same matter against which he was now acting.<sup>280</sup> In other words, the lawyer had constructed a legal

<sup>272</sup> Regarding the persistence of the duty of confidentiality post-termination of the retainer, see Patten, above n 84, 153 (citations omitted): ‘Even if the relationship and the obligation are coterminous, it is unlikely that equity would tolerate the professional ending the relationship in order to be able to disclose or use confidential information’. Arguably equity would operate in the same way in relation to the duty of loyalty.

<sup>273</sup> *Spincode* (2001) 4 VR 501, 522 (Brooking JA); *McMaster v Byrne* [1952] 1 All ER 1362, 1368 (Lord Cohen). See also *Edmonds v Donovan* [2005] VSCA 27 (Unreported, Winneke P, Charles and Phillips JJA, 22 February 2005) [56] (Phillips JA) (citations omitted):

Her Honour [Warren J] accepted it as well established that fiduciary duties could continue ‘beyond the termination of the fiduciary relationship’ ... although, with respect, it may perhaps be more accurate, strictly speaking, to say that fiduciary duties may survive the termination of the relationship that first called those duties into being.

<sup>274</sup> *Allison v Clayhills* [1907] All ER Rep 500, 501 (Parker J).

<sup>275</sup> See LexisNexis, *Halsbury’s Laws of Australia*, vol 16 (at 17 March 2006) 250 Legal Practitioners, ‘7 Duties to Clients’ [250-535]: ‘There is now general acceptance of the principle that a [lawyer] owes a duty of loyalty to the [lawyer’s] client or former client.’

<sup>276</sup> See Finn, *Fiduciary Obligations*, above n 244, 139 (citations omitted): ‘the courts will restrain a [lawyer] if he discharges himself for the purpose of acting for the opponent.’ See also *Flanagan v Pioneer Permanent Building Society Ltd* [2002] QSC 346 (Unreported, Dutney J, 22 October 2002) [10], where his Honour referred to this proposition with approval.

<sup>277</sup> See Finn, ‘Fiduciary Law and the Modern Commercial World’, above n 38, 27 (citations omitted):

At the heart of the matter is the question of what steps the law should take, what steps a firm or business should be obliged to take, to protect the confidences of the first client. But the matter is not seen simply in orthodox breach of confidence terms, because it is coloured by the fiduciary character of the first-client relationship ...

<sup>278</sup> (Unreported, Supreme Court of Victoria, Phillips J, 26 August 1994) 20, 23.

<sup>279</sup> *Ibid* 20, 24.

<sup>280</sup> *Ibid* 23.

edifice for both clients which he was now dismantling for one of them without the informed consent of the other.<sup>281</sup>

The judgment of Brooking JA in *Spincode* strikes an appropriate balance between the competing policy tensions. It is also important to note that the continuation of the duty of loyalty in former client conflict situations is strictly confined to circumstances in which the lawyer terminates the retainer for the purpose of acting against the former client or where the lawyer acts against a former client in the same or a closely related matter in which he or she had previously acted. Ultimately, it must be remembered that whether the duty of loyalty persists is an issue of jurisdiction. Whether or not a court decides to grant an injunction will, of course, depend on the facts of each case.

*(b) The Jurisdiction of the Court over its Officers — Administration of Justice*

It is clear from a survey of the law in both Australia and England that most cases involving former client conflict are decided on the basis of apprehended disclosure of confidential information. The inherent jurisdiction of the court over its officers is rarely invoked. The rarity of its invocation should not, however, mask its existence and importance. One can imagine circumstances where a client will fail to sustain a claim in relation to the apprehended disclosure of their confidential information but in which it is nevertheless desirable that a lawyer should be restrained from continuing to act. For instance, a lawyer might have a personal interest in the outcome of the proceedings, or might be likely to be called as a witness, and is consequently unable to give the court the independent and uninvolved assistance expected from officers of the court.<sup>282</sup>

The duty to the court arises from the court's concern that it should have the assistance of independent legal representation.<sup>283</sup> The integrity of the adversarial system in England and Australia 'is dependent on lawyers acting with perfect good faith, untainted by divided loyalties of any kind.'<sup>284</sup> This is central to the preservation of public confidence in the administration of justice. In *Spincode*, Brooking JA said that there was a 'good deal of authority for the view that a [lawyer], as an officer of the court, may be prevented from acting against a

<sup>281</sup> See above n 117 and accompanying text.

<sup>282</sup> See *Clay v Karlson* (1997) 17 WAR 493, where lawyers proposed to act for an executor and beneficiary supporting a will. There was an allegation that the firm had been negligent in drawing up a codicil to the will and the partner involved was likely to be called as a witness. Cf *Yamaji v Westpac Banking Corporation* (1993) 42 FCR 431. See also *Executive Homes Pty Ltd v First Haven Pty Ltd* [1999] VSC 261 (Unreported, Byrne J, 13 July 1999) [10]; *Keppe v Law Society of the Australian Capital Territory* (1983) 62 ACTR 9, 21 (Blackman CJ, Kelly and Gallop JJ); *Chapman v Rogers; Ex parte Chapman* [1984] 1 Qd R 542, 544 (Campbell CJ); *Jeffery v Associated National Insurance Co Ltd* [1984] 1 Qd R 238, 245 (Thomas J); *Commissioner for Corporate Affairs v Harvey* [1980] VR 669, 762 (Marks J); Ipp, above n 118, 92.

<sup>283</sup> See *Nangus Pty Ltd v Charles Donovan Pty Ltd (in liq)* [1989] VR 184, 186, where Young CJ stated that 'the Court is concerned that it should have the assistance of independent counsel'. Contrast this with the position of independent expert witnesses and the general reluctance of courts to prevent them from giving evidence even when it may be shown that there are significant connections between them and the person who has retained them to give evidence. See *SmithKline Beecham (Australia) Pty Ltd v Chipman* (2003) 131 FCR 500, 508–9 (Weinberg J); *FGT Custodians Pty Ltd v Fagenblat* [2003] VSCA 33 (Unreported, Ormiston, Chernov and Eames JJA, 15 April 2003) [33] (Ormiston JA).

<sup>284</sup> Ipp, above n 118, 93.

former client even though a likelihood of danger of misuse of confidential information is not shown.<sup>285</sup> In *Woolf v Snipe*, Dixon J observed in a different context that the jurisdiction of courts over lawyers has ‘never [been] doubted’.<sup>286</sup> Further, several Australian judges, writing extra-curially, have observed that this jurisdiction is ‘long standing’.<sup>287</sup>

The Victorian authority is fairly clear. In *Grimwade v Meagher*,<sup>288</sup> Mandie J adopted a number of statements of principle made in New Zealand and Canadian judgments and restrained a lawyer from acting ‘to ensure the due administration of justice and to protect the integrity of the judicial process and in order not only that justice be done but be manifestly and undoubtedly seen to be done.’<sup>289</sup> His Honour considered that a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice required that the lawyer be restrained from acting because of a real risk of ‘lack of objectivity’.<sup>290</sup>

This jurisdictional base is also widely accepted in other Australian jurisdictions.<sup>291</sup> In *Western Australia v Ward*, Hill and Sundberg JJ observed:

The present case is only another example of situations in which the ‘integrity of the judicial process’, the ‘interests of justice’, and the ‘need to preserve confidence in the judicial system’, to use some of the notions that lie behind the in-

<sup>285</sup> (2001) 4 VR 501, 514. See at 512, where Brooking JA referred to the judgment of Shadwell V-C in *Davies v Clough* (1837) 8 Sim 262; 59 ER 105. Shadwell V-C spoke of ‘this general principle, namely, that all Courts may exercise an authority over their own officers as to the propriety of their behaviour’. Interestingly, the injunction was granted not against the lawyer but against the new clients. Brooking JA also commented that: ‘The need for justice to appear to be done and the likely impressions of a properly informed and reasonable observer where a lawyer changes sides have been mentioned time and again in the cases’: *Spincode* (2001) 4 VR 501, 515.

<sup>286</sup> (1933) 48 CLR 677, 678. This was in the context of the regulation of legal fees. Followed in *Merrin v Cairns Port Authority* [2004] 1 Qd R 271, 280 (Williams JA).

<sup>287</sup> See, eg, a Justice of the Supreme Court of Queensland, Justice John Muir, ‘Working through Chinese Walls and Ring Fences: A Comment’ [2002] *Australian and Petroleum Law Association Yearbook* 708, 709. However, Justice Muir then commented that this ground will soon become of historical interest: at 709–10. For a discussion of the duties owed to the court, see further Ipp, above n 118, 93. Ipp is a Justice of the Supreme Court of Western Australia.

<sup>288</sup> [1995] 1 VR 446. See also *Sent v Fairfax* [2002] VSC 429 (Unreported, Nettle J, 7 October 2002) [111]–[116].

<sup>289</sup> [1995] 1 VR 446, 455, cited in *Spincode* (2001) 4 VR 501, 515 (Brooking JA).

<sup>290</sup> See *Pott v Jones Mitchell* [2004] 2 Qd R 298, 304–5 (McMurdo J): ‘The member of the public should be assumed to know the true facts of the matter, at least as they are known to the court which is asked to restrain the conduct of its officer.’

<sup>291</sup> The following cases support the principle stated herein but are not expressly referred to in this Part of the article: *Durban Roodepoort Deep Ltd v Reilly and Featherby (as administrators)* [2004] WASC 269 (Unreported, Le Miere J, 17 December 2004) [99]–[100]; *Frankland River Olive Co Ltd v Charters Securities Pty Ltd (receiver and manager appointed)* [2004] WASC 88 (Unreported, Pullin J, 28 April 2004) [30]; *Tottle Christensen v Westgold Resources NL* [2003] WASC 224 (Unreported, Malcolm CJ, Murray and Anderson JJ, 13 March 2003) [6]–[7] (Malcolm CJ, Murray and Anderson JJ); *Westgold Resources NL v St Barbara Mines Ltd* [2002] WASC 264 (Unreported, Heenan J, 15 November 2002) [21]; *Holborow v Macdonald Rudder* [2002] WASC 265 (Unreported, Heenan J, 15 November 2002) [28]–[29]; *Williamson v Nilant* [2002] WASC 225 (Unreported, McKechnie J, 18 September 2002) [25]–[26]; *Mintel* (2000) 181 ALR 78, 87 (Heerey J); *Newman v Phillips Fox* (1999) 21 WAR 309, 316 (Steytler J); *Emanuele v Emanuel Investments* (1996) 21 ACSR 83, 106–7 (Debelle J); *Carindale* (1993) 42 FCR 307, 311 (Drummond J); *Wan v McDonald* (1992) 33 FCR 491, 512–13 (Burchett J); *Murray v Macquarie Bank Ltd* (1991) 33 FCR 46, 49 (Spender J).

herent jurisdiction to exclude [lawyers], may override the public interest that a litigant be able to be represented by the lawyer of its choice.<sup>292</sup>

In *D & J Constructions Pty Ltd v Head*, Bryson J said that the ‘spectacle or the appearance that a lawyer can readily change sides is very subversive of the appearance that justice is being done.’<sup>293</sup> Similarly, in *Potts v Jones Mitchell*, McMurdo J observed that:

Clearly the court has power to control its own officers, and to that end to restrain a [lawyer] from acting in a way which unduly interfered with the administration of justice by undermining the confidence of reasonable persons in the judicial system.<sup>294</sup>

In *Mitchell v Pattern Holdings Pty Ltd*, Bergin J said: ‘I am of the view that as an incident of its inherent jurisdiction, this Court may decide upon the propriety of a legal practitioner representing a party in a particular case to ensure justice and the appearance of justice.’<sup>295</sup> Her Honour noted, however, that ‘[i]t has been said that such jurisdiction should be exercised with circumspection’.<sup>296</sup> In *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd*, Bergin J again recognised the jurisdiction of the court over its officers, despite following the decision in *Prince Jefri Bolkiah* in relation to the duty of loyalty.<sup>297</sup> Her Honour applied *Grimwade v Meagher*<sup>298</sup> and observed that ‘[t]he court’s jurisdiction over its officers is of course accepted both as to its existence and its breadth.’<sup>299</sup> Similarly, in *Oceanic Life Ltd v HIH Casualty & General Insurance Ltd*, Austin J said the following:

In the realm of conflicts of interest and conflicts of duty, the [lawyer’s] duty to the court may not be much different from his or her fiduciary duties to former and present clients. However, the duty to the court tends to be expressed in such a way as to emphasise the public interest in preserving confidence in the administration of justice and therefore in the appearance as well as the reality of independence, and the court’s practical approach to its supervisory discretions ...<sup>300</sup>

<sup>292</sup> (1997) 76 FCR 492, 498.

<sup>293</sup> (1987) 9 NSWLR 118, 123. See also *R v Matthews* (1887) 8 NSWSCR (L) 45, 52, where Innes J referred to *R v O’Neill* (1885) 6 NSWSCR (L) 43, which is perhaps the oldest Australian case recognising the inherent power of the court to protect the administration of justice. His Honour observed that the exclusion of the Crown Prosecutor from appearing on behalf of the defendant at his trial was based on the court’s jurisdiction to protect the administration of justice.

<sup>294</sup> [2004] 2 Qd R 298, 304.

<sup>295</sup> [2000] NSWSC 1015 (Unreported, Bergin J, 7 November 2000) [34].

<sup>296</sup> *Ibid* [34]. See also *Western Australia v Ward* (1997) 76 FCR 492, 498 (Hill and Sundberg JJ).

<sup>297</sup> [2005] NSWSC 550 (Unreported, Bergin J, 20 June 2005) [53], [56]–[58]. This case was recently followed in *Kallinicos v Hunt* [2005] NSWSC 1181 (Unreported, Brereton J, 22 November 2005) [74]–[76].

<sup>298</sup> [1995] 1 VR 446.

<sup>299</sup> [2005] NSWSC 550 (Unreported, Bergin J, 20 June 2005) [53].

<sup>300</sup> (1999) 10 ANZ Insurance Cas ¶61-438, 74 978.

The Victorian approach set out above is preferable. It is consistent with Canadian,<sup>301</sup> New Zealand<sup>302</sup> and some English<sup>303</sup> authority. Further, certain English commentators have observed that the decision in *Prince Jefri Bolkiah* may not represent an absolute impediment to the availability of this jurisdictional basis in England.<sup>304</sup> However, despite a number of English judgments recognising the court's inherent jurisdiction over lawyers,<sup>305</sup> this jurisdictional basis does not appear to carry much weight in English disqualification cases.<sup>306</sup> In *Re a Firm of Solicitors*, Lightman J went as far as to say that '[t]he basis of the courts' intervention is not a possible perception of impropriety: it is the protection of confidential information'.<sup>307</sup> Further, in *Re a Firm of Solicitors*, Staughton LJ said that the maxim 'is a sound general principle in cases of ... conflicts of interests ... although I suspect that it may on occasion result in timid reluctance to risk some imaginary appearance of conflict which has no substance'.<sup>308</sup>

<sup>301</sup> See *Everingham v Ontario* (1992) 88 DLR (4<sup>th</sup>) 755, 761–2 (Callaghan CJOC, Hartt and Campbell JJ):

The issue is whether a fair-minded reasonably informed member of the public would conclude that the proper administration of justice required the removal of the [lawyer]. ... The public interest in the administration of justice requires an unqualified perception of its fairness in the eyes of the general public. ... The goal is not just to protect the interests of the individual [client] but even more importantly to protect public confidence in the administration of justice ...

<sup>302</sup> *Kooky Garments Pty Ltd v Charlton* [1994] 1 NZLR 587, 590 (Thomas J); *Black v Taylor* [1993] 3 NZLR 403, 408–12 (Richardson J). In the latter case, the Court of Appeal of New Zealand upheld a declaration that a lawyer should not act any further for an estate. The lawyer had, for many years, acted for the deceased and members of his family, including the applicant. In upholding the declaration, the Court based its finding on the inherent jurisdiction of the Court to control its own processes and so prevent a practitioner from acting in relation to litigation in a way which would cause reasonable members of the community to lose confidence in the judicial system.

<sup>303</sup> *Rakusen* [1912] 1 Ch 831, 835 (Lord Cozens-Hardy MR); *Davies v Clough* (1837) 8 Sim 262, 267; 59 ER 105, 106–7 (Shadwell V-C). Cf *Prince Jefri Bolkiah* [1999] 2 AC 222, 234 (Lord Millett). The jurisdiction of English courts over their officers has also been discussed in contexts other than conflicts of duty: see, eg, *Ridehalgh v Horsefield* [1994] Ch 205, 225 (Bingham MR); *Arbuthnot Leasing International Ltd v Havelet Leasing Ltd* [1991] 1 All ER 591, 597 (Scott J); *Abse v Smith* [1986] 1 QB 536, 555 (Donaldson MR).

<sup>304</sup> See Hollander and Salzedo, above n 6, 67:

But it would be wrong to think that the perception of impropriety approach is never applied in [England]. It has been applied where the nature of the proceedings, and the role of the lawyers differs from the usual adversarial standpoint, where the lawyer's role is closer to public servant than merely advocate. In such circumstances, although the cases are not always consistent, the courts treat the issue as something close to a judicial conflict and apply a test analogous to the appearance of bias test which applies in that context.

<sup>305</sup> See above n 303.

<sup>306</sup> Hollander and Salzedo, above n 6, 76:

It is true that *Cholmondeley v Clinton* does not seem to have been before [the House of Lords in *Prince Jefri Bolkiah*], and it is also true that [Lord Millett] did not expressly refer to the narrower point, that such a jurisdiction only arises where the [lawyer] has discharged himself from the retainer, but it seems unlikely there is very much scope for reviving a claim on that basis in England.

With respect to the learned authors, they appear to have confused the application of the 'narrower point'. It is applicable to the persistence of the duty of loyalty but has no application to the court's inherent power over its officers. The court's jurisdiction in relation to the latter is wide and unrestricted.

<sup>307</sup> [1997] Ch 1, 9.

<sup>308</sup> [1992] 1 QB 959, 974.



In any event, it should be noted that the circumstances in which this jurisdictional limb will be invoked are likely to be limited. In *Holborow v Macdonald Rudder*,<sup>309</sup> Heenan J helpfully discussed the circumstances in which the jurisdiction of the court should be invoked. His Honour observed:

If there are circumstances which are likely to imperil the discharge of [the] duties to a court by a [lawyer] acting in a cause, whether because of some prior association with one or more of the parties against whom the [lawyer] is then to act, or because of some conduct by the [lawyer], whether arising from associations with the client or a close interest which gives rise to the fair and reasonable perception that the [lawyer] may not exercise the necessary independent judgment, a court may conclude that the lawyer should be restrained from acting ...<sup>310</sup>

Similarly, in *Kallinicos v Hunt*, Brereton J observed:

The test to be applied in this inherent jurisdiction is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice ...<sup>311</sup>

The court's enquiry will likely be focused on whether the lawyer is able (or would be perceived to be able) to act with objectivity and independence. As Thomas J said in *Kooky Garments Ltd v Charlton*:

As part of their professional responsibility ... [lawyers] must ensure that they do not appear in a matter in which they have an actual or potential conflict of [duty] or where, by reason of their relationship with their client, their professional independence could be called in question.<sup>312</sup>

It is the latter part of the preceding sentence which serves to distinguish this jurisdictional base from the others.

## VII RELATED MATTERS

Parts V and VI considered the jurisdiction of the court and the principles of law that condition the exercise of the power of the court in conflicts of duty cases. This Part of the article will consider the ability of a lawyer to avoid a potential conflict of duty. It will be observed that there are primarily two ways of avoiding conflicts of duty: obtaining the client's fully informed consent; and/or establishing an effective information barrier within the firm. It will be observed that the usefulness of these measures will depend, in part, on the particular jurisdictional base invoked in the case. For instance, an information barrier is designed to reduce the risk of disclosure of confidential information but serves no function in relation to the court's inherent jurisdiction over its officers. This is

<sup>309</sup> [2002] WASC 265 (Unreported, Heenan J, 15 November 2002). See also *Bowen v Stott* [2004] WASC 94 (Unreported, Hasluck J, 7 May 2004) [62], [65].

<sup>310</sup> *Holborow v Macdonald Rudder* [2002] WASC 265 (Unreported, Heenan J, 15 November 2002) [28].

<sup>311</sup> [2005] NSWSC 1181 (Unreported, Brereton J, 22 November 2005) [76] (citations omitted).

<sup>312</sup> [1994] 1 NZLR 587, 590.

discussed further below.<sup>313</sup> The remainder of this Part will consider whether delay in making an application is capable of disentitling a person from seeking to restrain a lawyer from acting.<sup>314</sup>

### A *Avoidance of Conflict of Duty*

#### 1 *Fully Informed Consent*<sup>315</sup>

A lawyer may act for different parties notwithstanding that a conflict of duty may arise, provided the lawyer has the informed consent of each of the parties.<sup>316</sup> In *Clark Boyce v Mouat*, the Privy Council defined ‘informed consent’ as:

consent given in the knowledge that there is a conflict between the parties and that as a result the [lawyer] may be disabled from disclosing to each party the full knowledge which he possesses as to the transaction or may be disabled from giving advice to one party which conflicts with the interests of the other.<sup>317</sup>

The disclosure which must precede fully informed consent must be full and frank and relate to all the material facts.<sup>318</sup>

The lawyer bears the onus of proving informed consent.<sup>319</sup> There may be situations in which it is impossible, notwithstanding full disclosure, for a lawyer to act fairly and adequately for different parties.<sup>320</sup> Even if permitted, a number of difficulties arise.<sup>321</sup> First, to disclose the nature of the conflict may, in some circumstances, be a breach of confidentiality owed to a client.<sup>322</sup> Second, in seeking consent, the lawyer is effectively asking to be relieved of their duty of

<sup>313</sup> See below Part VII(A)(2).

<sup>314</sup> See below Part VII(B).

<sup>315</sup> For reasons of brevity, ‘inferred consent’ is not discussed in detail in this article. This type of consent may arise where the combination of the knowledge of the client and the decision to instruct the professional with that knowledge precludes the client from complaining about non-disclosure of information communicated in confidence to the lawyer by the other client. See Hollander and Salzedo, above n 6, 47–9; Hollander, above n 76, 270.

<sup>316</sup> *Wan v McDonald* (1992) 33 FCR 491, 510–12 (Burchett J); *Archer v Howell [No 2]* (1992) 10 WAR 33, 49 (Rowland J); *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606, 636 (Upjohn LJ).

<sup>317</sup> [1994] 1 AC 428, 435 (Lord Jauncey). See also *Janesland Holdings Pty Ltd v Simon* [2000] ANZ ConvR 112, 122–4 (Crispin J); *Fitzpatrick v Waterstreet* [2000] ANZ ConvR 15, 19–20 (Mason P); *Maguire v Makaronis* (1997) 188 CLR 449, 466–7 (Brennan CJ, Gaudron, McHugh and Gummow JJ); Hollander, above n 76, 269 fn 44.

<sup>318</sup> *Clark Boyce v Mouat* [1994] 1 AC 428, 435–7, where Lord Jauncey also held that it may be necessary that the client be advised to obtain independent legal advice.

<sup>319</sup> *Birtchnell v Equity Trustees, Executors & Agency Co Ltd* (1929) 42 CLR 384, 398 (Isaacs J):  
But in a case like the present, equity has always held that the fiduciary relation itself imposes on the party bound to fidelity the obligation of justifying any private advantage he obtains in the course of his trust, or by reason of an interest conflicting or possibly conflicting with his duty. This is invariable.

<sup>320</sup> *Clark Boyce v Mouat* [1994] 1 AC 428, 436 (Lord Jauncey); *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, 90 (Richardson J). See also Maxton, above n 270, 233; O’Sullivan, above n 48, 90 fn 16, where it is suggested that ‘Lord Millett’s blanket prohibition on a [lawyer] acting against an existing client [would operate] regardless of consent’.

<sup>321</sup> See generally Dal Pont, *Lawyers’ Professional Responsibility in Australia and New Zealand*, above n 40, 190–2.

<sup>322</sup> See above Part VI(C)(1).

loyalty to one or more clients.<sup>323</sup> Clearly, consent of this kind is unlikely to be forthcoming except where the continuing client is not at arm's length to the other client(s). In any event, deprived of the entitlement to complete loyalty, the purpose that the continued representation serves must be queried. In the event of such consent apparently being given, the lawyer should 'scrutinise it lest it ha[s] been made by the clients ... without a proper appreciation of the facts.'<sup>324</sup>

Further, the usefulness of fully informed consent as a means of avoiding conflict is limited in circumstances where the court's inherent jurisdiction over its officers is invoked. In *Holborow v Macdonald Rudder*, Heenan J observed that

while a properly informed and advised client, not under any disability, may waive or ratify any breach of duty due to it by the [lawyer], the [lawyer's] duty to the court cannot be waived, so that if the particular disqualifying feature involves a conflict between the interests of the [lawyer] and his duty to the court which could give rise to a situation where the independent administration of justice may be put in jeopardy, the court will restrain the [lawyer] notwithstanding the wishes and interests of the client.<sup>325</sup>

It should also be noted that professional conduct rules sometimes prohibit a lawyer from acting even if informed consent has been obtained. These include certain conveyancing and financial transactions, such as the sale of land and guarantees.<sup>326</sup> The rules operate to bind the conduct of members of the professional organisation. A breach of the rules may result in a finding of professional misconduct and termination of the lawyer's membership of the organisation. Indeed, the lawyer's practising certificate may be cancelled. An application seeking to restrain a lawyer from acting will usually refer to these rules but, of course, the court is not bound to apply or even refer to the rules when considering its own jurisdiction.<sup>327</sup>

Additionally, a lawyer facing conflicting client duties may seek, with the consent of the client, to restrict the scope of the retainer in such a way as to remove the conflict.<sup>328</sup> In *Fruehauf Finance Corporation Pty Ltd v Feez Ruthning (a firm)*,<sup>329</sup> the court was prepared to accept undertakings that the retainer be limited in this way. However, in most cases the subject matter of the

<sup>323</sup> *Clark v Baker* (1987) 4 BPR 9476, 9484 (Waddell CJ). See also above Part III(B).

<sup>324</sup> *Law Institute of Victoria v A Solicitor* [1993] 1 VR 361, 368 (Tadgell J).

<sup>325</sup> [2002] WASC 265 (Unreported, Heenan J, 15 November 2002) [30].

<sup>326</sup> For the professional conduct rules governing solicitors in Victoria, see *Professional Conduct and Practice Rules 2005* (Vic) rr 4 (dealing with former client confidentiality), 8.4 (contrary to the interests of each client), 8.5 (conveyancing transaction), 8.6 (guarantee transaction), 8.7 (builder or owner of land), 8.8 (borrower or financier). See also *Revised Professional Conduct and Practice Rules 1995* (NSW) rr 4, 9.3; *Model Rules of Professional Conduct and Practice 2002* (NSW) rr 4, 8.4, 8.5, 8.6, 8.7. Cf *Rules of Conduct and Compulsory Continuing Legal Education 2005* (Vic) r 70, which allows barristers to retain briefs where the clients have given informed consent.

<sup>327</sup> See above n 79 and accompanying text.

<sup>328</sup> There is, however, a limit to this option. See Hollander and Salzedo, above n 6, 61:

the court is unlikely to permit a professional to provide the client with an inadequate service, in the sense that the client does not receive the advice he reasonably requires, by virtue of a definition of duty by the professional. And the limited retainer may have the effect that the client asks the professional questions or seeks advice which go beyond the limited retainer; the court might treat the limited retainer as having been extended by conduct.

<sup>329</sup> [1991] 1 Qd R 558, 571 (Lee J).

conflict is likely to be a material aspect of the transaction or litigation. Therefore, this approach will ultimately result in the client having to retain another lawyer to the extent of the conflict. Nonetheless, 'it may attract advantages in cost, speed and convenience which would be lost in the event of total withdrawal.'<sup>330</sup>

## 2 *Chinese Walls*<sup>331</sup>

The establishment of internal rules and procedures designed to prevent the passage of confidential information from one part of a firm of lawyers to another is often referred to as the erection of a 'Chinese wall'. Generally, this involves the giving of undertakings,<sup>332</sup> the imposition of restraints upon persons and/or limitations upon communications between various persons within a firm.<sup>333</sup> Professor Finn has defined Chinese walls in the following terms:

a Wall is an organizational 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.<sup>334</sup>

The term 'Chinese wall', although routinely used in legal vernacular, is an 'imprecise metaphor'.<sup>335</sup> For this reason Straughton LJ in *Re a Firm of Solicitors* preferred to call it an 'information barrier'.<sup>336</sup> In *Mallesons v KPMG*, Ipp J observed that '[t]he derivation of the nomenclature [was] obscure. It appears to be an attempt to clad with respectable antiquity and impenetrability something that is relatively novel and potentially porous.'<sup>337</sup>

There is no rule of law that Chinese walls, or other arrangements of a similar kind, are insufficient to eliminate the risk of disclosure of client confidential

<sup>330</sup> Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand*, above n 40, 192.

<sup>331</sup> Chinese walls or information barriers are created to circumvent one of the potential bases for an injunction against the lawyer, namely the duty of confidentiality. Should the court decide to exercise its jurisdiction in relation to the duty of loyalty or its inherent jurisdiction over its officers, then information barriers will serve little or no utility. For this reason, in *Prince Jefri Bolkiah*, Lord Millett seems to have had in mind that Chinese walls could never apply to protect the fiduciary in present client conflicts (as discussed above in Part V, the English approach is based exclusively on the duty of loyalty), unless both clients had given their informed consent to the lawyer acting by means of the Chinese wall: *Prince Jefri Bolkiah* [1999] 2 AC 222, 238–9. See also *Re a Firm of Solicitors* (Unreported, Queen's Bench Division, Evans J, 28 February 1991) 3, where his Honour stated that 'at least for the purposes of deciding [present client conflicts] no Chinese wall however impermeable can effectively subdivide one firm'. See also Finn, 'Fiduciary Law and the Modern Commercial World', above n 38, 26: 'Whatever virtue segregation may be found to have in the context of other types of conflict, it is highly improbable, I would suggest, that it will be held to be an effective alternative to full disclosure'.

<sup>332</sup> See the undertakings given by the law firm that was sought to be restrained in *Photocure* (2002) 56 IPR 86, 102 (Goldberg J).

<sup>333</sup> See Law Commission of England and Wales, *Fiduciary Duties and Regulatory Rules*, above n 73, 139–40.

<sup>334</sup> Finn, 'Conflicts of Interest and Professionals', above n 21, 33.

<sup>335</sup> Aitken, 'Chinese Walls and Conflicts of Interest', above n 10, 92. See also John Quarrell, 'Modern Trusts in Legal Education' (1991) 5 *Trust Law International* 99, 103–4: 'The Chinese used to make walls out of paper through which you could whisper and therefore the name is a flagrant indication of what frequently goes on'.

<sup>336</sup> [1992] 1 QB 959, 975: 'These have been called a "Chinese wall;" but, in order that metaphor may not cloud meaning, I prefer to call them an information barrier.'

<sup>337</sup> (1990) 4 WAR 357, 371 (Ipp J).

information. The starting point, however, is that ‘unless special measures are taken, information moves within a firm.’<sup>338</sup> Mere physical segregation, especially within one department, will not suffice.<sup>339</sup> The orthodox view is that established institutional arrangements, as opposed to ad hoc arrangements, designed to prevent the flow of confidential information between separate departments, are more likely to be accepted by a court.<sup>340</sup> An illustration of an acceptable institutional barrier is found in *Re a Firm of Solicitors*.<sup>341</sup> In that case, the matters were handled by different departments of the firm, which were located in two different buildings. Walker J observed that ‘[t]he two individuals in charge of the two respective cases have never been into each others’ offices. Indeed, before the current matter arose, they had never met.’<sup>342</sup> However, ad hoc arrangements have been held in a number of recent Australian and English cases to be sufficient to ensure the protection of confidential information.<sup>343</sup> In *Young v Robson Rhodes (a firm)*, Laddie J observed that

[t]he crucial question is ‘will the barriers work?’ If they do, it does not matter whether they were created before the problem arose or are erected afterwards. It seems to me that all Lord Millett was saying was that Chinese walls which have become part of the fabric of the institution are more likely to work than those artificially put in place to meet a one-off problem.<sup>344</sup>

In any event, the critical issue will be whether the barriers are effective.

In practice, courts in both England and Australia have been reluctant to accept the effectiveness of Chinese walls.<sup>345</sup> In *David Lee & Co (Lincoln) Ltd v Coward*

<sup>338</sup> *Prince Jefri Bolkiah* [1999] 2 AC 222, 237 (Lord Millett). This suggests that it is a rebuttable presumption.

<sup>339</sup> *Ibid* 239 (Lord Millett): ‘Furthermore, there is evidence that physical segregation is not necessarily adequate, especially where it is erected within a single department’. See also Aitken, ‘“Chinese Walls”, Fiduciary Duties and Intra-Firm Conflicts’, above n 32, 122.

<sup>340</sup> See Law Commission of England and Wales, *Fiduciary Duties and Regulatory Rules*, Report No 236 (1995) 13 fn 39; Law Commission of England and Wales, *Fiduciary Duties and Regulatory Rules*, above n 73, 139–40, which sets out the suggested ‘organisational arrangements’. These include: physical separation of departments; an educational programme; strict and detailed procedures for exceptions to the operation of the wall; monitoring of the effectiveness of the wall by compliance officers; and disciplinary sanctions where there has been a breach of the wall: at 140. These arrangements were referred to in *Prince Jefri Bolkiah* [1999] 2 AC 222, 238–9 (Lord Millett): ‘In my opinion an effective Chinese wall needs to be an established part of the organisational structure of the firm, not created ad hoc and dependent on the acceptance of evidence sworn for the purposes by members of staff engaged on the relevant work.’

<sup>341</sup> [2000] 1 Lloyd’s Rep 31, 34, where Walker J also commented: ‘Thus before any question of conflict ever arose, there was a clear departmental and physical separation. It seems to me that these are two crucial factors’: at 34 (emphasis in original).

<sup>342</sup> *Ibid*.

<sup>343</sup> See *Photocure* (2002) 56 IPR 86, 103–4 (Goldberg J); *Bureau Interprofessionel* [2002] FCA 588 (Unreported, Ryan J, 9 May 2002) [54], [60].

<sup>344</sup> [1999] 3 All ER 524, 539. See also *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2005] NSWSC 550 (Unreported, Bergin J, 20 June 2005), where undertakings were proffered but were ultimately unnecessary. See also *Re a Firm of Solicitors* [1992] 1 QB 959, 976 (Staughton LJ): ‘It is the effectiveness of the information barrier which must be considered in each case.’

<sup>345</sup> Harry McVea, ‘Heard It through the Grapevine: Chinese Walls and Former Client Confidentiality in Law Firms’ (2000) 59 *Cambridge Law Journal* 370, 386–8; *Mytton’s Ltd v Phillips Fox* (Unreported, Supreme Court of Victoria, Coldrey J, 23 September 1997) 3: ‘This was not a case in which it was sought to employ the unsatisfactory construct of the “Chinese wall”’. See also *Yunghanns v Elfic Ltd* (Unreported, Supreme Court of Victoria, Gillard J, 3 July 1998) 28, where

*Chance (a firm)*, Browne-Wilkinson V-C observed ‘experience in [the Court of Chancery] 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.’<sup>346</sup> In *Re a Firm of Solicitors*, Parker LJ observed that ‘only in very special cases that any attempt should be made’ to rely on an information barrier.<sup>347</sup> Similarly, in *Pradhan v Eastside Day Surgery Pty Ltd*, Bleby J observed that ‘[i]t will only be in very rare cases, if at all, that a “Chinese wall” ... will be sufficient protection. There will always be a risk that some confidential information will be inadvertently revealed across the wall.’<sup>348</sup> Further, Sir Anthony Mason pointedly observed that ‘[a]s 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.’<sup>349</sup> It is interesting to note that judicial intolerance of Chinese walls in the context of lawyers does not correlate with the prevailing acceptance of them in the financial services industry.<sup>350</sup> The elevated importance of the lawyer–client relationship in the administration of justice might explain the different treatment.

In England, a court will restrain a lawyer from acting ‘unless satisfied on the basis of clear and convincing evidence, that [all reasonable] measures have been taken to ensure that no disclosure will occur’.<sup>351</sup> Of course, this is quite different to the Victorian formulation which does not provide for a reversal of the onus of proof in this way. Under the Victorian formulation, a court would ordinarily consider the effectiveness of a Chinese wall as part of its overall assessment of whether a ‘real and sensible possibility’ of misuse of confidential information exists. The shift in the evidentiary burden under the English formulation places greater importance on the measures taken by the lawyer in protecting confiden-

Gillard J called the proposed Chinese wall ‘a Dutch dyke; a good barrier to water but involving the ever present risk of seepage leading to a leak.’ Because of the long relationship between the law firm and the former client, over some 20 years, the risk of ‘seepage’ was held to be too high: at 28. Cf *Australian Liquor Marketers Pty Ltd v Tasman Liquor Traders Pty Ltd* [2002] VSC 324 (Unreported, Habersberger J, 14 August 2002) [27]. Cf the United States, where it would appear that the phenomenon of the ‘mega-firm’ has meant that Chinese walls are generally accepted, provided they are put in place in a timely manner: see *Newman v Phillips Fox* (1999) 21 WAR 309, 324 (Steytler J); Aitken, ‘“Chinese Walls”, Fiduciary Duties and Intra-Firm Conflicts’, above n 32, 132.

<sup>346</sup> [1991] Ch 259, 270. See also *D & J Constructions Pty Ltd v Head* (1987) 9 NSWLR 118, 122–3 (Bryson J).

<sup>347</sup> [1992] 1 QB 959, 97. Parker LJ also commented that ‘save in a very special case such as *Rakusen’s case*, I doubt very much whether an impregnable wall can ever be created and I consider it is only in very special cases that any attempt should be made to do so’: at 97. See also *Re a Firm of Solicitors* (Unreported, Queen’s Bench Division, Evans J, 28 February 1991) 11: ‘By way of general comment it seems to me that it is unlikely that any Chinese wall, however constructed, could be expected to [remove the reasonable anticipation of mischief].’

<sup>348</sup> [1999] SASC 256 (Unreported, Doyle CJ, Bleby and Prior JJ, 18 June 1999) [52] (Bleby J). See also at [1] (Doyle CJ), [2] (Prior J).

<sup>349</sup> Sir Anthony Mason, ‘Legal Liability and Professional Responsibility’ (1992) 14 *Sydney Law Review* 131, 135.

<sup>350</sup> This is considered with some scepticism in Norman S Poser, ‘Chinese Wall or Emperor’s New Clothes? (Pt 1)’ (1988) 9 *Company Lawyer* 119; Norman S Poser, ‘Chinese Wall or Emperor’s New Clothes? (Pt 2)’ (1988) 9 *Company Lawyer* 159; Norman S Poser, ‘Chinese Wall or Emperor’s New Clothes? (Pt 3)’ (1988) 9 *Company Lawyer* 203.

<sup>351</sup> *MacDonald Estate v Martin* [1990] 3 SCR 1235, 1262 (Sopinka J), as adopted in *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222, 237–8 (Lord Millett). See also *Bureau Interprofessionnel* [2002] FCA 588 (Unreported, Ryan J, 9 May 2002) [60]; *Photocure* (2002) 56 IPR 86, 96, 103 (Goldberg J).

tial information. To this extent, the English formulation is to be preferred. The lawyer should bear the evidential onus if he or she seeks to obtain the benefit of what is, after all, an artificial construct of his or her own making. This is also consistent with the view expressed earlier in this article that it is a rebuttable presumption that confidential information moves within a firm.<sup>352</sup> In these circumstances, the evidential onus should rest on the law firm to demonstrate that it has put in place information barriers sufficient to rebut the presumption.

#### B *Laches* — *Delay in Bringing an Application to Restrain a Lawyer from Acting*

The prospect of delay disempowering a present or former client from making an application to restrain a lawyer is an issue which has been considered in a number of cases. In *Vakauta v Kelly*, Dawson J observed that

where a party in civil litigation, being aware of the circumstances giving rise to a right to object, allows the case to continue for a sufficient time to show that he does not presently intend to exercise that right, he may be held to have waived it.<sup>353</sup>

In *Orr v Ford*, Deane J observed that ‘[s]trictly used, acquiescence, indicates the contemporaneous and informed (“knowing”) acceptance or standing by which is treated by equity as “assent” (ie consent) to what would otherwise be an infringement of rights’.<sup>354</sup>

In *South Black Water Coal Ltd v McCullough Robertson (a firm)*,<sup>355</sup> the former client did not dispute, for a period of 14 months, the lawyer acting for another party with an adverse interest. Muir J held that the former client’s acquiescence had, as a matter of equity, caused the client to lose their entitlement to complain. Similarly, in *Colonial Portfolio Services Ltd v Nissen*, Rolfe J indicated that he would have refused the application on the grounds of delay had he not decided that there was no real risk of misuse of confidential information.<sup>356</sup> In that case, there was a delay of some eight months. However, in *Sogelease Australia Ltd v MacDougall*, Wood J warned that a court should be slow to invoke the doctrines of laches or delay as a discretionary bar to proceedings involving a breach of fiduciary duty.<sup>357</sup> In *Mytton’s Ltd v Phillips Fox (a firm)*, a five-month

<sup>352</sup> See above Part II(B).

<sup>353</sup> (1989) 167 CLR 568, 579.

<sup>354</sup> (1989) 167 CLR 316, 337, where his Honour also noted: ‘There has, over the years, been considerable criticism of the loose use of the word “acquiescence” as a broad conjunctive or disjunctive companion to “laches”’. For reasons of brevity, this article does not describe the differences between the two words. See also *Allcard v Skinner* (1878) 36 Ch D 145, 174 (Cotton LJ); *De Bussche v Alt* (1877) 8 Ch D 286, 314 (Thesiger LJ).

<sup>355</sup> [1997] QSC 77 (Unreported, Muir J, 8 May 1997). See also Mulheron, above n 55; *Re Holmes* (1877) 25 WR 603, where Viscount Hall V-C dismissed an injunction application, remarking that the fact no objection had been taken earlier showed that the application was not bona fide.

<sup>356</sup> (2000) 35 ACSR 673, 700: ‘In my opinion, it would be inequitable in the circumstances which have existed, to grant equitable relief to the defendants even if I were otherwise of the view that they were entitled to it.’

<sup>357</sup> (Unreported, Supreme Court of New South Wales, Wood J, 17 July 1986) 10–11, followed in *In the Marriage of Gagliano* (1989) 12 Fam LR 843, 851 (Renaud J). See also *Kalenik v Apostolidis* [2005] VSC 27 (Unreported, Hansen J, 18 February 2005) 18; *Village v BDW* [2004] Aust Torts Reports ¶81-726, 65 340 (Byrne J); *BATAS v Blanch* [2004] NSWSC 70 (Unreported, Young CJ in Eq, 20 February 2004) [137]; *Sent v Fairfax* [2002] VSC 429 (Unreported, Nettle J,

delay was held not to constitute a disqualifying period.<sup>358</sup> Similarly, in *Durban Roodepoort Deep Limited v Reilly and Featherby (as administrators)*, an eight-month delay was held not to be sufficient to disentitle the applicant, although the application seeking to restrain the lawyer failed for other reasons.<sup>359</sup>

#### VIII CONCLUSION

The competing policy issues inherent in this field of law are tolerably clear. On the one hand, there is a general concern to maintain the high standards of the legal profession and the overall integrity of the justice system. On the other hand, a client should not be deprived of their choice of lawyer without good cause. The proverbial bar is set high for the former and low for the latter. A test that is too easy to satisfy, however, may diminish the confidence of the public in the administration of justice. That is because a lawyer's conflict of duty is subversive of the appearance of justice being done. Equally, a test that is too high may undermine our system of justice by limiting a client's choice of lawyer. It may also unduly restrict the mobility of individual lawyers within the legal profession and threaten the economic viability of legal practice by causing large firms to refuse matters. The critical issue is where the line should be drawn in relation to these competing policy tensions. Resolution of this issue can only occur if we consider the principles of law which ought to condition the exercise of judicial power to restrain a lawyer from acting.

Ironically, the present divergence of the law in England and Australia has less to do with the principles of law which ought to condition the exercise of power and more to do with the preliminary issue of whether the court has jurisdiction. In England, a court does not have jurisdiction to restrain a lawyer from acting against a former client unless there is a risk of misuse of confidential information. A lawyer's duty of loyalty is not available in this kind of conflict. Similarly, a court does not have jurisdiction to restrain a lawyer from acting against a present client unless there is a breach of the lawyer's duty of loyalty. Misuse of confidential client information is not available in this kind of conflict.

In Australia, it has been observed that the law is less settled. Victorian courts have adopted a multiple jurisdiction approach to questions of conflict (whether present or former client conflict). In other words, any one of three jurisdictional bases may be available in both forms of conflict. Contrast this with the approach of other Australian courts, which have tended to exclude the duty of loyalty as a jurisdictional basis in former client conflicts (as in the English approach). Ultimately, only the High Court of Australia is capable of resolving the divergence which has emerged within Australian jurisprudence. It should be noted, however, that Australian courts unanimously recognise the availability of their inherent jurisdiction over officers of the court in both forms of conflict. By contrast, English courts are less inclined to recognise this jurisdictional base.

7 October 2002) [61]–[62]; *McVeigh v Linen House Pty Ltd* [1999] 3 VR 394, 400 (Batt JA), where cursory claims in relation to delay were rejected.

<sup>358</sup> (Unreported, Supreme Court of Victoria, Coldrey J, 23 September 1997) 7–8. See also Mulheron, above n 55, 35.

<sup>359</sup> [2004] WASC 269 (Unreported, Le Miere J, 17 December 2004) [101]–[102].



In any event, limits have been placed on the court's jurisdiction because there is a concern that the pendulum will otherwise swing too much in favour of restraining lawyers from acting. The fact that a court has jurisdiction does not, however, mean that that power will be exercised capriciously. Indeed, courts will interfere with the client's choice of lawyer 'only if there is reason to do so'.<sup>360</sup> It is for this reason that the judgment of Brooking JA in *Spincode* should be preferred. One is not troubled with courts having a wide jurisdiction to restrain lawyers from acting, so long as the power is exercised properly. The connecting factors<sup>361</sup> condition the exercise of judicial power so that there is little scope for such concern. They limit the prospect of clients being unnecessarily deprived of their choice of lawyer. Ultimately, as is so often the case, it is apt to heed the words of Sir Owen Dixon in setting the 'bar':

Unless high standards of conduct are maintained by those who pursue a profession requiring great skill begotten of special knowledge, the trust and confidence of the very community that is to be served is lost and thus the function itself of the profession is frustrated.<sup>362</sup>

<sup>360</sup> *Farrow Mortgage Services Pty Ltd (in liq) v Mendall Properties Pty Ltd* [1995] 1 VR 1, 4 (Hayne J).

<sup>361</sup> See above Part IV.

<sup>362</sup> Sir Owen Dixon, *Jesting Pilate: And Other Papers and Addresses* (1<sup>st</sup> ed, 1965) 192. See also Finn, 'Conflicts of Interest and Professionals', above n 21, 40–1 (citations omitted); Sir Gerard Brennan, 'Pillars of Professional Practice: Functions and Standards' (1987) 61 *Australian Law Journal* 112, 117.