

PART VIII — CONFLICTS OF INTEREST

1 INTRODUCTION

1.1 *Fiduciary Duties*

In equity, certain relationships of trust give rise to onerous obligations of loyalty. For example, where someone stands in a position of ascendancy (or special trust and confidence) over another, they have an obligation not to act unconscionably. Lawyers are said to be in such a position vis-a-vis their clients.

Chief among lawyers' fiduciary duties is an obligation of undivided loyalty to their clients. To meet this obligation, lawyers are expected to avoid situations which raise a conflict of interest between:

- The lawyer's personal interest and their duty to the client ('lawyer–client conflicts'); or
- The interests of multiple clients ('client–client conflicts').

1.2 *Rationale for the Obligation to Avoid Conflicts of Interest*

Lawyers have a fiduciary obligation to avoid both kinds of conflicts. Dal Pont describes the rationale for this obligation in the following passage:

Conflict of interest principles were developed to serve two purposes: to protect the client by assuring zealous and loyal representation and to maintain a public perception of integrity of the profession and the administration of justice.¹

1.3 *When Conflicts Arise*

If a conflict of interest arises, the lawyer must take two steps to deal with it successfully:

- First, he or she must refrain from using the relationship as a conduit to making a personal gain (apart from a reasonable professional fee); and
- Second, he or she must fully disclose to the client any conflicts or gains.

Lawyers have three further fiduciary duties:

- They must avoid representing a client where that would conflict with duties owed to a former client ('successive conflicts').
 - The rationale for this type of conflict lies in its potential for inadvertent disclosure of confidential information
- They must fully account for money held on behalf of clients and for any costs incurred during the running of a matter
 - This obligation stems from trusts law, supplemented by statutory and common law duties

¹ Gino Dal Pont, *Lawyers' Professional Responsibility* (2001) 150.

- They must disclose and use for client's benefit all material information that comes into their possession concerning the client's affairs
 - This duty derives from tortious obligations, principally in negligence

1.4 Consequences for Breach of a Fiduciary Duty

Breach of a fiduciary duty gives rise to a common law cause of action and is also likely to amount to misconduct or unsatisfactory conduct.

Equitable remedies for breach of a fiduciary duty include an injunction to disqualify the lawyer in question from acting in the conflicting manner, the setting aside of any transaction between the lawyer and the client, and requiring the lawyer to account for their profits and possibly make restitution.

In general, if an individual lawyer is unable to act because of a conflict of interest, their entire firm will also be disqualified from acting.

At common law, an action for negligence or breach of contract may also be possible.

Finally, breach of a fiduciary duty as a result of an unchecked conflict of interest will probably also amount to misconduct or unsatisfactory conduct. Failing to disclose or otherwise deal with a conflict of interest is in breach of professional conduct rules, and attracts consequences (including expulsion) from the disciplinary system under the *Legal Practice Act 1996* (Vic).

2 LAWYER–CLIENT CONFLICTS

2.1 Introduction

There are two kinds of lawyer–client conflicts:

- Direct financial interests (where the direct interests of a client and their lawyer overlap); and
- Indirect financial interests (where other financial interests, values, loyalties, or interests overlap).

More legally and ethically significant than the fact of a conflict itself is how the lawyer handles it.

2.2 Dealing with Lawyer–Client Conflicts

A lawyer faced with either form of lawyer–client conflict of interest has two options:

- 1 **Avoidance**
Take measures to avoid or remove the conflict itself; and/or
- 2 **Disclosure**
For less serious conflicts, it may be sufficient to fully disclose the conflict to the client and obtain the client’s consent to continue. As part of full disclosure, this generally requires that the client is advised to obtain independent legal advice.

PCPR 9 outlines the nature of lawyer–client conflicts:

9 Avoiding conflict of interest (where practitioner's own interest involved)

9.1 A practitioner must not, in any dealings with a client

- 9.1.1 Allow **an interest of the practitioner or an associate** of the practitioner to conflict with the client's interest;
- 9.1.2 Exercise any **undue influence** intended to dispose the client to benefit the practitioner or an associate of the practitioner in excess of the practitioner's fair remuneration for the legal services provided to the client;

9.2 A practitioner must not accept instructions to act or continue to act for a person in any matter when the practitioner is, or becomes, aware that the person's interest in the matter is, or would be, in conflict with the practitioner's own interest or the interest of an associate.

[See also Rules 10 (drawing up wills), 11 (borrowing money from clients), 13.4 (becoming a witness in proceedings)]

In the case of financial conflicts introduced by the lawyer’s suggestion, the case law seems clear that the conflict must be avoided rather than merely consented to (*Harvey*).

Law Society of New South Wales v Harvey [1976] 2 NSWLR 15:Facts

- Harvey is a solicitor who is also a director and shareholder of three property investment companies
- His clients often, at his suggestion, lent money to these companies for investment purposes; he did not disclose the full extent of his interest (just that he was a director)
- The investment was used in projects which would result in substantial financial gains for Harvey, if successful
- The clients were often inexperienced in investment matters, and did not have the risks explained to them
- The defendant did not advise his clients to obtain independent legal advice
- Eventually, the companies' financial states deteriorate, but Harvey continues to encourage the client loans in order to prop them up
- Many clients lose money on what eventuate to be failed investments
- The Law Society brings an action for professional misconduct against Harvey

Issue

- Is the professional misconduct serious enough to warrant Harvey being struck off from the roll of practising solicitors?

Reasoning (Street CJ)

- Where there is any conflict between the client's and solicitor's interests, the duty of the solicitor is 'to act in perfect good faith' and to make 'full disclosure' of his interest
 - This includes disclosure of all material circumstances, and everything known to him which might influence the client
 - To disclose less is to positively mislead
- A deliberate proposal of the solicitor is a conflict of interest which is avoidable, and ought to be avoided
 - Even advising a client to retain independent legal advice does not overcome the objection to a solicitor proposing, inviting or encouraging a client to deal with him or his company in a proposed transaction
 - In the absence of very special circumstances, a solicitor who promotes himself as the dealer with his client misuses his position
 - A solicitor ought neither promote, suggest nor encourage a client to deal with him
 - Instead, he should take all reasonable steps necessary to *avoid* dealing with the client either directly or indirectly
- Where conflict is deliberate and dishonest, striking off is appropriate
 - Harvey's professional misconduct was serious and sustained, involving many clients and large amounts of money
 - Motivated by greed and self interest, and in deliberate and flagrant disregard of his duty to his clients
 - Demonstrates that Harvey is unfit to be a solicitor

Decision

- 'We come to the inescapable conclusion that, on a grand scale, extending over some years, the defendant, deliberately and for his own benefit, caused the affairs of his clients to be intermingled with his affairs and that, while supposedly acting for them he grossly preferred his own interests to those of his clients'
- Harvey should be struck off the roll of practising solicitors

However, other conflicts are able to be addressed simply by disclosing them and proceeding only with the client's consent (*Maguire*).

***Maguire v Makaronis* [1997] HCA 23:**Facts

- Lawyers advise a client in regards to a farm investment; the client has imperfect English
- One lawyer personally provides bridging finance, lending some money to the client
- However, the lawyer does not tell the client that it is coming from him
- The client defaults and the lawyer sues for possession of the farm

Issue

- Is the lawyer entitled to an equitable remedy to retake possession?

Reasoning

- There was not full disclosure of the lawyer's interest in the loan
- The lawyer also failed to advise the client to receive independent legal advice
- The conflict of interest could have been cured by disclosure and advice

Decision

- The contract is rescinded and the mortgage set aside
- [See further](#)

Roche provides another example of a case in which a failure to disclose the existence of a lawyer–client conflict of interest resulted in professional misconduct.

***Council of the Law Society Inc v Roche* [2003] QCA 469:**Facts

- A law firm conducts a personal injury practice and advertises on the basis of a 'no win, no fee' costs structure
- A Mr Arthur approaches the firm, having financial difficulties, and is seeks to claim damages in respect of injuries suffered by his children
- Subsequently, the firm proposes to increase his fees to \$300/hour
- Mr Arthur is of the view (erroneously) that most of the legal costs had already been incurred, so that the proposed increase would have little overall effect on the amount payable in respect of his daughter's claim; that was not so
- The solicitor fails to advise Mr Arthur to seek independent legal advice before amending their Costs Agreement, and also fails to draw Mr Arthur's attention to the provisions of the first retainer which limited the capacity of the firm to increase the fees payable

Issue

- Is the agreement void for breach of fiduciary duty?

Reasoning

- The lawyer's interest is here in obtaining higher fees; the revised cost agreement

- purported to give the firm more than reasonable pay
- This interest is in conflict with their fiduciary duty to the client (to act in their best interests and ensure that costs incurred are reasonable and not unconscionable)
 - Renegotiation of fees in any interest must be accompanied by advice to the effect that the client should receive independent legal advice about the continued viability of the retainer
 - Roche should have made this plain to the client, but didn't
 - Citing *Foreman* per Mahoney JA:
 - '... if costs agreements of this kind are to be obtained from clients, it is necessary that the solicitor obtaining them consider carefully her fiduciary and other duties, that she be conscious of the extent to which the agreements contain provisions which put her in a position of advantage and/or conflict of interest, and that she **take care that, by explanation, independent advice or otherwise, the client exercises an independent and informed judgment** in entering into them.' (at 437)

Decision

- The solicitor should have advised the client to obtain independent legal advice
- Solicitor is suspended from practice for 12 months
- [See further](#)

Conflicts such as these must be assessed in terms of their quantum. The cases suggest that even the smallest conflicts must be disclosed and a statement to seek independent legal advice given, but this will be sufficient to cure minor conflicts (such as owning shares in one of the parties being represented).

Such would have been sufficient in *Roche* (lawyer's interest in increasing costs) and *Maguire* (lawyer's interest in providing mortgage). Indeed, values and loyalties in maximising profitability will always go against the client's interests (in minimising legal costs) to some extent. These interests should always be disclosed (though it does seem quite unfeasible to advise a client to receive independent legal advice, which itself would be subject to the same pecuniary conflict). However, in the case of more serious conflicts, such as that which arose in *Harvey* (investing in companies of which lawyer is director and shareholder), nothing short of avoidance will be sufficient.

The adversarial advocacy approach suggests that absolute dedication to the client is required. However, this is unrealistic to expect: lawyers, like other people, are always self-interested, so there is inevitably going to be some degree of conflict between them and their clients.

3 CLIENT–CLIENT CONFLICTS

3.1 *Simple Situations*

3.1.1 *Client Conflicts in Contentious Work*

There is an absolute ban on acting simultaneously for two clients with opposing interests in the same civil or criminal litigation (or another contentious matter). An injunction is available to prevent it.

8 Acting for more than one party

- 8.2 A practitioner must avoid conflicts of interest between two or more clients of the practitioner.

(A similar principle may apply to non-consensual alternative dispute resolution. However, it may not bar representation where the parties have the same interests.)

3.1.2 *Acting for Two or More Parties in Non-Contentious Work*

There is no absolute ban on acting for two or more parties to a matter if the practitioner receives the fully informed consent of all parties and there is no 'actual' conflict.

- 8.2A Nothing in this Rule shall limit or restrict any common law, equitable or statutory duty or obligation which a practitioner owes.

- 8.2 A practitioner must avoid conflict of interest between two or more clients of the practitioner.

- 8.3 A practitioner who, or whose firm intends to act for a party, to any matter where the practitioner is also intending to accept instructions to act for another party to the matter must be satisfied, before accepting an engagement to act, that **each party is aware** that the practitioner is intending to act for the others **and consents** to the practitioner so acting in the knowledge that the practitioner:

- (a) May, thereby, be **prevented from** —
- (i) **disclosing** to each party **all information relevant to the matter** within the practitioner's knowledge; or
 - (ii) **giving advice** to one party **which is contrary to the interests** of another; and
- (b) **Will cease to act for all parties** if the practitioner would, otherwise, be **obliged to act in a manner contrary to the interests of one** or more of them.

In some circumstances, the each client's consent must be given in writing (PCPR 8.5). PCPR 8.6–8.8 also set out several circumstances (mostly relating to land, mortgages, finance, trusts, and shareholders) in which acting for more than one party is absolutely prohibited.

For example, PCPR 8.3 would mandate disclosure and informed consent before a practitioner could act for the vendor and purchaser in a sale of land. It is acceptable to do so where the sale is non-contentious, but if it does become contentious (as where, for example, the terms of the sale are disputed), the practitioner must immediately withdraw from acting for either party (PCPR 8.4; see below). The courts treat lawyers who fail to withdraw in such circumstances very harshly.

A practitioner must not act if 'actual conflict' exists (whether pre-existing or arising during the course of representation). However, it is often difficult to determine when clients' interests are or are not in conflict. Conflicts exist in fine gradations, from those readily apparent, diametrically opposed objectives (plaintiff/defendant) through to far more indirect, subtle oppositions (companies in the same industry disadvantaged by the other's success, defendant that provides valuable services to another client).

The perspective underpinning PCPR 8.3–8.8 is clearly that of the adversarial advocate. However, one might also criticise Rule 8.3 from this perspective on the basis that a lawyer is unable to adequately protect their clients' interests if they are also bound to act in the interests of another party. Whilst the result may fall short of being 'contrary to the interests' of the other party, it is still less than complete partisanship. Even so, the client should retain the right to share their representation, which is often undertaken to reduce legal costs or other overheads.

3.1.3 Conflict Arising During Representation

Where a conflict arises between two clients during representation, the practitioner must withdraw from representing both.

...

- 8.4 If a practitioner who is acting for more than one party to any matter determines that the practitioner cannot continue to act for all of the parties without acting in a manner contrary to the interests of one or more of them, the practitioner must immediately cease to act for all parties.

Naturally, as per PCPR 8.3, both parties must have given fully informed consent before the practitioner may act in first place.

A common example of conflict which arises during representation is where a lawyer is acting for two parties on the same side (eg, two co-accused in a criminal trial). This is fine so long as they give informed consent to it (PCPR 8.3). However, if, during the trial, the co-accused blame one another or run inconsistent defences, and 'actual' conflict arises and the lawyer must withdraw from acting for both.

3.2 Complex Situations

Spincode v Look Software sets out the principles which should be used to resolve conflicts of interest in more complicated situations. Such situations include:

- Acting against a former client;
- Switching sides or acting for an individual client after acting for an entity of which they were a part (the facts in *Spincode*); or
- Acting against a current client in a different matter.

Spincode identifies three legal foundations for not acting:

- 1 Confidentiality**
A practitioner should not act where there exists a 'real possibility' that previously obtained confidential information will be misused;
- 2 Loyalty**
Practitioners owe an enduring obligation of loyalty (both as fiduciary and contractual party) to their former clients, such that they should not act against their interests in subsequent matters that are the same or similar;
- 3 Administration of justice**
Where solicitors jeopardise the Court's administration of justice, the Court must exercise their jurisdiction to control them so as to prevent its subversion.

If any of these three 'tests' of disqualification are met, this is sufficient basis for an injunction preventing the disqualified lawyer from acting. This is confirmed by PCPR 4 (see below).

***Spincode Pty Ltd v Look Software Pty Ltd* [2001] VSCA 248:**

Facts

- Moore is the director of Spincode, Rogers the director of G-Wiz
- The two companies merge to form Look Software ('LS'), who retain one Mr Kirton of law firm 'McPherson + Kelly' ('MPK') to act for them
- Look Software now hires additional employees, the Kay brothers and Dee; MPK were not engaged in any contested work at this point
 - However, during this time, bills sent by Mr Kirton name Look Software as their client
 - The registered contact names include both Moore and Dee
 - Journal vouchers also name the company as client
- Employees begin to fight over pay, shares and other entitlements; Moore threatens to sue Look Software in order to resolve the dispute
- Subsequently, Spincode engages the assistance of Mr Kirton to sue Look Software in order to wind it up
- MPK is still acting for Look Software, but attempt a mediation with Spincode
- Moore asks Mr Kirton to send a fax to Look Software informing them of their intentions; this he does

Issue

- Is there a conflict of interest?

Reasoning

- Brooking JA:
 - As Lord Eldon and Finn note, where a solicitor discharges himself for the very purpose of acting for the opponent, he will be restrained
 - In all other circumstances, three justifications exist for an interdict
 - Risk of disclosing confidential information
 - Lawyers, like all professions, have a legal and ethical duty to maintain the secrecy of information acquired from or about their clients when acting for them
 - The obligation of secrecy subsists after the termination of the retainer; this duty sets limit on when a lawyer may act against a former client
 - A risk of disclosing confidential information will usually warrant intervention, but it is not the only ground
 - Duty of loyalty
 - The need for justice to appear to be done and the likely impressions of a properly informed and reasonable observer where a lawyer changes side
 - The spectacle that a lawyer can readily change sides is subversive of the appearance that justice is being done
 - A duty of loyalty means ‘to act selflessly and with undivided loyalty’ in the service of the interests of the other
 - Until each client agrees to the contrary, they are entitled to the undivided loyalty of the fiduciary they have engaged: there needs to be fully informed consent before a lawyer can undertake a duty to another which is inconsistent with his duty to a past client
 - The new matter must be ‘the same or a closely related matter’ to that in which the solicitor originally acted for the former client
 - It is this ‘obligation of “loyalty”’ which forbids not only the concurrent holding of two inconsistent engagements by different clients in the same matter but also the holding of two successive inconsistent engagements
 - Officer of the Court (Ormiston JA)
 - No experienced solicitor of sound judgment would have done what has been done in this case
 - The nature and objectives of the Court’s jurisdiction to discipline its officers point to the fact that the Court must consider the conduct of the solicitors who attempt to act in a manner inconsistent with a former retainer
 - It would be *pessimi exempli* if MPK were not called to account
 - It is desirable to restrain solicitors as officers of the Court
 - Another possible approach is suggested by contract
 - There may be an implied term in the retainer between MPK and LS preventing MPK from act against it in a dispute relating to the matter for which they had been retained by LS
 - Australian law has diverged from that of England; the danger of misuse of confidential information is not the sole touchstone for intervention where a solicitor acts against a former client
 - In their Lordships’ view, the duty of loyalty largely perishes along with the retainer from which it sprang, the only survivor being that aspect of the duty which protects confidential information

- By contrast, in Australia, loyalty is considered to impose an abiding negative obligation not to act against the former client in the same matter
- Such a view ‘commends itself to me as fair and just’: the equitable obligation of ‘loyalty’ is breached where a solicitor ‘acts against a former client *in the same matter*’ (at 522)
- Mr Kirton had confidential information pertinent to LS
 - MPK is now seeking to acting against their former client, LS, in the interests of a constituent agent, Moore
- However, the client was always LS, the entity, not individuals
 - LS paid the bills, sent the letters in its name, etc
- It would be unconscionable if MPK could ignore their fiduciary obligations to LS by ending the retainer
 - There is an ongoing obligation not to act against a company previously a client
- MPK can act for someone who was previously a part of LS (such as Moore), but not so as to act *against* LS itself

Decision

The appeal is dismissed. The trial judge correctly granted an injunction and MPK should be prevented from acting for Moore.

Brooking JA: Besides confidentiality, there are two other possible bases for an interdict. First, it may be aid to be a breach of a fiduciary duty of loyalty for a solicitor to take up the cudgels against a former client in the same or a closely related matter. Second, even if there was no breach of such an obligation, the solicitors’ conduct may be so offensive to common notions of fairness and justice that they should, as officers of the Court, be brought to heel notwithstanding that they had not infringed any legal or equitable right.

The kind of conflict which arose in *Spincode* was that between an individual and an entity. Such conflicts are systemic in modern commerce; see, eg, the simultaneous legal representation of HIH Insurance and individuals on its board of directors. It is arguable that such conflicts degrade corporate accountability by entwining the personal interests of individuals with the business interests of the entity as a whole.

Spincode offers a fundamental re-statement of the basis for principles resolving client–client conflicts of interest. The reasoning draws on a long line of authority. As a decision of the Supreme Court of Victoria, it is binding on lower Victorian courts, there not being a High Court decision on point yet. Australian case law (particularly in Victoria) has departed from the United Kingdom authority; *Spincode* confirms this departure.

Australian courts now appraise client–client conflicts of interest in terms of the professional role and reputation of lawyers. This is an enquiry broader than confidentiality, though such obligations inevitably form a part of it.

3.2.1 Preventing Misuse of Confidential Information

One of the principal justifications traditionally used to deny acting against a former client is that it may allow confidential information about that client gained during previous representation to be inadvertently disclosed to the other side. As such, PCPR 4 prohibits acting against a former client where this is a risk.

4 — Acting against a former client:

A practitioner must not accept an engagement to act for another person in any matter **against**, or in opposition to, the interest of a person ('the former client'):

- (a) **For whom the practitioner** (or, in the case of a practitioner not being a firm, the practitioner's current or former firm) or the former firm of a partner, director or employee of the practitioner or of the practitioner's firm **has acted previously** and has thereby **acquired information personally, confidential to the former client and material to the matter**; and
- (b) If the **former client might reasonably conclude** that there is a **real possibility** the information will be used to the former client's **detriment**.

This Rule was applied in *World Medical Manufacturing v Phillips, Ormonde and Fitzpatrick*. The Court articulates several salient questions when considering conflicts of this kind.

***World Medical Manufacturing Corp v Phillips, Ormonde and Fitzpatrick Lawyers* [2000] VSC 196:**

Reasoning

- (i) Is the former supplier of services **in possession of** information provided by the former client which is confidential and which the former client has not consented to disclosure?;
- (ii) Is or may the information be **relevant to the new matter** in which the interest of the other client is or may be adverse to his own;
- (iii) If the answers to the first two issues are 'yes', then is there a **risk which is real** and not merely fanciful nor theoretical that there will be disclosure?
- (iv) If there is that risk then the evidential burden which is heavy, rests upon the provider of services to establish that there is **no risk of disclosure** and this may be established in exceptional cases by the provision of a '**Chinese wall**' but this is rarely of sufficient protection.
- (v) Should a **permanent injunction** be granted?

3.2.2 Breach of an Obligation of Loyalty

This test is set out by the Court in *Spincode*, quoting from *Wan v McDonald*, wherein it is expressed as applying to circumstances

*where the one solicitor, having acted for both parties, seeks to act against one of his former clients, and in the interest of a preferred client, in **litigation arising***

out of the very matter in which he himself acted for both. *In my opinion, it could only be in a very rare and very special case of this latter kind that a solicitor could properly be permitted to act against his former client, whether or not any real question of the use of confidential information could arise.*²

The assumption underpinning this consideration is that lawyers owe a continuing obligation of loyalty to their clients not to act against their interests — even after representation has ceased.

One (perhaps unintended) consequence of this test of disqualification is that conflicts can be used as a strategy to prevent lawyers for a potential litigant from acting against a party. It is now common practice for major corporations to retain the services of multiple corporate law firms so as to prevent such firms (who commonly represent other corporations) from appearing against them. This makes it more difficult for litigants to sue companies with the resources to secure widespread legal representation.

3.2.3 Officer of the Court

The officer of court test of disqualification relates to the public's interest in the fair administration of justice. It is premised upon the assumption that the public's confidence in lawyers and the legal institution would be undermined if the impression was given that lawyers were able to engage in sophistry and could swiftly and easily change sides.

Brooking JA in *Spincode* explains that whether disqualification is necessary must depend upon the following consideration:

*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...*³

Thus, while there may be no risk of confidential information being disclosed, and no breach of an obligation of loyalty, the solicitors' conduct may nevertheless be 'so offensive to common notions of fairness and justice' that they should, as officers of the Court, be brought to heel notwithstanding that they had not infringed any legal or equitable right (*Spincode* per Brooking JA).

3.3 Examples

- *Village Roadshow Ltd v Blake Dawson Waldron* [2003] VSC 505
 - The firm's original advice to Village concerned a prospectus document, the validity of which another party (for whom the same firm acts) now seeks to challenge
 - There was nothing confidential in the original matter, which concerned publicly available information
 - However, the law firm cannot act for another client and argue that the document which they originally assisted Village in producing is invalid
 - The loyalty and public perception tests thus disqualify the firm from acting
 - ([See further](#))
- *Grimwade v Meagher* [1995] 1 VR 446
 - The public perception test is applied

² *Wan v McDonald* (1992) 33 FCR 491, 517 (Burchett J).

³ *Spincode Pty Ltd v Look Software Pty Ltd* [2001] VSCA 248, 515.

Observing the effect of *Spincode*'s disqualifying tests, it might well be asked: ought lawyers be obliged to maintain such loyalty? Eventually, the harm caused by being unable to represent new clients with contrary interests will outweigh the harmful impression given by 'changing sides'. To preserve the independence and continued capacity of law firms to act effectively, the public perception and loyalty tests should be applied strictly. This is necessary to prevent the misuse of conflict principles by unscrupulous parties seeking to hinder future litigation.

3.4 Chinese Walls

A 'Chinese wall' (or 'Dutch dyke', as it has recently become known) is an information barrier designed to protect the confidentiality of information. It generally takes the form of an internal division in the structure and composition of an organisation. The effect is to separate confidential information related to simultaneous clients with conflicting interests. A successful 'wall' prevents the spread of confidential information and may thus form a shield with which to resist a claim seeking an injunction on the basis of a client–client conflict of interest.

However, Chinese walls are complex to establish and difficult to maintain. There remains a constant thread that information will 'leak' from one side to the other (making the analogy of a dyke particularly appropriate). They are typically used by firms to demonstrate that there is no chance that confidential information could be misused (thereby defeating the primary rationale for prohibiting client–client conflicts).

The Court will examine several factual matters when determining whether a Chinese wall is sufficiently strong to be considered effective (*Prince Jefri Bolkiah v KPMG*).

***Prince Jefri Bolkiah v KPMG* (1999) 1 All ER 517:**

Facts

- This case concerns a Chinese wall erected within an accounting firm, but the principles are analogous in the case of law firms

Issue

- Is the Chinese wall effective?

Reasoning

- In determining whether a wall is effective, the court may look for evidence of:
 - (a) Physical separation of various departments in order to isolate them including separate dining arrangements and other details;
 - (b) Recurring educational programs within the firm that emphasise the importance of not improperly or inadvertently divulging confidential information;
 - (c) Strict and carefully defined procedures for crossing walls and records when it does occur;
 - (d) Monitoring of effectiveness of the wall by compliance officers; and
 - (e) Disciplinary sanctions imposed on staff that breach the procedures.
- The initial onus of proof lies on the plaintiff who seeks the injunction: they must establish that the solicitor has confidential information, and that it is or may be relevant to the new matter
 - This burden is not a heavy one

- Once the plaintiff has established that the solicitor is in possession of confidential information which is or may be relevant to a matter in which he or his firm is proposing to act in a manner adverse to the plaintiff's interests, the evidential burden shifts to the defendant
 - The defendant must show that there is still no risk that confidential information will come into the possession of the solicitors now acting for the other party
 - Prima facie, unless special measures are taken, information moves within a firm
 - It is at this point that the Court must consider the effectiveness of any strategies adopted to preclude the passing of information within the firm
- A Chinese wall will probably only be effective if effective segregation is an established part of the firm's organisational structure
 - Being part of the 'professional culture in which staff work' is insufficient
 - It must be pre-existing to preclude information passing between parts of the business
 - It cannot be dependent on the acceptance of evidence sworn by staff members engaged in the relevant work
- Chinese walls that are set up on an *ad hoc* basis among members of single working group in relation to particular cases will rarely be effective

Decision

Lord Millett: I am not satisfied on the evidence that KPMG have discharged the heavy burden of showing that there is no risk that information in their possession which is confidential to Prince Jefri and which they obtained in the course of a former client relationship may unwittingly or inadvertently come to the notice of those working on the new case. The appeal is allowed and the injunction granted.

Prince Jefri Bolkiah v KPMG was subsequently followed in *World Medical Manufacturing v Phillips, Ormonde and Fitzpatrick* [2000] VSC 196.

Australian Liquor Marketers concerns a law firm acting *for* and *against* the same party in two completely unrelated matters and by two geographically distinct offices.

***Australian Liquor Marketers Ltd v Tasmanian Liquor Traders Pty Ltd* [2002] VSC 324 (14 August 2002):**

Facts

- The Brisbane office of Deacons acts *for* Tasmanian Liquor Traders ('TLT') in a litigation occurring in Queensland against Venacorp
- Later, TLT is engaged in a sale dispute against a third party, Australian Liquor Marketers ('ALM')
- The Melbourne office of Deacons is engaged by ALM to act for them in the dispute
- TLT sues Deacons with the intention of preventing their Melbourne office from representing ALM *against* them

Issue

- Can Deacons be prevented from acting for TLT on the basis that it would be a conflict of interest?

Reasoning

- Here there is no risk of confidential information being exposed
 - The matters are completely unrelated
 - No confidential information was gained during Deacons' first representation of TLT, apart from 'get to know you factors'

- In any case, the geographic separation of the two offices meant that the risk of disclosure was minimal
 - Being in different state offices, and concerning different undertakings, it seems almost impossible that confidential information would be disclosed
 - Though the Court does not call it a Chinese wall, this classification is implicit in its reasoning

- Because the subsequent sale concerns a completely different matter to the original litigation with Venacorp, no obligation of loyalty is breached by allowing subsequent representation against TLT

Decision

- TLT fails: the Court allows consecutive representation for and against TLT