

**SOLICITORS
AND CONFLICTS OF INTERESTS**

A LECTURE

BY

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INTRODUCTION

1. The problems that solicitors face as a result of conflicts of interest and the duty of confidentiality appear to have increased in recent years. Although lawyers' professional rules governing conflict and confidentiality should be in step with the rules laid down by the common law, this has not been the case with the Law Society's rules in recent years with the result that they have been regarded as irrelevant. As new rules for solicitors came into force on 25 April 2006 (now incorporated into the 2007 Code of Conduct which comes into force on 1 July 2007), it is appropriate to look at the common law rules and the new rules to see the extent of the interrelationship. However, in respect of any claims brought against solicitors which relate to matters before 25 April 2006, the common law rules will apply.

COMMON LAW

CONFLICT BETWEEN CLIENT'S INTERESTS AND SOLICITOR'S PERSONAL INTERESTS

2. When there is a conflict between the interest of the solicitor and the client, the solicitor will be in breach of his fiduciary duty. A decision that the solicitor was negligent is not required: **Longstaff v Birtles**¹. Therefore, the lawyer who does his incompetent best for his client is not thereby guilty of a breach of fiduciary duty. The extent of the fiduciary obligation was definitively re-stated by the Court of Appeal in **Bristol & West Building Society v Mothew**² in which Millett LJ held that:

“The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary”

¹ [2001] 1 Lloyd Rep PN 826
² [1998] 1 Ch 1

3. The solicitor who deals directly with the client is likely to have the transaction set aside or, if that is not possible, to pay compensation. The solicitor will be in breach of his fiduciary duty unless he can prove (as the burden will be on him) that the client was given all the relevant information about the contract and that the transaction was fair. The correct course is for the solicitor to refuse to act: **Spector v Ageda**³. If he continues to act, he should ensure that the client obtains independent legal advice: **Longstaff v Birtles**⁴.
4. In **Spector v Ageda**⁵, the solicitor failed in her claim for repayment of the loan to the client. Megarry J. said [at p.46] that:

“Where, however, one of the parties is the solicitor himself, then thesolicitor must be remarkable indeed if he can feel assured of holding the scales evenly between himself and his client. Even if in fact he can and does, to demonstrate to conviction that he has done so will usually be beyond possibility in a case where anything to his client's detriment has occurred. Not only must his duty be discharged, but it must manifestly and undoubtedly be seen to have been discharged. I abstain from any categorical negative: the circumstances of life are of such infinite variety. But I can at least say that in all ordinary circumstances a solicitor ought to a refuse to act for a person in a transaction to which the solicitor is himself a party with an adverse interest; and even if he is pressed to act after his refusal, he should persist in that refusal. Nobody can insist upon an unwilling solicitor acting for him, at all events when there is a conflict of interests”.

5. The result will be the same even though the relationship of solicitor and client has come to an end provided that the relationship of trust and confidence has not come to an end: **Longstaff v Birtles**⁶. The claimants retained the solicitors in their intended purchase of a hotel. That purchase did not proceed. However, one of the partners in the solicitors suggested that the claimant should pay £50,000 to buy into a hotel business of which he was a partner. They were not advised to take independent legal advice. The business was a disaster. The claimants lost their money and employment and became destitute. The evidence was that, had the claimants been properly advised, they would have withdrawn from the transaction.

³ [1973] Ch 30.

⁴ [2001] 1 Lloyd Rep PN 826

⁵ [1973] Ch 30.

⁶ [2001] 1 Lloyd Rep PN 826

6. Their claim for damages was dismissed by the trial judge when the claim was put on the basis that the solicitors' retainer continued after the first transaction fell through. However, they succeeded in the Court of Appeal when they were permitted to amend their claim to plead that the solicitors were in breach of their fiduciary duty to the claimants. The case had to be remitted for assessment of the compensation but the Court of Appeal indicated that it would be substantial and would have to put the claimants in as good a position as that in which they were before the breach occurred [para 36].

7. Mummery LJ gave the following analysis [at paras 1 and 35]:

“[1] A solicitor proposing either to buy property from or to sell property to a client is under a duty to cause the client to obtain independent advice. That duty may endure beyond the termination of the retainer which initially formed the professional relationship of solicitor and client.....,The source of the [fiduciary] 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. As long as that confidential relationship exists the solicitor must not place himself in a position where his duty to act in the interests of the confiding party and his personal interest ... may conflict”

[35] ... This case can and, in my judgment, should be decided on the simple ground that there was a relationship of trust and confidence between the Longstaffs and the solicitors; that that relationship did not cease on the termination of the retainer in respect of the intended purchase ... that during the course of that relationship a personal business opportunity presented itself to the solicitors; that the solicitors took advantage of that opportunity to propose that the Longstaffs buy into the [solicitors' business venture]; that in the context of the relationship the proposal gave rise to a situation in which the duty of the solicitors might conflict with their interest; and that they acted in breach of a fiduciary duty in continuing to deal with Longstaffs, in a situation of a conflict of duty and interest, without insisting that they obtain independent advice.”

8. **Johnson v EBS Pensioners Trustees Ltd**⁷ is an illustration of the considerable complications that can arise when solicitors fail to disclose the true position to their clients. The facts were:

⁷ [2002] 1 Lloyds Rep PN 309

- 8.1 Mr O'Shea and his company, Dufose Developments Ltd, were Mr Johnson's clients. Mr Johnson was a partner in Churchers. Dufose was granted a 21-year lease. Mr O'Shea was a party to the lease as guarantor.
 - 8.2 A £50,000 loan was made to Dufose by private lending clients of Churchers. The repayment of the loan was guaranteed by Mr. O'Shea. A legal charge was granted by Dufose to four named partners in Churchers, including Mr Johnson, in their capacity as trustees for a number of named investors.
 - 8.3 The loan was repayable on demand. Interest was to be paid at a rate of 16% per annum. Mr Johnson did not disclose to Mr O'Shea or Dufose that a service charge of 1.5% on the loan was levied by Churchers on their lending clients.
 - 8.4 Mr O'Shea was a party to the legal charge as a surety and covenanted to comply with its terms.
9. Mr O' Shea sought to have the guarantee set aside on various grounds which included that Churchers had entered into a transaction with him and, in particular, had failed to tell him that the firm stood to benefit from the transaction because it levied a service charge in respect of the interest paid to the lending principals. The Court of Appeal held:
- 9.1 The doctrine of abuse of confidence was not restricted to cases in which property passed. The doctrine applied to the surety covenant because Mr Johnson entered into the transaction with Mr O'Shea on behalf of Churchers' lending clients. Mr O'Shea had no direct contact with those clients and did not know their identity.
 - 9.2 (Mummery LJ dissenting) there was a breach of duty as a result of the non-disclosure to Mr O'Shea of the terms of the service charge and Mr Johnson had failed to prove that the transaction was a fair one having regard to all the circumstances. These terms were material to Mr O'Shea's decision to proceed with the transaction on the terms being offered to him and, therefore, he was deprived of the opportunity of seeking to negotiate a different deal from the one that he accepted in ignorance of the service charge.

9.3 The correct remedy for that breach was an account of the service charge and not rescission of the surety covenant. Rescission was a discretionary remedy and was unavailable when counter-restitution could not be provided and where it was unfair to order it. Mr Johnson's breach of duty was minimal. If the surety covenant had been set aside, Mr O'Shea would have been released from substantial contractual obligations from which he had derived very considerable benefit which would not be restored to the lenders.

Thus, the client who is able to establish a breach of duty will not automatically be entitled to be relieved of the consequences of the transaction into which he entered.

SOLICITOR ACTING FOR CLIENTS WITH DIFFERENT INTERESTS

10. Where the solicitor acts at the same time for two clients with competing interests, his problems may not be limited to those concerning the confidentiality of information. He owes two competing fiduciary duties of loyalty. This is known as an *existing client conflict*. The duty is owed by the firm, so the problem is not solved if a different individual is acting for each client. According to **Mothew**, the lawyer who acts in such circumstances is in automatic breach of fiduciary duty unless he has the informed consent of both clients. This situation is illustrated by the old case of **Moody v Cox**⁸ and the very recent decision of the House of Lords in **Hilton v Barker Booth & Eastwood**⁹.

MOODY v COX¹⁰

11. H was a solicitor. C was his managing clerk. Moody contracted to purchase from H and C, who were trustees, a portion of their trust property which was a public house in Reading. Throughout the transaction, H acted (through C) as solicitor both for the vendors (the trustees) and the purchaser (Moody). C failed to disclose to Moody valuations previously obtained showing that the

⁸ [1917] 2 Ch 71

⁹ [2005] 1 WLR 567

¹⁰ [1917] 2 Ch 71

property was not worth the price which Moody agreed to pay. Moody knew that the vendors were trustees. In the course of the negotiations, Moody offered and C accepted a bribe. In an action by Moody for rescission of the contract on the ground that the solicitor, who was acting for him, had failed to disclose the material facts of the low valuations. The defendants counterclaimed for specific performance.

12. The Court of Appeal upheld the trial judge's decision that Moody was entitled to rescission. The reason was that H, as Moody's solicitor, was bound to disclose to him all material facts relating to the matter, and he was not relieved of that obligation by the fact that he owed a conflicting duty to his cestuis que trust. Also, by claiming specific performance of the contract, which might have been repudiated on the ground of the bribe, the contract was affirmed. Therefore, Moody was not therefore deprived of his equitable right to rescission.
13. Scrutton L.J. stated that: "It will be (the solicitor's) fault for mixing himself up with a transaction in which he has two entirely inconsistent interests, and solicitors who try to act for both vendors and purchasers must appreciate that they run a very serious risk of liability to one or the other owing to the duties and obligations which such curious relation puts upon them".
14. The reasoning depended on the failure by the solicitors to disclose to their client information that it was their contractual duty to him to disclose. The fact that the disclosure of the information would, or might, have placed the solicitors in breach of duties they owed to others did not relieve them of the contractual duties they had undertaken or of the legal consequences of their breach of those contractual duties.

ROYAL BANK OF SCOTLAND v ETRIDGE¹¹

15. A frequent area of potential conflict is when a solicitor acts for a husband and wife, as all too readily there is an assumption that the interests of husband and wife coincide. The classic case in which those interests may well not

¹¹ [2002] 2 AC 773

coincide is where a wife is asked to stand as surety or co-surety for a debt to be incurred by the husband or by the company of which the husband is the controlling shareholder. Although the problems to which I have referred can apply equally to a situation in which the parties are not married and where they are of the same sex, for convenience only, I will refer to the person who is asked to be the surety as “the wife”.

16. In **Etridge**, the House of Lords decided that, rather than the wife having to be seen by another solicitor, it was more advantageous in the first instance for one solicitor to act for husband and wife subject to the following points.

16.1 First, when accepting instructions to advise the wife, the solicitor assumes responsibilities directly to her both at law and professionally.

16.2 Second, these duties are owed to the wife alone so that, when advising her, the solicitor is concerned only with her interests.

16.3 Third, therefore, in every case, the solicitor must consider carefully whether there is any conflict of duty or interest and, more widely, whether it would be in the best interests of the wife for him to accept instructions from her.

16.4 Fourth, if he decides to accept instructions, his assumption of legal and professional responsibilities to her ought, in the ordinary course of things, to provide sufficient assurance that he will give the requisite advice fully, carefully and conscientiously.

16.5 Fifth, if at any stage the solicitor becomes concerned that there is a real risk that other interests or duties may inhibit his advice to the wife, he must cease to act for her.

16.6 Sixth, the wife's consultation with her solicitor is not to be brushed off as a mere formality or a charade. It is in the interests of all the parties involved that the wife should appreciate the significance of what she has been asked to sign so that the transaction may not only appear to be fair but also in fact to be freely and voluntarily undertaken¹².

HILTON v BARKER BOOTH & EASTWOOD¹³

¹² Lord Hobhouse identified a further conflict in the case which was a conflict between the interests of the commercial community and the need to protect vulnerable members of society from oppression or exploitation (para 98).

¹³ [2005] 1 WLR 567

The Facts

17. The facts were:
- 17.1 In 1990, Mr Hilton was a builder and property developer who had a modest and reasonably successful business. He instructed BBE to act as his solicitors in respect of that business.
- 17.2 Mr Hilton was introduced to Mr Bromage via Mr Gorman, a solicitor at BBE. Unknown to Mr Hilton, Mr Bromage had recently been released from prison for an offence of fraud. Mr Gorman had acted for Mr Hilton over the years. BBE acted for Mr. Bromage in connection with fraudulent trading whilst an undischarged bankrupt.
- 17.3 Mr. Bromage told Mr. Hilton that he was interested in purchasing a development from him if he, Mr. Hilton, would develop the site. Mr Hilton was interested. Meetings took place at BBE with Mr Gorman, and, at the point where the transaction was to go ahead, Mr Hilton was referred to another solicitor in the firm. Mr Gorman continued to act for Mr Bromage. As Mr. Gorman knew, Mr. Bromage had no money and was lent the deposit monies (£25,000) by BBE.
- 17.4 BBE did not disclose to Mr. Hilton that they had a conflict of interest because they were acting for Mr. Bromage and lending him the deposit for the purchase from Mr. Hilton, nor did they disclose to him that they knew that Mr. Bromage had been declared bankrupt and was a convicted fraudster.
- 17.5 Unknown to Mr Hilton, Mr. Bromage had also arranged a sub-sale to a Mr. Riley who eventually disappeared to Mozambique. Mr Hilton spent money and energy developing the site and, when it came to completion, Mr Bromage failed to complete and also refused to vacate a caution which had been placed on the title. Only after this point did BBE withdraw from acting for Mr Hilton. Mr Hilton was ruined. The property was sold at a loss. He entered an IVA, his marriage collapsed, and he was also made bankrupt.

The Decision of the Trial Judge

18. In proceedings begun in 1993 by Mr. Hilton against BBE, he alleged that BBE were obliged to tell him to go to other solicitors and to tell him of Mr

Bromage's past although it was conceded that it would have been a breach of the duty owed to Bromage to do so. He claimed that his loss was his loss of profit on the transaction with Mr. Bromage.

19. At the trial in 2001, Mr Hilton did not allege, or seek to persuade the trial judge, that he would have learned about Mr. Bromage's past if BBE had sent him to another firm of solicitors.
20. The trial judge found that, if Mr. Hilton had been informed of Mr. Bromage's antecedents, he would not have become involved in the transaction. He held that BBE were in breach of duty but that the breach had caused no loss:

“...Mr. Hilton was entitled to be placed, and is entitled to be placed, in the position he would have been if he had instructed an independent solicitor. The claim was not advanced that any such solicitor would have been aware or would have become aware of Mr. Bromage's conviction, nor was it suggested that he should have advised Mr. Hilton to have a credit report. In short, Mr. Scott acted in the same way as would such an independent solicitor. It must follow that no loss was caused by the breach of duty.”

The Decision of the Court of Appeal

21. The Court of Appeal dismissed the appeal on the basis that BBE's retainer and duty of disclosure to Mr. Hilton were subject to an implied exclusion of information which BBE were obliged to treat as confidential namely the information which they knew about M. Bromage.
22. The Court of Appeal attempted to grapple with the consequences of a solicitor who appears to owe conflicting duties:
 - 22.1 Morritt V-C considered that there was an implied term that the general duty of disclosure owed to one client was subject to a limitation that it did not extend to information which the solicitors were under an obligation (to another client) not to disclose.
 - 22.2 Judge LJ said that the obligation of disclosure did not extend to information about another client which was legally to be treated as confidential but did not explain why that was the case.

22.3 Jonathan Parker LJ considered that there was no obligation to disclose information that was obtained from another client (without the informed consent of that client), and that any obligation that had otherwise been entered into to do so would be contrary to public policy.

The House of Lords

Submissions

23. In the House of Lords, Mr. Hilton's principal argument was that BBE's duty to him was to reveal the information which they knew about Mr. Bromage and he relied principally on **Moody v Cox**. He also intended to argue that the Court of Appeal approached causation on the wrong basis as the burden was on BBE to prove no loss, not the other way around. Finally, he intended to argue that damages should be approached on the loss of a chance basis. At the hearing, the case was argued orally only on the issue of duty.
24. Although Mr. Hilton had argued that some of the information about Mr. Bromage (i.e. his bankruptcy and his conviction) was in the public domain, these arguments did not appeal to the Lords in the course of submissions. Indeed, Lord Scott made it plain that, as BBE had a duty to act in the best interests of Mr. Bromage, revealing his bankruptcy and convictions to their other client would have been contrary to Mr. Bromage's best interests. Also, he made clear that the Lords considered examination of the law of confidence was a "red herring". Solicitors owe duties to act in the best interests of their clients and, therefore, would have been bound not to have disclosed to Mr. Hilton what they knew which was adverse to their client Mr. Bromage whether in the public domain or not.

The Judgment

25. The House of Lords held:
- 25.1 BBE could not properly act on both sides of the transaction in question and were under a duty to inform Mr. Hilton that they could not act for him and that he should seek legal advice from other solicitors. It was not enough for BBE simply to refuse to act.

25.2 The notion of confidentiality, as generally understood by lawyers, was not really relevant to the issues in the instant case. It was a solicitor's duty to act in his client's best interests and not to do anything likely to damage his client's interests, so far as that was consistent with the solicitor's professional duty. To disclose discreditable facts about a client, and to do so without the client's informed consent, was likely to be a breach of duty, even if the facts were in the public domain. Disclosure by BBE of their client's past would have been a breach of their duty to him.

25.3 The Court of Appeal was wrong to hold that BBE's retainer by Mr. Hilton contained an implied exclusion from the duty of disclosure. Such an implied term would not satisfy the well-known tests for implied terms and would have amounted to H's agreeing that, because his solicitors had failed in their duty to tell him to take separate advice and had instead proceeded to act for him as well as for their client, in a matter in which they had a financial interest, their duty to Mr. Hilton had to be curtailed in order to accommodate their first breach of duty. The notion that one breach of duty by BBE should exonerate them in respect of a subsequent and more serious breach of duty was contrary to common sense and justice. If a solicitor put himself in a position of having two irreconcilable duties it was his own fault. If he had a personal interest which conflicted with his duty, he was even more obviously at fault, **Moody v Cox**¹⁴ applied. BBE were not exonerated from liability by the fact that they could not satisfy their duty both to H and to Mr. Bromage.

25.4 The quantum of damages due to H should be assessed by a judge. After 15 years, it should be on a generous scale.

Comment

26. The decision confirms that, in the absence of express consent, a solicitor (and a barrister) cannot disclose matters learned in the course of a retainer that are or may be detrimental to a client or a former client, whether or not

¹⁴ [1917] 2 Ch 71

those matters can be regarded as “confidential”, and (in particular) whether or not those matters are in the public domain.

27. If a solicitor put himself into a position of having two irreconcilable duties, that is his own fault. The solicitor who has conflicting duties to two clients cannot prefer one to the other. He has to perform both as best he could and “this may involve performing one duty to the letter of the obligation, and paying compensation for his failure to perform the other”.
28. However, if there is a duty in Mr. Bromage’s best interests not to reveal adverse information to Mr. Hilton, how could Mr. Hilton be put into the position that he should be compensated as if he had been given the adverse information? To reach this step requires a duty to have been breached towards Mr. Hilton – i.e. a failure to act in his interests by revealing information which they were required in law to give. The House of Lords did not feel it necessary to analyse the logic too carefully because of **Moody v Cox**. The best way of analysing this is to say that, where a solicitor acts for two parties whose interests conflict, all assumptions necessary in the interests of justice will be made against the solicitor who continues to act for both in breach of the duty not to act where there is a conflict.
29. One of the difficulties with the decision is causation. Even in **Chester v Afshar**¹⁵, the majority decided that the claimant’s loss was caused in law by the defendant’s breach. In this case, however, the House of Lords do not even address questions of causation. It remains to be seen whether lower courts will follow the robustness of the House of Lords in deciding in favour of claimants because (to use the language of Lord Scott at para 8 of his opinion) they are the unfortunate victim and the solicitor has no answer to the claim against them for damages for breach of contract..
30. The “implied term” term theory suggested by Morritt V.C [that the general duty of disclosure owed to one client was subject to a limitation that it did not extend to information which the solicitors were under an obligation (to another client) not to disclose] is unsustainable.

¹⁵ [2005] 1 AC 134

INFORMED CONSENT

31. The principle that a fiduciary cannot act for two clients with potentially conflicting interests without the informed consent of each client is illustrated by **Clark Boyce v Mouat**¹⁶.

32. The claimant agreed to mortgage her house to secure a loan to her son. The solicitor in the defendant firm had agreed to act for both parties and had informed the mother that her position as mortgagor providing the security was substantially different from that of her son as guarantor and recipient of the loan, that she ought to obtain independent legal advice and that he could arrange for her to see a solicitor at a neighbouring firm if she wished. He also pointed out that she would lose her house if her son failed to meet the mortgage repayments. The claimant declined to see another solicitor and the defendant's solicitor then acted for both the claimant and her son and completed the mortgage transaction. The son later became bankrupt with the mortgage payments going into arrears and the claimant was left with a liability to repay the principal sum.

33. It was held that:
 - 33.1 a solicitor could properly act in a transaction for two parties with potentially conflicting interests, provided that he had obtained the informed consent of both parties;

 - 33.2 informed consent meant that each party knew that there was a possible conflict between himself and the other which might result in the solicitor being disabled from disclosing his full knowledge of the transaction or from giving one party advice which conflicted with the interests of the other;

 - 33.3 in determining whether the solicitor had obtained informed consent it was necessary for the Court to determine the precise services required of him by the parties, and in circumstances where the claimant had required the defendant to do no more than carry out a mortgage transaction and explain its consequences, where she had been aware of the consequences of the mortgage default and had

¹⁶ [1994] 1 AC 428

rejected independent advice, there had been no duty on the defendant to refuse to act for her.

34. However, in different circumstances, what a solicitor needs to do to obtain informed consent can be onerous. In **Mahoney -v- Purnell**¹⁷, the solicitor advised the claimant in a letter of his right to seek independent legal advice. The Court accepted that the claimant appreciated that the solicitor was declining to give him general advice about the transaction and that he understood that he could, if he chose, take independent advice. Whilst the solicitor had told the claimant that he could take independent advice, he did not tell him that he should. The Court found that the Claimant was to be classed in the category of an inexperienced, or perhaps vulnerable, client such that the scope of the solicitor's retainer was broader than it would have been for a more experienced client. Mr Justice May said: "There was a plain conflict of interest and [the solicitor] was skating on very thin ice".
35. Whilst the letter written by the solicitor had advised Mr Mahoney of his right to seek independent advice, the Court was not satisfied that the solicitor had impressed on the claimant that he should do so. The Court found that the solicitor's oral advice was no more emphatic than to say to the claimant that he ought to think about getting independent advice. The claimant was not advised that he should. Mr Justice May said:

"... [the solicitor] was obliged in the circumstances to give strong explicit advice which fully explained the conflict and told [the claimant] that he should get independent advice, failing which [the solicitor] would be obliged to withdraw. At the very least it is in my judgment clear that [the solicitor] did not fulfil his **Clarke Boyce** obligations. A solicitor who realises that a proposed transaction is potentially disadvantageous to one of his clients is, in my judgment, obliged to give more than the muted advice which [the solicitor] gave in this case, the more so when that client is potentially at a disadvantage."

CONFLICT BETWEEN LAY CLIENTS

36. In **TSB v Robert Irving & Burns**¹⁸ a firm of defendant professional indemnity lawyers was instructed by insurers to represent them and their insured

¹⁷ [1996] 3 All ER 61

¹⁸ (2000) 2 All ER 826

surveyors in a professional negligence claim. The insurers appeared to confirm cover and the insured thought that policy coverage was no longer an issue. The solicitors nevertheless had continuing doubts over policy coverage and, though they did not mention these to the insured, convened a conference with Counsel at which Counsel was instructed to investigate coverage issues as well as liability issues as between claimant and insured. Information was given by the insured at the conference which had a bearing on coverage. It was held by the Court of Appeal that the insurers could not rely on that information as against the insured in the coverage dispute which followed. By the time of the conference the solicitors were in a position of actual conflict as a result of which the insured could no longer be taken to have waived privilege and to have agreed that all information that the solicitors obtained should be made available to the insurers. Legal professional privilege therefore protected the information which he had disclosed.

37. This case suggests that solicitors (and barristers) acting for more than one client must always be alert to ensure that their clients' interests do not conflict. As well as insurer and insured there are many other categories of clients where the problem might arise – e.g. husband and wife; guarantor and debtor.

POSSESSION OF CONFIDENTIAL INFORMATION

38. The starting point for any discussion of these questions is the decision of the House of Lords in **Bolkiah v KPMG**¹⁹ Prince Jefri had been the chairman of the Brunei Investment Agency ("BIA"), for which KPMG had provided auditing services for many years. Between 1996 and 1998, KPMG also acted for Prince Jefri in respect of a major piece of litigation, in which his assets and their whereabouts was a relevant issue. That litigation was settled in 1998. Shortly thereafter, KPMG was asked by BIA to assist in an investigation as to various transactions, and to assist its lawyers in tracing and recovering assets belonging to it. Some of the confidential information provided by Prince Jefri to KPMG was or might be relevant to the new investigation. KPMG decided that no conflict of interest arose but nevertheless created an information barrier to protect the confidential information in its possession

¹⁹ [1999] 2 AC 222.

relating to the affairs of Prince Jefri.

39. Despite the existence of this Chinese wall, Prince Jefri applied to the court for an order restraining KPMG from acting for BIA on its investigation. By the time the application was heard, 50 partners or employees had clocked up more than 7,500 hours work. The injunction was granted, discharged on appeal and finally restored by the House of Lords.
40. Lord Millett used as his model the solicitor-client relationship. He identified the basis of the court's jurisdiction to intervene on behalf of a former client to be the protection of confidential information. He observed that, in the case of a *former* client, the jurisdiction could not be based upon any conflict of interest because the solicitor's fiduciary relationship with his client came to an end when the retainer was terminated²⁰. The solicitor's only duty was a continuing duty to preserve the confidentiality of information imparted during the subsistence of the solicitor-client relationship.
- 41 Lord Millett held that a claimant seeking relief needed to establish two matters only
- 41.1 That the former professional was in possession of confidential information, to the use or disclosure of which the former client had not consented.
- 41.2 That the information was or may be relevant to the new matter in which the interest of the new client is or may be adverse to his own.

There is no additional requirement that the claimant must prove that confidential information has already been abused. It is for the defendant to prove the absence of risk. The duty of confidentiality is not a duty to take reasonable steps to preserve confidentiality - it is an unqualified duty. The only circumstances in which a former client would not be entitled to relief would be where there was no risk of disclosure. The risk need not be substantial but a fanciful or theoretical risk would not suffice.

42. Lord Millett recognised that this approach was strict, but pointed out that there was no justification for a rule which exposed a former client to any

²⁰ However, Longstaff v Birtles (see above) is a clear Court of Appeal decision to the contrary.

avoidable risk that his confidential information would be abused, whether deliberately or inadvertently. He went on to observe that, where the information was not only confidential but also privileged, the case for a strict approach was unanswerable.

43. As Lord Millett accepted, the evidential burden upon the former solicitor is onerous. He must show that the former client is not exposed to any avoidable risk - including the risk of inadvertent or unwitting disclosure. The former solicitor must show by clear and convincing evidence that effective measures have been taken to ensure that no disclosure will occur. Lord Millett then evaluated the steps taken by KPMG and found them wanting. In particular, the measures were ad hoc rather than part of the firm's organisational structure. Finally, Lord Millett rejected the notion that BIA's interests should be balanced against those of Prince Jefri in deciding whether to grant injunctive relief.
44. In seeking to explain the difference between the **Bolkiah** principle and the general law of confidentiality, it is important to recall that the principle established in **Bolkiah** is modelled upon the solicitor-client relationship. It does not purport to be an incident arising out of the mere receipt of confidential information. If it were to be so treated, the principle articulated by Lord Millett could indeed apply to every employee who received confidential information and then went to work for a competitor. Thus, the receipt of confidential information is a necessary but is not a sufficient condition for the stringent **Bolkiah** principle to become applicable.
45. Lord Millett's model is based upon a relationship which is fiduciary in its nature. He stated at page 236F that

"It is difficult to discern any justification in principle for a rule which exposes a former client without his consent to any avoidable risk, however slight, that information which he has imparted in the course of a fiduciary relationship may come into the possession of a third party and be used to his disadvantage."

Thus, in order to bring the **Bolkiah** principles into play it is necessary to prove not only the receipt of confidential information but also the existence of a fiduciary relationship. This is consistent with the judgement of Lightman J in **In re a Firm of Solicitors** (supra), in which he acknowledged that the

position of a solicitor was extraordinary and special, and one in which the contract of retainer created a close fiduciary relationship (at page 11C-E).

46. Two cases reveal an unsettling difference in the way in which the courts can evaluate the degree of risk.
47. **Davies v Davies**²¹ concerned an application to restrain a solicitor from acting for a husband in divorce proceedings. In 1991, the solicitor was approached by the wife and discussed the state of her marriage. The solicitor was not retained. In 1997, she instructed a different firm of solicitors and petitioned for a divorce. Her husband thereupon retained the original solicitor. Correspondence ensued in which the wife's solicitor invited the husband's solicitor to withdraw. He protested that he had no recollection of ever seeing the wife and had never opened a file. An application to remove the husband's solicitor was made but withdrawn. Nevertheless, the issue resurfaced in the context of costs. The judge held that the application was properly issued because there was a real risk of disclosure. The Court of Appeal upheld that decision. In doing so, Aldous LJ observed that "*The memory was a complex phenomenon. Recall may be conscious or subconscious*".
48. **Davies v Davies** can be contrasted with **In the Matter of T**²². An application made in the course of care proceedings that the advocate appearing for the guardian ad litem should be restrained from appearing because she and/or her firm might be in possession of confidential information in respect of the father. The solicitor in question had indeed acted for the father on a burglary charge some years previously, but she could not remember this. The firm had also acted for the father on other criminal matters including one which did involve the children but the solicitor had no knowledge of these matters. The files had been shredded in 1998 following flood damage. The judge at first instance rejected the father's application, a decision which was upheld on appeal because of facts found by the judge.
49. Viewed in isolation, this decision is entirely unobjectionable. Nevertheless, it is very difficult to reconcile the result in this case with the result in **Davies v**

²¹ [2000] 1 FLR 39

²² [2000] 1 FLR 859

Davies. One might have predicted that if anyone was going to be restrained from acting, it was going to be the solicitors for the guardian ad litem in this case rather than the solicitors for the husband in **Davies**.

50. Over time, the **Bolkiah** principle has been applied by the courts less rigorously (or more sensitively, depending upon your point of view). A number of points have emerged and can be seen as influential in the court's decision:

50.1 The **Bolkiah** principle is not restricted to "same transaction cases". In **Marks & Spencer Group PLC v Freshfields**²³ the Court of Appeal stated that the same principles applied as in conflicts arising from the same matter or transaction, although the Court stated that there must be a "*degree of relationship between the two transactions*". Freshfields had previously acted for M&S and continued to do so. They agreed to act for Mr Green in his proposed acquisition. They argued that there was no existing client conflict because the existing retainers were not material to the issues that arose on the acquisition. This was rejected on the facts, but both courts recognised obiter that some limitation had to be placed on Lord Millett's words in **Bolkiah** when he appeared to say that a firm could *never* act at the same time in an adverse interest.. The Court was satisfied that the contractual arrangements were such an important part of M&S's business that there was a sufficient connection to the bid so as to make the matters related. The judgment makes it clear that a court "*must consider what the relationship is between the two transactions concerned*" and accordingly that a decision will always turn on the facts of each case.

50.2 The **Bolkiah** principle is not restricted to "hostile" actions. In **Marks & Spencer Group PLC v Freshfields** argued that it was premature to grant an injunction until it became apparent whether the bid was a hostile one or was recommended by the board. The Court of Appeal was unimpressed by this argument

50.3 It is no longer critical to the outcome that the information barrier is ad hoc or organisational. In **Bolkiah**, one of the criticisms of the Chinese walls established by KPMG was that they were ad hoc and not

²³ (2004) EWCA Civ 741

organisational. In **In re a Firm of Solicitors**²⁴, Timothy Walker J paid close attention to this point. However, in **Young v Robson Rhodes**²⁵, Laddie J. held that the critical question was not whether the Chinese walls were created before or after the problem had been identified, but whether the information barrier would work. Laddie J interpreted Lord Millett's dictum as meaning merely that organisational barriers were more likely to work than those created to meet a one-off problem.

50.4 The period of time during which the risk would remain in existence can affect whether that risk is characterised as real or fanciful. The Court of Appeal in **In the Matter of T** (supra) took account of the fact the problem had been identified in the course of a hearing and that there were only a few days left of that hearing. Thus, it reinforced the judge's conclusion that the risk was fanciful.

50.5 It is important to an evaluation of the risk to take account of the number of people privy to the confidential information. In **Bolkiah** itself and in **Robson Rhodes** there were a significant number of people who had previously received confidential information. By contrast, in **Halewood International Ltd v Addleshaw Booth & Co**²⁶, **Nick's Sport's v AJ Morrison**²⁷ and **Koch Shipping v Richards Butler**²⁸, the degree of risk was lower because the concern related to a single solicitor.

50.6 The fact that the risk relates to what is or may be in the mind of the solicitor and that documents are not available to refresh his memory is relevant to the degree of the risk (see **Koch Shipping**).

50.7 Significance is attached to the willingness of a solicitor to give undertakings so that the risk is one of inadvertent disclosure (see **Koch Shipping** and **Nick's Sports** - *"The court must to an extent be*

²⁴ [2000] 1 Ll. Rep 31

²⁵ [1999] 3 All ER 524

²⁶ [2000] Lloyds Rep PN 298

²⁷ C.A. unreported. 3.2.00

²⁸ CA unreported 22.7.02

able to accept the assertions of officers of this court that they will do their duty” per Longmore J in the latter case).#

- 50.8 It is open to the court to infer from the solicitor’s inability to recollect that he is not in possession of confidential information (see **In the Matter of T**). However, this was not a finding which had helped the solicitor in **Davies**.
- 50.9 Physical separation is likely to be highly important in many cases, but is not a necessary prerequisite to a conclusion that the risk is fanciful rather than real (see, for example, **Nick’s Sports** in which Longmore J held that there was no real risk even though there was no physical separation of the solicitor in question from the rest of the department).
- 50.10 Occasionally, a court may be able to determine that the confidential information possessed by the solicitor is irrelevant to the issues arising in the new retainer. An unusual example of this is to be found in **Hood Sailmakers Ltd v The Berthon Boat Company Ltd**²⁹. There was a trial of a preliminary issue to determine whether buildings were to be treated as improvements or fixtures for the purposes of the Landlord & Tenant Act 1954. The judge, upon discovering that the tenant’s solicitor had been a partner in the firm which had drafted the lease for the landlord, expressed himself “gobsmacked” and aborted the hearing after two days of evidence and argument. An attendance note revealed that the solicitor had briefly advised the landlord in the original matter. The Court of Appeal looked very closely at the note and the context in which it had been written. It concluded that the material was of no relevance to the particular issue before the court, and thus did not disclose a material conflict of interest. The Court of Appeal was only able to undertake this task because the landlord waived its privilege over the attendance note recording the advice given by the original solicitor. Such a waiver is not a common feature of these cases.

²⁹ C.A. unreported 24.3.99

51. As to the second qualifying condition for the application of the **Bolkiah** principle, the existence of a fiduciary relationship, it is important to remember that fiduciary duties may vary according to what the parties have agreed. This is of particular importance in the present context because it indicates a limiting principle. As set out above, the client can be taken to have consented to his adviser acting for competing clients provided his confidential information is not disclosed to the second client. In addition to lawyers, examples are estate agents, stockbrokers and auditors who can act for two competing clients but are not obliged to disclose to one client the confidential information belonging to another, despite the existence of a fiduciary relationship (see **Kelly v Cooper**³⁰, and **Bolkiah**³¹). In the case of such a relationship, an existing client could not obtain an injunction to prevent the adviser from accepting a second retainer. If so, it would seem to follow that a *former* client could not do so either. Thus, it is not enough to establish receipt of information in the course of a fiduciary relationship. One must go on to look at the content of the fiduciary duty.
52. This analysis is not without its difficulties. In **Davies v Davies**, it was held that there was a real risk of disclosure by a solicitor following a preliminary interview eight years earlier. The **Bolkiah** principle was engaged despite the absence of any retainer. The judgements do not, however, analyse whether in these circumstances a solicitor did indeed come under fiduciary obligations. On the face of it, this was a case in which the solicitor was the mere recipient of confidential information. In **Indata Equipment Supplies Ltd v ACL Ltd**³², the Court of Appeal rejected the argument that the receipt of confidential information created a fiduciary relationship (see pages 256, 262 and 264). The Privy Council reached a similar conclusion in **Arklow Investments Ltd v Maclean**³³. Preliminary discussions between a property developer and a merchant bank, in the course of which confidential information had been imparted, gave rise to a duty of confidence but not to a fiduciary duty. Thus, when the bank subsequently acted for a third party in respect of the same property, there was no breach of fiduciary duty.

³⁰ [1993] AC 205
³¹ per Lord Millett at page 235A-B
³² [1998] FSR 248
³³ [2000] 1 WLR 594

53. If **Davies** is to be treated as a deciding that the **Bolkiah** principle is engaged by the mere receipt of confidential information otherwise than in the course of a fiduciary relationship, then it may be that it is wrong. If, on the other hand, **Davies** is to be taken as deciding, sub silentio, that a solicitor conducting a preliminary interview with a prospective client can thereby become subject to fiduciary obligations, this seems, at first sight, a highly artificial construct. Any fiduciary obligations must have started at the outset of the interview with the wife, and ended with her departure from the solicitor's office. What, one may ask, is the position of a firm which participates unsuccessfully in a beauty contest in which the prospective client explains the nature of the case, the risks, the strategy and so forth? Can participation in a beauty contest give rise to a fiduciary relationship? On balance, it may well do so. At issue is not the duration but the quality of the relationship, which may in an appropriate case lead to the conclusion that the relationship, although fleeting, was nevertheless one of trust and confidence (see **Bristol & West Building Society v Motthew**³⁴).

THE CHANGES TO THE SOLICITORS' PRACTICE RULES

54. On 25 April 2006, with immediate effect, the Law Society brought new rules into force which regulate conflicts of interests and the duties of confidentiality and disclosure. They formed part of the Solicitors Practice Rules 1990 as Rule 16D (conflicts of interest) and rule 16E (duty of confidentiality and disclosure). Chapters 15 and 16 of the Guide to the Professional Conduct of Solicitors (the Guide) which formerly dealt with these issues were repealed. With effect from 1 July 2007, these rules will be Rules 3 (dealing with conflicts) and 4 (dealing with confidentiality and disclosure) of the 2007 Code of Conduct. In addition, there is detailed guidance on each rule of the Code. I refer to the Guidance on Rule 3 as "the Conflict Guidance" and I refer to the Guidance on Rule 4 as "the Confidentiality and Disclosure Guidance". The Law Society is publishing a Companion Guide to the 2007 Code of Conduct but it will not be available until August 2007. When the changes were made in 2006, the Law Society published "Questions, Answers and Examples on the new rules ("the Q & A"). The likelihood is that much that was in the Q & A

³⁴ [1998] Ch 1 at page 18

will be in the new Companion. However, as that is not yet published, I refer in this paper to the Q & A.

55. This is the first time that these issues have been dealt with as statutory rules. Therefore, the courts will enforce them as rules of law. In the past, breach of the rules might lead to a complaint to the Law Society but they would not be directly enforceable in the courts.
56. The reason for the changes was that commercial law practices and their clients found the previous Law Society's rules unworkable in today's legal market. The old rules were said to prevent solicitors from acting where the duty of confidentiality to one client conflicted with the duty of disclosure of all relevant information to another client, without including the possibility that a client can consent to waive either of these duties and may wish to do so. Although the use of information barriers has been recognised by the common law for some time, the previous rules made no such allowance except where firms amalgamated. The relaxation of the rules in this respect is perhaps the most significant aspect of the new rules.
57. The Law Society contended that the new rules reflect the fact that clients' needs, the law and the way in which firms now practice has changed significantly in recent years. Whilst retaining essential client protections, they allow greater flexibility for firms to respond to clients' needs. As the new rules relaxes the old rule in relation to conflict and disclosure so, a solicitor who complied with the old provisions will not be in breach of the new rules.

RULE 3 (CONFLICT OF INTERESTS)

Definition of Conflict of Interests

58. Rule 3.01(1) states that a solicitor must not act if there is a conflict of interests except in the limited circumstances set out in Rule 3.02.
59. Rule 3.01(2) provides that there is a conflict of interests if:
 - 59.1 the solicitor or firm owes separate duties to act in the best interests of two or more clients in relation to the same or related matters and

those duties conflict or there is a significant risk that those duties may conflict:

59.2 the solicitor's duty to act in the best interests of any client in relation to a matter conflicts, or there is a significant risk that it may conflict, with the solicitor's own interests in relation to that or a related matter.

60. The Conflict Guidance states that the definitions in Rule 3.01(2) will encompass all situations where doing the best for one client in a matter will result in prejudice to another client in that matter or a related matter: paragraph 2.

What Is A Related Matter?

61. The definition of conflict in 3.01(2) requires the solicitor to assess when two matters are "related". Rule 3.01(3) makes it clear that, if the two matters concern the same asset or liability, then they are "related". Accordingly, if a solicitor acts for one client which is negotiating with publishers for the publication of a novel, an instruction from another second client alleging that the novel is plagiarised and breaches copyright would be a related matter: paragraph 3 of the Conflict Guidance.

62. If the matters do not involve the same asset or liability, there must be some degree of relationship between the two matters for a conflict to arise. This follows **Marks & Spencer Group PLC v Freshfields.** In each case, it is necessary to make a judgment on the facts and, in doing so, it will always be necessary to take into account whether the firm holds any confidential information from the existing client which would be relevant to the new instructions and, if so, that the firm complies with rule 4.

63. However, it is not enough to ask whether the two matters are themselves related. The solicitor needs to ask himself whether the fact that the firm acts for both clients will affect the advice he would give or the steps he would normally take on behalf of either second client and, if so, whether this would prejudice the interests of the other client.

Examples of Related Matters

64. The solicitor acts for Mr. Jones in connection with his divorce and, quite separately, for Mr. Taylor in connection with his divorce. It has just been discovered that Mrs. Jones is cohabiting with Mr. Taylor although Mr. Taylor played no part in the breakdown of Mr & Mrs. Jones' marriage. Is there a conflict?
65. The Q & A states that there is a conflict. Although, initially, the two matters were unrelated, they have become related as a result of Mrs. Jones moving in with Mr. Taylor because any financial settlement reached in either matter will clearly have an impact on the other.
66. The solicitor has been acting for a wife in connection with matrimonial proceedings which have now been concluded. She has a costs order against the husband. The costs have not been paid. The solicitor is in correspondence with the husband's solicitors concerning the costs. The husband approaches the solicitor to act for him in buying a property. Would there be a conflict of interest in acting for him?
67. The Q & A states that there would be a conflict. Although, on the face of it, the two matters are unrelated, there is a significant risk that a conflict could arise. If the husband fails to pay the costs, the solicitor would have to advise the wife on what steps to take to enforce the order which would include applying for a garnishee order on the purchase monies when the husband puts the firm in funds or taking a charge on the husband's new property. In these circumstances, there is a significant risk that, by acting in the best interests of the wife, the solicitor will be acting to the prejudice of the husband.

Examples of Non-Related Matters

68. The solicitor acts for a company on a dispute with a garage about the cost of repairs to a company car. The firm would not be prevented from acting for a potential bidder for the company, even though the car is a minor asset of the company and would be included in the purchase: paragraph 4 of the Conflict Guidance.

69. If the solicitor acts for a client selling a business, he/she might conclude that the firm could also act for a prospective purchaser on the creation of an employee share scheme which would cover all the entities in the purchaser's group even though the work would perhaps: paragraph 4 of the Conflict Guidance although it adds "perhaps requiring the future inclusion of the target within the scheme and consideration as to whether this raised any particular issues".
70. The solicitor is instructed by X & Co to provide general advice to their HR department in relation to revising the company's staff handbook. Shortly thereafter, the solicitor's firm is asked to act for one of X & Co's former employees, A, in connection with bringing a claim against X & Co for unfair dismissal. Does the firm have a conflict of interest in agreeing to act for A?
71. The Q & A states that there is no conflict as the two matters are not directly related. If A succeeds in his claim against X & Co, that will be prejudicial to it but not in relation to the solicitor's retainer with the company. Similarly, whatever changes are made to the staff handbook will not have any impact on A's claim against the company. That answer assumes that A's claim does not rely on part of the handbook on which the solicitor has advised. The Q & A accepts that (1) it will be a commercial and reputational decision for the solicitor as to whether the solicitor wants to accept instructions against X & Co; and (2) the solicitor will have to consider as a separate issue whether the firm would be putting confidentiality at risk through acting for both parties.
72. The solicitor is instructed by A, who has been dismissed for gross misconduct, in bringing a claim for unfair dismissal against Z & Co. A conflict check reveals that the solicitor's firm is already acting for Z & Co in defending a claim being brought by another employee for unfair dismissal by reason of redundancy. Would there be a conflict in the firm acting for both clients?
73. The Q & A states that there is no conflict because, although both retainers relate to claims for unfair dismissal, the grounds for dismissal are unrelated. However, the solicitor would have to consider whether the firm has confidential information from Z & Co e.g. as to the way in which it deals with claims and, if so, whether the solicitor would be putting that confidentiality at risk by so acting for A. Also, it will be a commercial and reputational decision

for the solicitor as to whether the solicitor wants to accept instructions against Z & Co.

The Exceptions

74. There are two exceptions to the conflict rule: first, when the clients have a common interest exception; and, second, when the clients are competing for the same asset. These exceptions must be “used with caution” and: “It must be emphasised that this is not for the firm’s benefit and clients should not be pushed into agreeing that the firm should act”: paragraph 10 of the Q & A.

The Common Interest Exception

75. A firm is entitled to act for two or more clients in relation to a matter in situations of conflict or possible conflict if:
- 75.1 The different clients have a substantially common interest in relation to that matter or a particular aspect of it.
 - 75.2 All give their written informed consent to the solicitor or the firm.
 - 75.3 It is reasonable in all the circumstances to act for all these clients.
 - 75.4 the solicitor has drawn all the relevant issues to the attention of the clients before agreeing to act or, where already acting, when the conflict arises or as soon as is reasonably practicable, and in such a way that the clients concerned can understand the issues and the risks involved.
 - 75.5 The solicitor has a reasonable belief that the clients understand the relevant issues; and
 - 75.6 The solicitor can be reasonably satisfied that those clients are of full capacity.
76. In order to come within this exception, “there must be a clear common purpose and a strong consensus on how it is to be achieved. However, it will be for you to decide objectively on the facts in each case whether there is a “common interest” and it is appropriate to act. In making this decision, you should always consider whether the clients will be represented even-handedly with equal weight being given to the instructions from each”: paragraph 7(a) (ii) of the Conflict Guidance.

77. When acting under this exception, especially in family situations, the solicitor needs to consider the developing legal position. Courts are likely to make a presumption of undue influence where one of the parties who is considered vulnerable through age or other circumstances places trust and confidence in the other party. In any situation of doubt, it may well be in the best interests of the clients that they are separately represented: paragraph 7(a)(viii) of the Conflict Guidance.
78. Although accepted business practice will be a factor in determining whether an appropriate common purpose exists, the solicitor and the firm should always exercise caution when proposing to act in accordance with 3.02 and should be mindful of the residual test of reasonableness referred to in 3.02(3).

Limiting the Retainer

79. The new rules and the Conflict Guidance (paragraphs 7(a) (VI) and (vii), 13 and 14) contemplate that the solicitor can limit the retainer. In view of the problems that so often arise as to what the solicitor's retainer is, it is clear that, if the limitation is to be effective, the solicitor must be particularly careful to ensure that the limited retainer is confirmed in writing and that the client understands and accepts the limitation. Also, the limitation could only occur where the conflict did not undermine the common purpose.
80. Examples are:
- 80.1 To act for the parties in respect of their common purpose and other solicitors acting for them in respect of the areas of conflict: paragraph 13 of the Conflict Guidance.
- 80.2 Where the solicitor is retained by the owner of a company to advise on its disposal so that he/she would not generally be able to advise another party on the purchase of the company. However, in the hope and anticipation of a successful sale, a seller client which is a sophisticated user of legal services might agree that the solicitor should also accept a limited retainer to provide competition law advice to the prospective purchaser regarding the filings for competition law purposes that would be required in the event that the two businesses were combined: paragraph 7(a) (vii) of the Conflict Guidance.

Common Interest Exception Applies

81. "Common interest" might arise where the solicitor is acting for several members of a family in relation to their affairs or acting for various individuals in the setting up of a company. However, any areas of conflict must be substantially less important to all the clients than their common purpose and may, for example, relate to slightly different views on how the common purpose is to be achieved. It is the solicitor's duty to keep the differences under review with the clients and to decide if the point has been reached when it would be untenable to continue to represent all of them in a fair and open manner or without any of them being prejudiced: paragraph 7(a) (iii) of the Conflict Guidance.

82. There are some multi-party complex commercial transactions, where sophisticated users of legal services, who have a common purpose, may expect a firm to act for two or more parties, because this will facilitate efficient handling of the matter (taking into account amongst other things the desire to complete the transaction quickly, the availability of necessary experience/expertise and the overall costs). Indeed in many cases it may already be accepted business practice for firms to act in this manner. An example is acting for different tiers of lenders (for example senior lenders and mezzanine lenders) and/or different parties (for example arrangers/underwriters and bond/security trustees) in entering into a financing transaction where there is already an agreed or commonly understood structure with regard to the ranking of their respective claims, the content of their respective obligations and associated commercial issues: paragraph 7(a) (iv) of the Conflict Guidance.

83. The solicitor acts for a wife in matrimonial proceedings in which the husband is acting in person. There is a consent order whereby the husband and wife have agreed to sell the matrimonial home and have agreed on the distribution of the proceeds of sale. Both want the firm to act for them in connection with the sale although there is some disagreement about what fixtures and fittings should be included in the sale price. The Q & A states that the solicitor is able to act for both parties because they have a common goal and that the fixtures and fittings dispute is peripheral to the main purpose.

Common Interest Exception Does Not Apply

84. The solicitor is approached by two partners with a view to one buying out the interest of the other in their joint business. They both want the solicitor to act for them. There is a conflict between their respective interests. Can the solicitor act for them under the common interest exception? The Q & A states that the common interest exception does not apply because, although each wants the same end result, their interests in that end result are different. They require negotiation between them and do not have a common interest. The transaction serves a completely different purpose for each client.
85. The solicitor is asked to act for mother and son. The son is taking two loans in connection with his business and it has been agreed that one loan will be secured on the son's flat and the other on his mother's house. Can the solicitor act for both on the basis that they have a common interest?
86. The Q & A states that the common interest exception does not apply. Although the two matters are related, there is a conflict because the solicitor's ability to advise in the best interests of the mother is fettered by the solicitor's duty to act in the best interests of the son. Although the mother is willing to enter into the transaction, she does not have a common purpose with her son because she has no interest in the business. However, it is suggested that the solicitor could act if the solicitor limited the retainer – presumably, as in **Clark Boyce**.

Practical Steps for Dealing with Conflict if Common Interest Exception Applies

87. Either the parties must be advised jointly on their different options in respect of areas where there is disagreement "leaving them to come to some agreement whilst you continue to progress those areas where there is agreement" or, if they cannot agree, each client could be referred to another colleague in the firm for independent advice. The potential for uncertainty and actual conflict in both alternatives suggests that, if the conflict cannot be resolved and it is material, the parties would have to be represented by another firm: paragraph 16 of the Q & A.

88. Where the firm has acted for a family trust for several years and all the beneficiaries, who are of full age, are clear that they do not want to break the trust although each will be affected in different ways if it is broken, the firm could act for all the parties and could arrange for each beneficiary to be independently advised within the firm as to how it would affect them personally. However, the Q & A suggests that the solicitor “would have to keep a very close eye on those areas where there was a conflict and would have to stop acting if the point came when it was no longer tenable to continue acting for all of the clients for example, because the conflict cannot be resolved and threatens the common purpose or because the parties cannot be advised even-handedly”.

The Common Asset Exception

89. Under Rule 3.02(2), a firm is entitled to act for two or more clients in relation to a matter in situations of conflict or possible conflict if:
- 89.1 The clients are competing for the same asset which, if attained by one, will make that asset unattainable to the other client(s).
 - 89.2 There is no other conflict or significant risk of conflict between the interest of any client in relation to that matter.
 - 89.3 The clients have given written and informed consent to the firm acting.
 - 89.4 Unless the clients agree to the contrary, each client has to be advised by a different individual or team of lawyers.
 - 89.5 It is reasonable in all the circumstances to act for all these clients.
 - 89.6 The clients have been fully advised of the issues and the risks involved such that the solicitor has a reasonable belief that the clients understand these issues and that the clients are of full capacity.

Common Asset Exception Applies

90. The ambit of this exception is very narrow. Paragraph 7(b) (i) of the Conflict Guidance states that: “Sub rule 3.02(2) is intended to apply to specialised areas of legal services where the clients are sophisticated users of those services and conclude that rather than seek out new advisers they would rather use their usual advisers in the knowledge that those advisers might also act for competing interests”. Examples given of when the exception might apply are:

- 90.1 Acting on insolvencies so that a firm can act for more than one creditor.
 - 90.2 Acting for competing bidders and/or for those involved with funding of bidders for a business being sold by auction.
 - 90.3 Acting for competing tenderers submitting tenders to perform a contract.
91. The Conflict Guidance appears to give contradictory guidance. At paragraph 7(b) (iii), it states that rule 3.0(2) should not be applied to disputes over assets other than in the context of corporate restructurings and insolvencies. However, paragraph 7(b) (ii) notes that the wording of 3.02(2) is sufficiently wide to permit transactional work in the commercial field where clients can give consent other than in the examples given but suggests that solicitors and their firms should exercise considerable caution when proposing to act in accordance with 3.02(2) in categories of work where to do so is not already accepted business practice. There is no doubt that extreme caution should be exercised when relying on the exception because of the inherent conflict situation and the exception does not apply if the clients are in dispute over the asset.
92. A common asset could be either a tangible object or a business opportunity or a contract: paragraph 7(b) (i) of the Conflict Guidance.

Common Asset Exception Does Not Apply

93. Mrs Smith owns a house. She wants to transfer her property to her son and daughter-in-law who will then take on a mortgage on the property in order to build an extension for Mrs. Smith to live in. All three parties want to instruct the same solicitor. Mrs Smith is adamant that this is what she wants and that the solicitor should act on the basis that he does not give her any legal advice in respect of the merits of the transaction. Is it appropriate for the solicitor to act and for the solicitor to limit his retainer for Mrs Smith in the way suggested?
94. Assuming the exception applies to situations other than corporate restructurings and insolvencies, the Q & A suggests that a solicitor would be ill advised to act for all three because there is clearly a significant potential

conflict between the parties' interests and that Mrs Smith should have an independent solicitor because she is at a disadvantage in relation to her son and daughter-in-law in view of her age, what she is giving up and her vulnerability if she subsequently falls out with them. If, having taken independent advice, Mrs Smith wants the solicitor to act, he could do so by limiting his retainer to preparing the documentation and registering the transfer.

95. The solicitor is asked to act by a husband and wife in obtaining a divorce. They have come to an amicable agreement as to the grounds on which the petition will be presented and they have agreed to split the costs equally. They do not want advice on the ancillaries which they have already dealt with.
96. The Q & A suggests that it is never advisable to act for two parties on opposite sides of a potentially litigious situation even when limiting the retainer. Although the parties have reached a settlement, it might not be a fair one because one party may not have made full disclosure or one party may not have fully understood the consequence e.g. in relation to pension rights.

Informed Consent for Both Exceptions

97. Rule 3.02(4) obliges the solicitor to discuss with the clients the implications of the solicitor, or the firm, continuing to act for all of them. The solicitor must be satisfied that the clients understand the issues and that their consent is independently and freely given. The less sophisticated the client, the more careful the solicitor must be in ensuring that the client fully understands the implications. It will also be essential to ensure that each client is of full capacity and that none is being pressured by the others to give consent. Any explanation must include informing the clients that there may come a point when it is no longer reasonable to act for all their clients because of their conflicting interests with the result that the solicitor may have to cease acting for one or more of them with the resulting delay and extra cost.
98. In order to achieve informed consent, paragraph 10(a) of the Conflict Guidance states that:

- 98.1 The solicitor “should consider” setting out in the initial terms of business letter the issues discussed in relation to the conflict of interests and how that might affect your ability to represent both or all of the clients as the matter progresses. It is surprising that the Conflict Guidance does not make this mandatory.
- 98.2 Extreme caution will be required where one of the clients is particularly vulnerable due to mental health, language or other problems affecting their understanding of the issues, although where a litigation friend acts for a person who lacks capacity they will be able to consent on that person's behalf.
- 98.3 The solicitor must always be alert to situations where a client might be consenting under duress or undue influence and in those circumstances must insist on separate representation. For the avoidance of doubt, and for evidential purposes, the solicitor should always keep a written record of all discussions with the clients about the implications of acting for them.
- 98.4 The solicitor must always obtain all the clients' written consent on each occasion when acting under either of the exceptions.
99. Where seeking informed consent under, the solicitor should identify by name the other clients he/she or the firm propose(s) to act for, or be able to do so when their identities are known. Provided that this is done and the requirements of rule 3.02(4) are complied with, the obligation to obtain "informed" consent in 3.02(2) (b) will have been satisfied: paragraph 10(b) of the Conflict Guidance. However, where consent is sought under 3.02(2), the solicitor needs to comply with the requirements of 3.02(4) but the solicitor need not identify by name the other clients he/she or the firm propose(s) to act for.

When is it Reasonable to Act if the Common Interest Exception Applies?

100. Reasonableness is an important rider to 3.02 so that, in some situations even though there is compliance with 3.02, it would still not be reasonable to act. The apparent unequal bargaining position of the parties, concerns about the

mental stability of one of the parties, a family arrangement where an elderly parent is providing security for their son's or daughter's business loan, and the importance of one of the clients to the firm may all be situations where instructions to act for both or all parties should be declined: paragraph 8 of the Conflict Guidance.

101. Having accepted instructions, the solicitor must be satisfied that he/she can act even-handedly for both or all clients and that, taking into account any limitations in a specific retainer, he/she does not favour one at the expense of the other(s): paragraph 8 of the Conflict Guidance.
102. The criterion against which reasonableness will be judged is whether one client is at risk of prejudice because of the lack of separate representation. In relation to all situations where the solicitor is proposing to act for two or more clients under the provisions of 3.02, the onus is on the solicitor to demonstrate why it was reasonable to act for all the clients at the time the instructions were accepted. Above all, the solicitor must be satisfied that unfettered advice can be given, without fear or favour, to the clients. The solicitor must also keep under review whether it remains reasonable to continue to act for them and he/she must also have regard to Rule 1.04 (Best interests of clients) which requires him/her to act in the best interests of each of the solicitor's clients: paragraph 9 of the Conflict Guidance.

Solicitor's Interest Conflicting with Client's Interests

103. The guidance issued in 2006 stated that, in respect of any conflict between the solicitor's interest and that of the client is concerned, the rule and its application are intended to follow the common law: paragraphs 40-55. Although that statement does not appear in the Conflict Guidance, it applies equally to rule 3.01 (2). The Conflict Guidance emphasises that the rule applies not only where the solicitor dealing with the matter has a personal interest but, also, where another person working in the firm has an interest of which the solicitor is aware so that it impairs the first solicitor's ability to give independent and impartial advice: paragraph 48. It also emphasises that, where the client is advised to seek independent advice, that means both legal advice and, where appropriate, competent advice from a member of another profession e.g. a chartered surveyor: paragraph 46.

104. Examples identified in the Conflict Guidance are:

104.1 The solicitor should never enter into any arrangement or understanding with a client or prospective client prior to the conclusion of a matter (whether contentious or non-contentious) under which he/she acquires an interest in the publication rights with respect to that matter: paragraph 42.

104.2 Although the solicitor is entitled to take security for costs, he/she should be aware of the risk of the court finding undue influence. Therefore, before taking a charge over a client's property it is advisable, therefore, to suggest the client consider seeking independent legal advice. Such advice would not normally be essential unless the terms of the proposed charge are particularly onerous or would give the solicitor some unusual benefit or profit. It is, however, important always to ensure that the client understands that a charge is being taken and the effect of such a charge: paragraph 43.

104.3 Interests are not solely economic and so the Conflict Guidance advises that, if the solicitor becomes involved in a sexual relationship with the client, he/she must consider whether this may place his/her interests in conflict with those of the client or otherwise impair his/her ability to act in the best interests of the client: paragraph 49.

DUTIES OF CONFIDENTIALITY AND DISCLOSURE

Introduction

105. Rule 4 is the new rule which applies where the firm possesses confidential information belonging to one client which is relevant to another. Solicitors must keep the affairs of clients and former clients confidential except where disclosure is required or permitted by law or by the client or former client: rule 4.01. By rule 4.02, there is also a duty to disclose to the client all information of which the solicitor is aware which is material to that client's matter regardless of the source of the information subject to:

105.1 The duty of confidentiality.

105.2 Where such disclosure is prohibited by law.

105.3 Where it is agreed expressly that no duty to disclose arises or a different standard of disclosure applies.

105.4 Where the solicitor reasonably believes that serious physical or mental injury will be caused to any person if the information is disclosed to a client.

Therefore, where there is a conflict between a solicitor's duty to disclose information to one client and the duty of confidentiality to another client, it is the duty of confidentiality which will be paramount.

106. In this section, the first client refers to the existing or former client to whom the firm owes a duty of confidentiality and the second client refers to an existing or potential new client to whom the information is material.

107. By rule 4.03, if the solicitor or firm holds confidential information in relation to the first client (whether an existing or former client), they must not risk breaching confidentiality by acting (or continuing to act) for the second client where:

107.1 The confidential information might reasonably be expected to be material; and.

107.2 The second client has an interest adverse to the first client's interest unless the solicitor can put the arrangements set out in rules 4.04 or 4.05 in place.

108. Although the rules do not define adverse interest, the Confidentiality and Disclosure Guidance states that the intention is to mirror what is considered adverse at common law as laid down in **Bolkiah**. Also, it states that adversity arises when one client is or is likely to become the opposing party to the other party in a negotiation or some form of dispute resolution: paragraph 28. The example given is the firm acted for a client in a criminal case in which the client was convicted of assault. If the client's wife, unaware of the conviction, then wished the solicitor to represent her in divorce proceedings, he/she would have to refuse the instructions. The confidential information held about the husband would be material to her case and, if so, her interests would be adverse to his.

of duty, the solicitor should refuse the instructions or, if already acting, immediately cease to act for that client. Any delay in ceasing to act is likely to increase the risk that you are liable for breach of duty: paragraph 23.

- 112.2 The solicitor should not seek to pass the client to a colleague (who would not be bound by the same duty because he or she is personally unaware of the material information) unless the client agrees to this, knowing the reason for the transfer and, if the solicitor has already started to act for the client, agreeing that he/she is released from his/her duty to disclose up to the time when you personally cease to act for the client on that matter. Further, the solicitor should consider carefully whether, even if these conditions are satisfied, it is appropriate for any members of the firm to act. A firm which holds information which it cannot convey to a client but which, if known to that client, might affect the instructions to the firm in a material way will usually be in an invidious position and quite possibly unable to act in the best interests of the client: paragraph 24.

End of Conflict Checks?

113. The new rules do not mean the end of conflict checks. Even though the solicitor for the second client would not be in breach of duty if he did not know of information, the solicitor could still be prevented from acting for the second client, or from continuing to act, if another solicitor in the firm has confidential information about the first client which could be material to the second client's retainer.

Practical Consequences

114. Paragraph 31 of the Q & A suggests that:
- 114.1 The conflict checker should not be the second client's solicitor. If the checker identifies that the firm has or may have material confidential information, the firm will have to evaluate on behalf of the solicitor who might be acting for the second client whether the firm would be in breach of the duty not to put confidentiality at risk if that solicitor were to act for the second client.

- 114.2 In order to evaluate those risks, the checker must speak to the solicitor for the first client, consider the first client's file and consider the information that the solicitor for the second client has and, in doing so, must ensure that there is no disclosure of information between the two solicitors.
- 114.3 The checker must be an experienced legal practitioner.
- 114.4 In smaller firms, this procedure may well cause difficulties such that they may find it easier to decline to act.

Information Barrier

- 115. By Rules 4.04 and 4.05, firms may use information barriers in limited circumstances where, but for the use of the barrier, the firm could not act. Paragraph 35 of the Q & A suggests that the use of an information barrier is only appropriate "where the clients are sophisticated users of legal services and capable of fully appreciating the risks. Further, this is a device to be used for the clients' benefit because it is something they want and not purely because it enables the firm to accept new instructions".

Information Barrier – First Exception

- 116. By rule 4.03, the firm may act where both clients gives informed consent to the firm acting or continuing to act only if:
 - 116.1 The client for whom the solicitor acts or is proposing to act knows that the firm, or a member of the firm, holds, or might hold, material information in relation to their matter which he/she cannot disclose.
 - 116.2 The solicitor has a reasonable belief that both clients understand the relevant issues after these have been brought to their attention;
 - 116.3 Both clients have agreed to the condition under which the solicitor will be acting or continuing to act: and
 - 116.4 It is reasonable to act.

It is obviously good practice that the consent is in writing although, oddly, the Rules do not require it.

- 117. An obvious problem here is that "informed consent" may be difficult to obtain because of the restrictions on what can be told to either client. If that means

that, in fact, the consent cannot be “informed”, the new instructions will have to be refused. Both clients must know the potential risks if the firm continues to act and those risks will include the possibility that the firm may have to cease to act.

118. The Confidentiality and Disclosure Guidance deals in detail with the issue of informed consent. It acknowledges that one of the difficulties with seeking such consent of the client is that it is often not possible to disclose sufficient information about the identity and business of the other client without risk of breaching that other client's confidentiality. The solicitor will have to decide in each case whether he/she is able to provide sufficient information for the client to be able to give “informed consent”. Every situation will be different but generally it will be only sophisticated clients, for example, a corporate body with in-house legal advisers or other appropriate expertise, who will have the expertise and ability to weigh up the issues and the risks of giving consent on the basis of the information they have been given. If there is a risk of prejudicing the position of either client then consent should not be sought and the solicitor and the firm should not act. It may, however, be possible to give sufficient information to obtain informed consent even if the identity of the other client(s) and the nature of their particular interest(s) are not disclosed. Wherever possible the solicitor should try to ensure that the clients are advised of the potential risks arising from the firm acting before seeking their consent: paragraph 35.
119. It is also suggested that, in the case of sophisticated clients only, it may be possible to seek consent to act in certain situations at the start of and as a condition of the retainer and to do so through standard terms of engagement. For example, a sophisticated client may give its consent in this way for a firm to act for a future bidder for that client if, when the bidder asks the firm to act, a common law compliant information barrier is put in place to protect any of the client's confidential information which is held by the firm and which would be material to a bidder: paragraph 36.

Information Barrier – Second Exception

120. By rule 4.05, the firm may continue to act for the second client on an existing matter, or on a matter related to an existing matter, in the circumstances

otherwise prohibited by rule 4.03 above without the consent of the first client for whom the firm, or a member of the firm, holds, or might hold, confidential information which is material to your client but only if:

120.1 It is not possible to obtain informed consent from the first client for whom the firm, or a member of the firm, holds, or might hold, material confidential information.

120.2 The second client has agreed to the solicitor acting in the knowledge that the firm, or a member of the firm, holds or might hold material information in relation to the client's matter which cannot be disclosed;

120.2 The safeguards to protect the first client's confidential information comply with the standards required by law at the time they are implemented are put in place;

120.3 It is reasonable in all the circumstances to act.

However, paragraph 37 of the Q & A states that: "...you must never underestimate the severity of the protections required by the law to put in place an information barrier without [first client's] consent. These will be beyond the capability of most firms." It also advises that the first client must be told that an information barrier has been put in place and what steps have been taken.

121. If the first client is an existing client, it is highly unlikely that the firm would continue to act for the second client.

Safeguards for Information Barriers

122. Although rigid safeguards have not been prescribed by the new rules, a number of factors (derived from the common law) are in the Confidentiality and Disclosure Guidance as normally appropriate to demonstrate the adequacy of an information barrier.

123. The Confidentiality and Disclosure Guidance sets out two lists of arrangements in relation to information barriers. The first is a list of arrangements, some or all of which it might be appropriate to agree in a situation where both clients consent to the firm acting. The second is a list of further arrangements which may also be appropriate particularly where the consent of both clients cannot be obtained.

124. The following safeguards are proposed for both sets of situations. They are (again referring to the second client and the first client):
- 124.1 The second client who might be interested in the confidential information acknowledges in writing that the information held by the firm will not be given to him.
 - 124.2 The 'Restricted Group' (i.e. the group holding the relevant confidential information) will be identified and have no involvement with or for the second client.
 - 124.3 No member of the Restricted Group should be managed or supervised in relation to that matter by anyone from outside the Restricted Group.
 - 124.4 Confirmation from the Restricted Group members at the start of the engagement that they understand that they possess or might come to possess information which is confidential and that they must not discuss it with any member of the firm unless that person is, or becomes a member of the Restricted Group, and that the obligation will be regarded by everyone as on-going.
 - 124.5 Confirmation from the Restricted Group members at the start of the engagement and the setting up of the information barrier that they have done nothing to breach it.
 - 124.6 Only Restricted Group members to have access to the confidential documents.
125. The following safeguards are suggested as "appropriate and might in particular be necessary where acting" when the first client does not consent:
- 125.1 Physical separation of the Restricted Group from those acting for the second client e.g. being in a separate building or on a separate floor or in a segregated part of the office and that some form of access restriction is put in place to ensure physical segregation.
 - 125.2 Separate computer networks or password protection.
 - 125.3 A statement by the firm that it will treat any inadvertent breach as a serious disciplinary offence.

- 125.4 Each member of the Restricted Group issues a written statement at the start of the engagement that they understand the terms of the information barrier and will comply with them.
- 125.5 The firm will do nothing to prevent compliance.
- 125.6 The firm identifies a specific partner or other appropriate person in the Restricted Group with overall responsibility for the information barrier.
- 125.7 The firm provides formal and regular training on duties of confidentiality and responsibility under information barriers and will ensure that such training is provided prior to the work being undertaken.
- 125.8 The firm implements a system for the opening of post, faxes and distribution of email which will ensure that confidential information is not disclosed to anyone outside the Restricted Group.
126. It is just over a year since the new rules came into operation and so too short a time to know their effect. It will be interesting to see the extent to which the rules work in practice and, when they do not, whether disgruntled clients rely on the rules or common law or both when seeking a remedy in the courts.

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