

CONFLICTS OF INTEREST : THE NEW ZEALAND PERSPECTIVE

By

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Introduction

The conference brochure set the scene for this session by drawing attention to the tension between large law firms, which are often asked by commercial clients to undertake multiple roles in large non-litigious transactions, and corporate counsel, who are taking an increasingly conservative attitude to potential conflicts. My task is to comment from a New Zealand perspective on this topic.²

I begin by trying to inject some conceptual clarity into the debate on conflicts of interest – at least as far as I can, the area not being easily amenable to rigid classification.³ I deal first with the situation as it relates to current clients, move on to successive representation and then provide some thoughts on the situation of large firms. In the next section, I examine in more detail the decision in *Russell McVeagh McKenzie Bartleet & Co v Tower Corporation*.⁴ I then provide some comments on Associate Professor Aitken's paper.⁵ Finally, I offer some thoughts on whether or not the tension between law firms and corporate counsel is well founded.

¹ Judge of the New Zealand Court of Appeal. This paper was presented at the 23rd Annual Banking & Financial Services Law & Practice Conference held at Surfers Paradise on 11-12 August 2006. I express my gratitude to Justice Paul Heath and to Professor Paula Baron of Victoria University for their helpful comments on the first draft of this paper. I also acknowledge the help of our long-suffering librarian, Clare Gleeson, and the work of my clerk, Claire McGuinness, in particular on the appendices. The views expressed in this paper are my own, as are any remaining errors.

² The keynote address in this session was given by Associate-Professor Aitken of Sydney University. The other commentator was Mr David Krasnostein, Chief General Counsel, National Australia Bank, Melbourne.

³ This does not purport to be a full treatment of this topic. For a recent text, see Hollander and Salzedo *Conflicts of Interest & Chinese Walls* (2ed 2004). See also Finn "Conflicts of Interest and Professionals" presented at Legal Research Foundation Seminar on Professional Responsibility (28-29 May 1987), Dal Pont *Lawyers' Professional Responsibility in Australia and New Zealand* (2ed 2001) at 181 and 201 and Webb *Ethics, Professional Responsibility and the Lawyer* (2ed 2006) at 235 and 307.

⁴ [1998] 3 NZLR 641 (CA). In that case, the majority judgment was given by Henry J (writing for himself, Richardson P and Gault J), with Blanchard J concurring and Thomas J dissenting.

⁵ These comments are based on the version of Associate Professor Aitken's paper that was presented at the conference on 11 August 2006.

Current clients

Turning first to the question of duties to current clients, I start with the obvious point that lawyers⁶ are fiduciaries, subject to fiduciary obligations. What does this mean? In the context of lawyers' professional ethical obligations and the jurisprudence on conflicts of interest, two duties in particular are relevant – the duty of loyalty and that of confidence.

I put the duty of loyalty first because much of the confusion in this area arises, I think, because of undue concentration on confidential information. Admittedly, concentration on the duty of loyalty may, with some justification, be thought to do little to alleviate the confusion as the scope of that duty is uncertain.

As a general definition, the duty of loyalty requires lawyers to act single-mindedly and disinterestedly in the interests of their clients. They must put all their skills and knowledge at the disposal of their clients, share with their clients all information⁷ they have that may be of interest to those clients and not undertake any other activities⁸ that could distract them from the pursuit of their clients' interests.⁹

Put this widely, it might be thought impossible for lawyers to have more than one client. Lawyers do have multiple clients and, unless they are all breaching the duty of loyalty as a matter of course, the duty must be limited in some manner and it is. Take the requirement for lawyers to share all information with the client and to put all their skills and knowledge at the client's disposal. Although there are cases that, at first blush, may appear to

⁶ I concentrate on lawyers in this paper but many of the comments apply equally to accountants (particularly if they are acting in a litigation support role) and to other advisors (including banks), albeit in some respects in an attenuated form. This paper deals with client/client conflicts and not with lawyer/client conflicts.

⁷ See Sir Robert Megarry's comments in *Spector v Ageda* [1973] Ch 30 at 48. I note that Dal Pont *Lawyers' Professional Responsibility* at 151 treats the duty of disclosure as a separate duty from that of loyalty. According to Dal Pont, the duty of disclosure has three distinct components – the disclosure of lawyer/client conflicts of interest, the disclosure of information in the lawyer's possession material to the representation and the duty to account for moneys held on behalf of others and for fees chargeable to the client.

⁸ This includes acting for multiple clients whose interests may conflict. This is because no lawyer can give undivided loyalty in such circumstances as he or she may be placed in a position where to advise or act in the interests of one party could be contrary to the interests of the other. See Dal Pont and Chalmers *Equity and Trusts in Australia* (3ed 2004) at para 4.115 at 105.

⁹ The duty of loyalty may, however, be subjugated in some cases to higher duties – for example the duty owed to the court. See Webb at para 5.10.2 at 204 - 206.

make the duty wider, it is usually agreed that the duty relates only to information, skills and knowledge related to the particular matter for which the lawyer is engaged. The duty of loyalty is thus constrained by the scope of the retainer.¹⁰

For example, there is a line of cases where lawyers have acted for both lender and borrower and have been held not to be in breach of the duty of loyalty when they did not pass on information about the borrower's financial status. Although not without their difficulties, these cases can be explained on the basis that the retainer for the lender covered only the loan documentation and matters relevant to the security but did not extend to advice on the credit status of the borrower.¹¹

This also explains the case of *Clark Boyce v Mouat*¹² where it was held that the retainer of the lawyer in that case related only to documentation and not to advice on the wisdom of the transaction.¹³ Despite the decision in *Clark Boyce*, it is fair to say that courts are much more likely to hold there to have been a limited retainer in cases involving commercial rather than personal clients.¹⁴

It follows from the above that there is nothing to stop lawyers acting for clients (even if they are commercial competitors and even without consent) on unrelated¹⁵ and non-contentious matters, as long as information received under one retainer is not relevant to the other (so that no duty of disclosure arises).

¹⁰ For a discussion of this topic in a New Zealand context see Butler (ed) *Equity and Trusts in New Zealand* (2003) at para 14.3.2.

¹¹ See the discussion in Hollander and Salzedo at paras 5-07 – 5-48 at 89 - 106. See also Hollander "Conflicts of Interest and the Duty to Disclose Information" (2004) 23 CJK 257, which discusses the mortgage lending cases as a discrete line of authority.

¹² [1993] 3 NZLR 641 (PC).

¹³ The case concerned a solicitor acting both for a son (who was borrowing money to do alterations to his house), and for his mother (who was guaranteeing the loan, the guarantee being secured by a mortgage over her house). The mother was, on a number of occasions, advised to get independent advice but she chose not to do so.

¹⁴ See for example *Day v Mead* [1987] 2 NZLR 443 (CA) where the solicitor was a friend and had acted for the client for 25 years. In that case, the Court found that the lawyer was in breach of his fiduciary obligations when he advised his client to invest in a company. It was not sufficient for the lawyer simply to explain to the client that he was a director and shareholder of the company. Rather, the lawyer should have referred the client to an independent adviser and informed him of the management and financial difficulties which the company faced.

¹⁵ I use the term unrelated to mean matters where no conflict of loyalty arises in the sense that a lawyer does not risk feeling constrained in advice or actions on behalf of one client because of his or her duties to another client. See the discussion in Hollander and Salzedo at para 11-23D at 198.

Lawyers may even arguably act both for and against a current client on unrelated contentious transactions, subject again to information received on one transaction not being relevant to the other.¹⁶ This is, however, also subject to a possible obligation to disclose the fact of the other retainer if that retainer is material. This possible obligation is based on Thomas J's dissenting judgment in *Russell McVeagh*¹⁷ and is designed to allow clients the choice of taking their business elsewhere if their lawyer accepts a retainer to act against them, even in an unrelated matter.¹⁸

There is also nothing to stop lawyers acting for multiple clients¹⁹ in situations where there is a possible potential conflict²⁰ between their interests, as long

¹⁶ Dal Pont in *Lawyer's Professional Responsibility* at 186, referring to the guarded approval of this practice in *Canadian Pacific Railway Co v Aikins, MacAulay & Thorvaldson* (1998) 157 DLR 473 at 484, points out that there are dangers with this approach in that the firm may nonetheless access information which could be useful against one or both clients. In *Australian Liquor Marketers Pty Ltd v Tasman Liquor Traders Pty Ltd* [2002] VSC 324 Deacons Lawyers was acting for TLT in one proceeding in Queensland and for ALM in an unrelated proceeding against TLT in Victoria. In refusing TLT's application to restrain Deacons from further acting for ALM, the Court emphasised the following factors at [26]: the two proceedings were truly unrelated; there was no question of any confidential information having been obtained by Deacon; the nature of the disputes involved in the two proceedings; the fact that one proceeding was being handled in the Brisbane office of Deacons and the other in the Melbourne office; and the assurances given by Deacons that appropriate safeguards would be put in place.

¹⁷ Thomas J (at 656 and 663) considered that Russell McVeagh was under an obligation to inform Tower (which was a current client) that it was proposing to accept instructions from GPG with regard to a hostile takeover of Tower. He considered that such an obligation arose out of the duty of loyalty, trust and confidence which is integral to the fiduciary relationship between solicitor and client. The firm was under a recognised duty to disclose all material information in its possession relevant to the client's affairs and, in Thomas J's view, this must include all matters which would or might bear on the taxation retainer or its continuation. He said that, in addition to considering whether there is a conflict of interest or a risk of the client's information being disclosed, the law firm must address whether the client would or might object to the new instruction, wish to discontinue its retainer or to modify or adjust that retainer. This latter point receives some support from Rule 1.05 of the NZLS Rules of Professional Conduct (see Appendix One to this paper). The majority in *Russell McVeagh* stated at 648 – 649 that it could not assist Tower to classify the duty as one to disclose to Tower the proposal to accept instructions from GPG for two reasons. First, Tower's right to prohibit Russell McVeagh from acting could only arise if there would be an unacceptable conflict of interest, which in this case turned on the risk of disclosure of confidential information. If that disappears, the right to prohibit future representation also disappears. Secondly, injunctive relief restraining further conduct which is not in itself in breach of a plaintiff's continuing right cannot be justified in principle.

¹⁸ Issues may arise as to whether compensation would have to be paid for what could be seen as the effective constructive termination of a retainer in such circumstances – see the discussion in Hollander and Salzedo at paras 2.22 - 2.24 at 16 - 17.

¹⁹ A blanket rule prohibiting multiple representation would clearly be against public policy. As pointed out by Hammond J in *Taylor v Schofield Peterson* [1999] 3 NZLR 434 at 439 (HC), from an economic perspective, a requirement for independent representation may represent few (if any) benefits to compensate for the significant increase in legal expense. There can also be benefits of efficiency, particularly in straightforward transactions, in allowing one firm to act for multiple parties. It thus makes sense to allow clients the right to choose to be represented by one firm in such circumstances, subject to ensuring that they are told of the risks. Dal Pont in *Lawyers' Professional Responsibility* at 188 - 9 sets out, however, some of the possible drawbacks of multiple representation from the lawyers' point of view. The disadvantages include, for example, that the standard of skill and care required of a lawyer who acts for two or more parties is at least as great as that which would be required of a lawyer who acts for one party alone and it is no excuse for a lawyer who has placed himself in a position of conflicting responsibilities to plead that his duty to one of the parties prevents the fulfilment of the duty owed to another.

²⁰ Common situations where lawyers will act for multiple parties include conveyancing transactions, joint ventures and trusts (where the same firm may act for both trustees and beneficiaries). Lawyers will also often be called upon to bring actions in the name of the insured on behalf of an insurer. For the issues that can arise in the latter regard see Chapman and Mallon "Conflicts of Interest Faced by Solicitors Instructed by Insurers to Conduct Litigation on Behalf of Insureds" (1996) 26 VUWLR 679. See also Hollander and Salzedo at paras 11-38 – 11-42 at 209 - 211 and Shirvington *Ethics and Conflict of Interest and Duties* (Law Society of New South Wales 2006) at 47 – 49, available at <http://www.lawsociety.com.au/page.asp?partid=18097> (last accessed 4 September 2006).

as each client gives their fully informed consent.²¹ If the potential conflict is realised, however, there will come a point where the lawyer cannot continue to act (and usually for either party)²² and this likely applies even if there is consent and despite the existence of any information barriers.²³

The other relevant duty is that of confidentiality.²⁴ This is an absolute duty. It is seen as the cornerstone of the lawyer/client relationship and as being essential to the proper administration of justice. It encourages clients to disclose all relevant facts so that the lawyer's advice will be given on the basis of full information. The importance of the duty of confidentiality is reinforced by the doctrine of legal professional privilege. It will be obvious that the duty of confidentiality to one client can conflict with that of disclosure to another client.

Acting against former clients

I now turn to the issue of successive representation. The House of Lords held in *Prince Jefri Bolkiah v KPMG*²⁵ that general fiduciary duties do not survive the termination of the retainer and that the only duty relevant to successive representation is that of confidence. The duty of confidence is, however, coloured by the prior duty of loyalty and this means that a lawyer's duty of

²¹ It is not enough merely to disclose the fact of multiple representation. At least for commercially unsophisticated clients, a full explanation must be given of the fact that the lawyer may not be able to disclose all relevant information and that he or she might be disabled from giving advice which conflicts with the interests of the other party – see the remarks of the Privy Council in *Clarke Boyce v Mouat* [1993] 1 NZLR 641 at 646. These comments were affirmed in *Taylor v Schofield Peterson* at 440. In that case, the Court held that the client did not give informed consent to the solicitor acting because the client was not given a proper explanation as to the nature and effect of a conflict of interest and the necessity of independent legal advice.

²² Rule 1.07 of the New Zealand Rules of Professional Conduct for Barristers and Solicitors (7th edition) states that in the event of a conflict or likely conflict of interest among clients, a practitioner shall decline to act further for any party in the matter where so acting would or would be likely to disadvantage any of the clients involved. In England and Wales the Solicitors' Practice (Conflict) Amendment Rule 2004 prohibits a solicitor from acting if there is a conflict of interest, except in certain defined circumstances. The Rule also provides that if, during the course of acting for more than one client in a matter, a conflict arises between the interests of two or more of those clients, the solicitor may only continue to act for one of the clients provided that the duty of confidentiality to the other client is not put at risk. See also Dal Pont *Lawyers' Professional Responsibility* at 200 and *Shirvington* at 27.

²³ See the comments of Richardson J in *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83 at 90. The narrowing of the scope of a retainer may in some circumstances, however, mean that an actual conflict does not arise. See Dal Pont *Lawyers' Professional Responsibilities* at 190 - 192 for a discussion of the issues that can arise even where there is consent to the representation of multiple parties in a situation of conflict or potential conflict.

²⁴ See Finn, "Professionals and Confidentiality" (1992) 14 Syd LR 317, Dal Pont *Lawyers' Professional Responsibility* at 263 and Webb at 275.

²⁵ [1999] 2 AC 222 at 235.

confidence is more stringent²⁶ than in cases where the duty of confidence arises in other circumstances.²⁷

Generally a lawyer who has received confidential information from a former client²⁸ (and which remains confidential) cannot, without the consent of the former client, act for a new client in circumstances where that information is relevant to the proposed retainer for the new client²⁹ and thus subject to the duty of disclosure to that new client.³⁰ Unless the former client consents, this will normally apply whether or not the new client agrees that the information will not be passed on. This is because there remains the risk of subconscious use or inadvertent disclosure of the confidential information.³¹

By contrast to the House of Lords decision in *Bolkiah*, courts in some jurisdictions have held there to be a lingering duty of loyalty³² over and above the continuing duty of confidence. This is based on a concern to maintain the public perception of confidence in the justice system, which would be undermined if lawyers were allowed to switch sides with impunity.³³ The

²⁶ Lord Millett at 236 of *Bolkiah* said: "It is in any case 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 confidence in the course of a fiduciary relationship may come into the possession of a third party and be used to his disadvantage. Where in addition the information in question is not only confidential but also privileged, the case for a strict approach is unanswerable. Anything less fails to give effect to the policy on which legal professional privilege is based. It is of overriding importance for the proper administration of justice that a client should be able to have complete confidence that what he tells his lawyer will remain secret. This is a matter of perception as well as substance. It is of the highest importance to the administration of justice that a solicitor or other person in possession of confidential and privileged information should not act in any way that might appear to put that information at risk of coming into the hands of someone with an adverse interest."

²⁷ See the discussion in Hollander and Salzedo at paras 4.40 - 4.52 at 80 - 86. See also the comments of Finn "Fiduciary Law and the Modern Commercial World" in McKendrick ed *Commercial Aspects of Trusts and Fiduciary Obligations* (1992) at 27-28. Finn in "Professionals and Confidentiality" at 318 suggests that the requirement for the maintenance of information privacy by professionals is not merely designed for the protection of client interests but also to enhance public confidence in the standards and integrity of the justice system and to facilitate public utilisation of it.

²⁸ One issue that is of interest in these days of "beauty parades" is the point at which a retainer arises – see the discussion in Hollander and Salzedo at paras 2.28 - 2.30 at 18.

²⁹ I prefer to put the test in this way rather than saying that a lawyer cannot act in a related matter (which is essentially the test in the United States). How the test is articulated does potentially make a difference. If it is put in terms of the possession of confidential information then the former client must show the existence of that information rather than merely relying on an assertion that the matters are related. In most situations, however, there will be little difference as the existence of confidential information will be readily inferred – see *Bolkiah* at 235.

³⁰ It would not be acceptable to have a more stringent rule as this could conflict with the cab rank principle and raise the possibility of large clients deliberately instructing numerous law firms so as to ensure they could not in future act against them. The cab rank principle is set out in Rule 1.02 of the Rules of Professional Conduct which states that a barrister or solicitor must not, without good cause, refuse to accept instructions for services within the practitioner's fields of practice from any particular client or prospective client.

³¹ There may be a possibility of a firm continuing to act even if confidential information is held, however, if effective information barriers are introduced. This is discussed in more detail below. I also discuss below the divergence between *Bolkiah* and *Russell McVeagh* as to whether lawyers will always be disqualified from acting where there may be risk of a breach of the duty of confidence in successive representation.

³² See for example Brooking JA's view in *Spincode Pty Ltd v Look Software Pty Ltd* [2001] VSCA 248. I note, however, that, although the other judges in that case were supportive, they did not offer a definitive view. For subsequent cases going both ways on this point see the discussion in Shirvington at 35 – 42.

³³ See the discussion in Tuch "Contemporary Challenges in Takeovers: Avoiding Conflicts, Preserving Confidences and Taming the Commercial Imperatives" (2006) 24 *Company and Securities LJ* 107 at 116 - 118.

jurisdiction to intervene in such cases is often linked to the status of lawyers as officers of the court but intervention on this ground alone would be invoked rarely.³⁴

New Zealand law does not recognise continuing fiduciary obligations after the termination of the relationship - see *MacLean v Arklow Investments Ltd*.³⁵ The Courts have, however, relied on the status of lawyers as officers of the court in order to support disqualification – see *Black v Taylor*.³⁶ The majority in *Russell McVeagh* did not overrule *Black v Taylor* but restricted it very much to its facts. Henry J said in *Russell McVeagh* that the rationale for the Court intervening, in commercial disputes at least, was not “some perception of disloyalty or impropriety” but the principle of the protection of confidential information.³⁷

Dal Pont and Chalmers³⁸ do not support the view that there is a lingering duty of loyalty or that what they call “some amorphous notion of public confidence in the legal system” is a basis for disqualification. In their view, given the protection offered by the law of confidentiality, there is no need for those additional two planks of protection. Further, the former notion does not sit easily with the view that fiduciary-type duties end with the termination of the retainer and the latter risks creating special duties for lawyers only and thus injecting uncertainty into the law, as well as imposing too great a restriction on freedom of clients to choose their legal representatives.

³⁴ In New South Wales in *Kallinicos v Hunt* [2005] NSWSC 1181 Beneton J said the jurisdiction was exceptional and to be exercised with caution.

³⁵ [1998] 3 NZLR 680 at 688 - 689 (CA) (affirmed on other grounds in *Arklow Investments Ltd v MacLean* [2000] 2 NZLR 1 (PC)).

³⁶ [1993] 3 NZLR 403 (CA).

³⁷ See *Russell McVeagh* at 649.

³⁸ See Dal Pont and Chalmers at para 4.115 at 105 – 6.

Large firms, successive representation and information barriers³⁹

I now offer some brief thoughts on the situation of large firms, which, because of their size, have particular problems with potential conflicts.⁴⁰ The most important point is that, even with large firms, each member of the firm is assumed (subject to proof to the contrary) to have access to the confidential information held by the other members of the firm. I use the term member of the firm in the widest sense to cover all partners as well as legal and non-legal staff.⁴¹ Equally, the whole firm and not just the lawyer acting is deemed to owe a duty of loyalty to the client. Conflict situations thus cannot usually be avoided by having different members of the same firm acting.⁴²

One exception to this, at least with successive representation, may be where an information barrier has been put in place to protect confidential information, although there is no doubt that the courts have not in the past been very supportive of such devices.⁴³ It appears, however, that the attitude of the

³⁹ Also called Chinese walls or cones of silence, the latter invoking images of Maxwell Smart, the Chief and Agent 99. Information barriers are widely used (often sanctioned by legislation) in the financial services industry but this practice is not without its critics. See for example Pose *International Securities Regulation* (1991) discussed in Tomasic, "Chinese Walls, Legal Privilege and Commercial Reality in Multi-Service Professional Firms" [1991] 14 UNSWLJ 46. Numerous articles have been written on information barriers and legal firms, including Aitken "Chinese Walls' and Conflicts of Interest" (1992) 18 Mon LR 91; McVea "Heard it Through the Grapevine": Chinese Walls and Former Client Confidentiality in Law Firms" (2000) 59 CLJ 370 and Midgley "Confidentiality, Conflicts of Interest and Chinese Walls" (1992) 55 MLR 822.

⁴⁰ This is not to discount the problems of lawyers in small country towns where there may be a very limited number of lawyers.

⁴¹ This raises the question of the rules applying to barristers' chambers. It is not uncommon for barristers in the same chambers to be acting for opposing parties while at the same time continuing normal social intercourse and even sharing the same secretary. The courts, at least in England, have in the past not been sympathetic to claims of conflicts in those circumstances on the basis that barristers are not in partnership – see the discussion in Hollander and Salzedo at 11-54 – 11-59 at 216 - 219. Times are, however, likely to be changing. Note the case of *Laker Airways Inc v FLS Aerospace Ltd* [1999] 2 Lloyd's Rep 45, which involved an application for the removal of an arbitrator on the grounds that a barrister from the same chambers was acting for one of the parties. The arbitrator was not disqualified but precautions had been taken to ensure that there was no flow of information and the barristers worked in different buildings. There have been other situations where barristers have been disqualified from acting because of personal relationships between each other or with one of the parties – see Hollander and Salzedo at 11-57 – 11-59 at 218 - 219. I note, however, that the case of *Kooky Garments Ltd v Charlton* [1994] 1 NZLR 587 (HC) seems to me to go too far in finding a conflict in the circumstances of that case.

⁴² There is doubt, however, as to the extent to which all members of a firm, as against the particular lawyers actually acting for the client, have, in accordance with the duty of loyalty, an obligation to disclose information they hold to that client. The modern view appears to be that the duty of disclosure applies only to those lawyers directly involved with the client - see the discussion in the Tuch article (cited at fn 34 above) at 118 - 9 and 123. See also Dal Pont *Lawyers' Professional Responsibility* at 152 – 3. This shows a recognition by the courts of the practicalities of legal practice where, especially in a large firm operating in a number of centres, it would be impossible for all members of the firm to be familiar enough with all matters on which the firm was acting in order to fulfil any duty of disclosure to all the firm's clients. I note, however, that the case of *Kooky Garments Ltd v Charlton* [1994] 1 NZLR 587 (HC) seems to me to go too far in finding a conflict in the circumstances of that case.

⁴³ See for example the remarks of Ipp J in *Mallesons Stephen Jaques v KPMG Peat Marwick* [1991] 4 WAR 357 at 371 (WASC) where he said "The derivation of the nomenclature [Chinese wall] is obscure. It appears to be an attempt to clad with respectable antiquity and impenetrability something that is relatively novel and potentially porous." See also the comments of Sir Nicolas Browne-Wilkinson in *David Lee & Co (Lincoln) Ltd v Coward Chance (A Firm)* [1991] Ch 259. I venture to suggest that the attitude of the courts might well have been because such devices as have come before the courts have usually been set in place far too late and with inadequate systems to ensure that information cannot pass. There have also been attempts to rely on information barriers in situations

courts may be softening.⁴⁴ In my view, the courts may be willing to accept information barriers if these conform to the recommendations of legal professional bodies.⁴⁵ Thus information barriers may be accepted if they are put in place early enough, if they are supported by physical separation⁴⁶ as well as undertakings⁴⁷ and if there is a proper and timely educational programme for all staff⁴⁸ as well as monitoring by compliance officers. There must also be disciplinary sanctions for any staff who breach the barrier.⁴⁹ In my view, courts are much more likely to sanction information barriers if they involve only a few identified people (for example, one or two partners or staff who have transferred from another firm)⁵⁰ and where only limited confidential information is held, particularly if it is of some antiquity and is not of a type likely to be disclosed inadvertently.⁵¹

The concept of information barriers received some measure of (reluctant) support in *Russell McVeagh*. The majority⁵² commented that, although information barriers leave much to be desired and cannot be allowed to obscure the realities of life and the ordinary behaviour and incidents of relationships where individuals practise together in a firm, internal control measures may nevertheless in some circumstances be both appropriate and sufficient to ensure protection. Blanchard J mentioned information barriers

where their use would clearly be inappropriate because of the nature of the confidential information held and the number of people potentially covered by any information barrier.

⁴⁴ See the discussion of the caselaw in Shirvington at 50 – 61.

⁴⁵ See Appendix Two for the Information Barrier Guidelines of the Law Society of New South Wales in consultation with the Law Institute of Victoria. These guidelines relate to successive representation only. Guidelines for information barriers in other jurisdictions are also discussed in that Appendix.

⁴⁶ In these days of computer systems and information management systems there may be some challenges in keeping information physically inaccessible. The challenges will extend to the management of photocopiers, printers, fax machines etc.

⁴⁷ Undertakings alone will rarely be satisfactory. In *Russell McVeagh* Thomas J commented at 670 that solemn undertakings not to divulge information amount to no more than lawyers saying “trust me”. See also *Newman v Phillips Fox* [1999] 21 WAR 309 at 325 (WASC) per Steyler J and *Bolkiah* at 239.

⁴⁸ This includes general education as well as more intensified education when an information barrier is in place.

⁴⁹ See the discussion in Dal Pont *Lawyers’ Professional Responsibility* at 222-231. See also Hollander and Salzedo at paras 6.03 - 6.36 at 117 - 134.

⁵⁰ For a discussion on this topic see Coull “Typhoid Marys: The Ethical Dilemma of Lawyers Who Switch Firms” (1998) 28 VUWLR 41. See also *Equiticorp Holdings Ltd v Hawkins* [1993] 2 NZLR 737 (HC). There is no doubt that the test may be easier to meet if it involves one person only, particularly if that person works part time, because this limits the opportunities for contact – see *Koch Shipping Inc v Richard Butler (A Firm)* [2002] 2 All ER (Comm) 957. By contrast, the large numbers of staff involved in the relevant matters was the main reason information barriers were not considered sufficient in *Marks & Spencer plc v Freshfields Bruckhaus Deringer (a firm)* [2004] 1 WLR 2331 (Ch) affirmed in *Marks & Spencer plc v Freshfields Bruckhaus Deringer (a firm)* [2005] PNLR 4 (CA).

⁵¹ As was the case in *Russell McVeagh*. See also *GUS Consulting GmbH v Leboeuf Lamb Greene & Macrae (a firm)* [2006] All ER (D) 229, affirmed on appeal in *GUS Consulting GmbH v Leboeuf Lamb Greene & Macrae (a firm)* [2006] EWCA Civ 683.

⁵² See at 654-655 of the majority judgment. For a discussion of the earlier New Zealand cases relating to the use of information barriers, see the Coull article (cited at fn 52 above) at 56 - 64.

only briefly in his concurring judgment.⁵³ He commented that proof by the law firm that disclosure has not occurred and is not likely to occur may be assisted by the existence of an information barrier but its existence will by no means be determinative.

Thomas J's dissenting judgment contained an extensive discussion of the use of information barriers.⁵⁴ He categorised them as "inherently insecure and prone to leak" but recognised that there may be exceptional circumstances where their use is acceptable. More than mere undertakings is, however, required and the device cannot in his opinion be used to escape the duty of loyalty. Information barriers can only be used in his view to meet the obligation not to disclose the confidential information of one client to another.⁵⁵

The test for disqualification⁵⁶: Russell McVeagh vs Bolkiah

The major authority in the area of conflicts of interest in New Zealand is the case of *Russell McVeagh*. A tax partner in the Wellington office of Russell McVeagh had been engaged in 1995 to act for Tower Corporation in a major dispute with the Revenue relating to the 1990 tax year. In 1996, while the Wellington office was still dealing with the taxation matter, a partner from the Auckland office was approached by Guinness Peat Group International Insurance Ltd (GPG) which intended a hostile takeover of Tower. The instructions were accepted. Tower first became aware that Russell McVeagh had been advising GPG in relation to the takeover bid in September 1997, when GPG presented its proposal to Tower. Tower objected and it was only then that Russell McVeagh instituted formal internal arrangements to ensure that no information passed from the taxation team to the team advising GPG.

⁵³ See at 678 of Blanchard J's judgment.

⁵⁴ See at 670 of Thomas J's judgment.

⁵⁵ A similar point was made by Finn in "Fiduciary Law and the Modern Commercial World" at 26. He said that whatever efficacy information barriers may have as information protection devices, segregation is not a loyalty-engendering contrivance.

⁵⁶ It is beyond the scope of this paper to discuss remedies other than disqualification.

Tower applied to the High Court claiming that, while acting for it on the taxation matters, Russell McVeagh had obtained information valuable to a hostile bidder like GPG about Tower's method of operations, its negotiating style, its corporate culture and structure and the personalities of members of its management team. It also said that the firm had gained particular knowledge about Tower's financial affairs through the provision of management accounts. Tower argued that all this knowledge was confidential and potentially useful to GPG in pursuing its planned acquisition. I note that, although Tower was a current client at the time Russell McVeagh accepted the instructions from GPG, by the time of the proceedings it had become a former client,⁵⁷ the taxation matter having been completed in April 1997. The Court therefore was concerned with successive rather than concurrent representation.

The majority⁵⁸ observed that Tower's argument was advanced on the basis of a breach of fiduciary duty owed to Tower and on the possession of confidential information. As to the duty of loyalty, the majority pointed out that there was no longer concurrent representation and thus Russell McVeagh was no longer in danger of breaching the alleged fiduciary duty of loyalty. As to whether the possession of confidential information should lead to disqualification, the majority held that three questions emerged:

- (a) the first is whether confidential information is held which if disclosed is likely to affect the former client's interests adversely;
- (b) the second is whether in the particular factual circumstances, viewed objectively,⁵⁹ there is a real or appreciable risk that confidential information will be disclosed;

⁵⁷ Apart from two other minor taxation matters which Tower was not concerned about.

⁵⁸ Thomas J dissented. He considered that there was a breach of the duty of loyalty by accepting instructions that were materially adverse to Tower's interest in a situation where the fact of the instruction could not be communicated to Tower. He did not consider that this breach of duty was spent by the time of the objection by Tower. He also did not consider that enough had been done before Tower objected to protect Tower's confidential information.

⁵⁹ The Supreme Court of Canada in *MacDonald Estate v Martin* [1990] 3 SCR 1235 at 1260 suggested that this should be viewed from the standpoint of the general public. Thomas J's dissenting judgment in *Russell McVeagh* suggested the same. If viewed from this perspective, there is a risk of introducing considerations of public perception

- (c) the third is whether, recognising the significance and importance of the special fiduciary relationship which gives rise to the duty of protection, the Court's discretionary power to disqualify should be exercised.

The majority said that all three questions will frequently overlap. The nature and sensitivity of the information, the extent of the risk, and the adverse effects of possible disclosure are likely to affect all three inquiries. In making a final determination as to whether disqualification is appropriate, the Court will need to take into account the competing factors of a person's right to the services of a solicitor of choice,⁶⁰ and the corresponding right of the solicitor to offer his or her services to the public generally. Mobility within the profession, access to specialist services and market competition are also matters relevant to the public interest. In the majority's view, a balancing exercise, which is mindful of the interests of all directly concerned but does not undermine the integrity of the fiduciary relationship, is more likely to meet the overall ends of justice than rigid rules. Turning to the facts of the case, the majority held that Tower had not made out a sufficient case to justify disqualifying Russell McVeagh from acting for GPG.⁶¹

The balancing test in *Russell McVeagh* was rejected by the House of Lords in *Bolkiah*. In that case KPMG had been the auditors for the Brunei Investment Agency (BIA), which had been established to hold and manage the general reserve fund and the external assets of the Government of Brunei. The firm had also acted in a major piece of litigation for Prince Jefri (the Sultan of Brunei's brother), who for many years had been the chairman of BIA. In mid 1998, Prince Jefri was removed as Chairman of BIA and the BIA retained KPMG to provide assistance in tracing some BIA assets, which were alleged to have been used by Prince Jefri for his own benefit. Prince Jefri

rather than the realities of the situation. Some would argue, however, that maintaining public confidence in lawyers is the very purpose of the rules and thus that this is the appropriate test.

⁶⁰ Another relevant factor may be that the new client could suffer major expense and inconvenience if it has to instruct a new lawyer (and it often will have had no idea of the possible conflict).

⁶¹ The position of the majority in *Russell McVeagh* has not received unqualified approval in New Zealand. It was described by Associate Professor Duncan Webb in "Client's Secrets and Secret Clients: Conflicts, Confidentiality and Disclosure in the Court of Appeal" (1999) 5 NZBLQ at 91 as undermining the perception of integrity in the solicitor/client relationship as well as introducing an undesirable degree of understanding in the law. Contrast Tobin "Former Clients and Chinese Walls: *Russell McVeagh v Tower* and *Prince Jefri Bolkiah v KPMG*" [1999] NZ Law Review 305.

commenced an action for breach of confidence against KPMG and sought an interlocutory injunction restraining them from acting for the BIA.

The House of Lords held that lawyers and accountants (at least while acting in a litigation support role), cannot, without the fully informed consent of the former client, accept instructions from a new client if doing so will increase the risk that information which is confidential to the former client may come into the possession of a party with an adverse interest.⁶² Once the former client shows the existence of confidential information and that no consent has been given to its disclosure, the burden is on the lawyer to satisfy the court that no disclosure will occur. This is obviously a more stringent test than applied in *Russell McVeagh*.⁶³ In the circumstances, the House of Lords held that the precautions taken by KPMG were not sufficient to eliminate the risk of inadvertent disclosure.

The question you will no doubt have is whether the test in *Russell McVeagh* will survive in New Zealand. I cannot of course answer that, given that it is not up to me.⁶⁴ Even were it up to me, I would prefer to defer answering that question until I have to (and after hearing full argument).⁶⁵ What I can say is that I do not see the tests in *Russell McVeagh* and *Bolkiah* (particularly as *Bolkiah* has since been applied in England)⁶⁶ as leading to different

⁶² It is interesting that, despite these being more business oriented times, the modern test is more stringent than that pertaining in England for most of the twentieth century - see *Rakusen v Ellis, Munday & Clarke* [1912] 1 Ch 831 (CA). There will be some that would argue that, in these days of multi-jurisdictional mega firms and a situation where clients spread their work between firms, the rules and the shift in the onus of proof where lawyers hold confidential information should be relaxed. The contrary view was expressed by Thomas J in *Russell McVeagh* at 661. He said that, if the existing structure of the profession cannot cope with the responsibilities and standards required of a fiduciary, it is the structure of the profession which must adjust. Similar comments were made by Byrne J in *Village Roadshow Limited v Blake Dawson Waldron* [2003] VSC 505 at [49] and Sopinka J in *MacDonald Estate* (at 1244). He said that, as the structure management and practices of large firms are indistinguishable in many respects from those of business, it is important that fundamental professional standards be maintained and even improved. This is necessary in his view to maintain the confidence of the public that the law is a profession.

⁶³ McVea (in the article cited at fn 40) at 389 welcomes the decision in *Bolkiah*, despite the flaws he identifies, as a timely reminder that legal rules ought not slavishly to follow commercial practice and that information barriers are not the panacea many City firms believed them to be. In support of his views on Chinese Walls, he quotes Professor Bowen's comment, in a report on investor protection, that he had "never met a Chinese wall that did not have a grapevine trailing over it."

⁶⁴ The High Court of New Zealand remains bound by *Russell McVeagh*. As there have been developments in the law in the House of Lords since *Russell McVeagh*, it is not inconceivable that the New Zealand Court of Appeal could change its view - see *R v Chilton* [2006] 2 NZLR 341 at [85], [88] and [93]. The Supreme Court, New Zealand's highest court, would clearly be free to depart from *Russell McVeagh*.

⁶⁵ One of the main arguments in favour of the *Russell McVeagh* approach is that it provides some flexibility to take into account the practicalities of the particular situation and it may thus discourage purely tactical disqualification applications. The attraction of the *Bolkiah* approach is that of certainty and the fact that it maximises the protection of confidential information, a cornerstone of the lawyer/client relationship.

⁶⁶ Stafford in "Chinese Walls and Confidential Information" (2003) 19 Professional Negligence 306 discusses the pragmatic approach to the *Bolkiah* test taken in the later English cases, including *Young v Robson Rhodes* [1999] 3 All ER 524, *Halewood International Ltd v Addeshaw Booth & Co* [2000] Lloyd's Rep PN 298 and *Koch Shipping Inc v Richards Butler (a firm)*. At 309 - 10, Stafford identifies the factors that will lead to the courts refusing to intervene,

conclusions in the vast majority of cases. The difference in approach between the two cases, in my view, had its roots in the different factual matrix facing the courts.

In *Bolkiah*, the amount of the confidential information held, its wide dissemination in the firm and the extent of the investigation that KPMG was to undertake meant that the risks of leakage of information was very high. On the other hand, in *Russell McVeagh* the confidential information held that could conceivably have been of use in the takeover was limited, it had been used by the taxation section of the firm only, it was no longer in the firm's hands and was of a type not amenable to accidental or unconscious disclosure. Use of the information required extrapolation from the historical management accounts provided in aid of the taxation dispute (and even this possible use was doubted by the majority).

Comments on Associate Professor Aitken's paper

I now make some brief comments on the five points Associate Professor Aitken makes in his paper. His first assertion is that the bulk of the authority on successive representation is of little use as it relates largely to family disputes.⁶⁷ Even leaving aside his rather surprising characterisation of the litigation in *Bolkiah* as a large-scale family dispute, the proposition does not, with respect, withstand scrutiny. The legal principles and ethical obligations make no distinction among types of disputes or transactions.

This is not to deny the possible differences in the application of the principles between individual and commercial clients. When dealing with individual clients who are not commercially sophisticated, for example, courts may be more reluctant to limit the scope of a retainer so as to restrict the duty of

including the period of time during which the risk will remain in existence, the number of people affected and the fact that the risk relates to information in the mind of the lawyer where the documents are no longer available to refresh his or her memory. See also Lyons and Tucker "Sent to Coventry" (2006) 156 NLJ 696.

⁶⁷ There are of course plenty of examples of cases relating to commercial disputes – see in New Zealand *Russell McVeagh* (which related to a hostile takeover), in the United Kingdom *Marks and Spencer v Freshfields Bruckhaus Deringer* (also involving a takeover) and *David Lee & Co (Lincoln) Ltd v Coward Chance (a firm)* (involving allegations of knowing participation in a fraudulent breach of trust against professional firms), in Australia *Newman v Phillips Fox* (relating to a commercial arbitration), *Village Roadshow Limited v Blake Dawson Waldron* (involving an opposed preference share buy back) and *National Mutual Holdings Pty Ltd v Sentyry Corporation* (1989) 87 ALR 539

loyalty. It may also be more difficult to obtain a properly informed consent to joint representation in situations of potential conflict from such clients.⁶⁸ There is also no doubt, as Associate Professor Aitken says, that courts will be more willing to take into account what have been called the “getting to know you factors”⁶⁹ in cases involving family disputes when considering the propriety of successive representation.⁷⁰ This is likely because such factors are typically of more relevance in such disputes than they are in commercial disputes.⁷¹ Where witness credibility risks becoming a major factor in a commercial dispute, however, getting to know you factors could well assume a similar degree of importance.⁷²

The second point made by Associate Professor Aitken is that Australia and New Zealand do not have a sufficiently large pool of expertise to allow firms and clients the same luxury of choice as in the United States, the United Kingdom and Canada. Thus, his argument goes, we cannot afford to have the same rules on conflict of interest as in those jurisdictions. He says that this is implicitly recognised by both clients and advisors, as is shown by the absence of disqualification applications in contested takeover or other contexts even though the comparative cost of applying for injunctive relief is quite small.

Our jurisdictions are certainly smaller than in those countries but so are our populations and our economies. Whether a simplistic comparison by numbers is apt is therefore highly debatable. In any event, New Zealand has at least five large full service commercial firms and a growing number of boutique specialist commercial firms. Many firms also belong to international

(involving an agreement to purchase shares), and in Canada *Calgas Investments Ltd v 784688 Ontario Ltd* (1991) 4 OR 3d 459 (Gen Div) (relating to the breach of a partnership agreement).

⁶⁸ See for example *Farrington v Rowe McBride & Partners* and *Taylor v Schofield Peterson*.

⁶⁹ See Hollander and Salzedo at para 6.21 at 125.

⁷⁰ See, for example, *Black v Taylor*. These matters have also been seen as being of importance in criminal proceedings – see *Mallesons Stephen Jaques v KPMG Peat Marwick* at 368.

⁷¹ There may also (at least in Australia) be a stricter view taken as to whether there is a real possibility of disclosure of confidential information of former individual clients especially in family matters – see eg *In the Marriage of Thevenaz* (1986) 84 FLR 10 and *In the Marriage of Magro* (1989) 93 FLR 365. See also the discussion of the family law cases in Aitken “Chinese Walls’ and Conflicts of Interest” at 106-108 and in the Shirvington paper at 42 - 47.

⁷² For an acceptance that these factors may be of use in a commercial situation, see the remarks of Byrne J (although ultimately rejected on the facts) in *Village Roadshow Ltd v Blake Dawson Waldron* at [36]. See the discussion in Dal Pont *Lawyers’ Professional Responsibility* at 221 – 2, however, for a note of caution expressed as to the effect this could have on client choice and lawyer mobility if there is too much willingness to take this factor into account. He also expresses the concern that a large client, by instructing multiple firms, could effectively corner the market.

networks that enable them to access offshore expertise where necessary. As far as litigation is concerned, there is also the separate Bar with a number of very experienced commercial barristers. I do not understand the situation to be very different in Australia, albeit on a larger scale. Client choice is therefore not as restricted as Associate Professor Aitken postulates. Even if there were issues in this regard, however, I do not think our jurisdictions can afford to be out of step on matters such as the regulation of professional conduct with jurisdictions which are our main trading partners and from which much of our foreign investment is sourced.

I also doubt the validity of Associate Professor Aitken's assertion that the lack of disqualification applications shows that clients and their advisors are prepared to accept that firms will act for multiple parties in conflict situations. Of course, as long as there is fully informed consent, there is nothing wrong with a firm acting for multiple parties whose interests could potentially conflict but where no actual conflict has arisen. Any disqualification application would be futile in such circumstances.

If an actual conflict has arisen, however, it is unlikely that even consent and any associated information barrier would allow a firm to continue to act. Certainly no court would contemplate the same firm acting on opposing sides of litigation, even in the interlocutory stages. I would be surprised if many clients would accept that situation either and, even if they did initially, their views would probably change if they turned out to be the losing party.

It seems to me that there could well be another explanation for the relative dearth of disqualification applications - that firms on the whole take their obligations with regard to actual and potential conflicts seriously. That was certainly the case when I was in practice.⁷³ Firms had (and I am sure still have) computer search facilities to pick up potential conflicts and ethics

⁷³ In Appendix One to this paper I set out a summary of the ethical professional rules in New Zealand. These rules are clear on the duty to avoid conflicts of interest and are not treated lightly. They are stressed right from start of a young lawyer's career. While a legal ethics paper is not, per se, a compulsory component of a law degree, the New Zealand Council for Legal Education requires law graduates to pass an approved Legal Ethics course in addition to the professional legal studies course, in order to be admitted as a barrister and solicitor of the High Court of New Zealand. The professional legal studies course (which must be undertaken before admission as a barrister and solicitor) has a professional conduct component which includes a unit on conflicts of interest and fiduciary duties.

committees to undertake, where necessary, an independent assessment of such possible conflicts. Conflict assessment also played a large role in merger negotiations or when partners were switching firms (although I suspect less so for associates or support staff). If that is still the case (and I have no reason to think it is not), most situations where a firm finds itself acting for multiple parties in an actual conflict situation are likely to have arisen through inadvertence or where a conflict has arisen unexpectedly.

If a firm finds itself acting for multiple parties in a clear conflict situation, this would most likely be resolved by the firm immediately sending one or both parties to other lawyers, if for no other reason than that breach of the ethical rules in this regard can lead to professional misconduct proceedings. In that case, there would be no need to seek injunctive relief. Even where the situation is less clear-cut (for example where it is a case of successive representation and the firm holds very limited confidential information), the situation will often still be resolved in some way, so as to avoid the distraction and cost of disqualification proceedings. This resolution could take the form of a change of representation or the use of an information barrier. Even though there may be doubts as to the efficacy of information barriers, as clients can consent to the disclosure of confidential information, they must be able to consent to the risk of a breach of the barrier.

It is not surprising to me that both lawyers and clients may seek to settle in such circumstances. The cost of an initial injunction may indeed be relatively small by comparison to the stakes in the transaction but this is relative only. Litigation of any sort is never cheap and, especially in a case that is not clear-cut, appeal costs must also be factored in. There is also the inherent uncertainty of any litigation and the indirect costs of delay and distraction from the main transaction. Further, there is a reputational risk for the professionals involved (and, in some circumstances, for the client also).

Associate Professor Aitken's next assertion is that any matter with over \$50m at stake will never be litigated as the stakes are too high for any party to lose.⁷⁴ This phenomenon leads, he suggests, to multiple parties to such a transaction being happy to be represented by a single firm as long as there are appropriate information barriers in place. As these assertions are not, as he admits, based on any empirical data or even, it seems, on any anecdotal evidence, it is difficult to know how to respond sensibly.

I first make the obvious point that clients can never be sure that litigation will not arise out of a transaction, even if the stakes are above the magic figure of \$50m. In many cases one of the parties may have nothing to lose (particularly if legally aided) and everything to gain in pursuing a claim, while on the other side there may be issues of principle involved which would inhibit settlement. The second point is that, if the stakes are high, then I would have expected clients to seek separate representation from inception and thereby have the single-minded attention of a whole firm,⁷⁵ unless separate representation was clearly unavailable or there were particular advantages in being represented by a single firm. A prudent lawyer would also be better to avoid representing multiple parties in transactions which are complex and/or involve large sums on the basis that liability will be so much greater if things go wrong.⁷⁶

This is not to deny that litigation is often (and maybe even usually) settled. Indeed, settlement (often after some form of alternative dispute resolution process) is the only rational business decision in most cases. As indicated above, litigation is costly, not only in itself but because it drains executive time away from more productive uses. It is also risky. In addition, many parties have ongoing relationships they wish to maintain, which could be jeopardised by protracted litigation.

⁷⁴ This of course assumes that litigation is a "winner takes all" game which is very often not the case. It also assumes that \$50m is of the same significance to all parties. The importance will obviously be relative to the size of the entity involved. Of course Associate Professor Aitken may just be updating the old adage – if you owe \$500,000 it is your problem but \$50m is the bank's problem.

⁷⁵ A further disadvantage for clients would be that, if anything does go wrong, the client would likely have to be sent to another firm just at the time the client needs the lawyer most.

⁷⁶ See the discussion in Dal Pont *Lawyers and Professional Responsibility* at 188 - 9.

I confess that I do not fully understand the significance of Associate Professor Aitken's fourth point, which is that it is necessary for lawyers to consider the "commerciality" of the position of the parties rather than strict legal precedent. If all he means is that the decision whether or not to litigate is a business decision like any other then it is difficult to argue. Few lawyers would now see themselves as taking only a narrow legal role. They pride themselves on providing a much wider advisory service, one that has as its primary focus the commercial imperatives under which their clients operate. Any advice they give would thus naturally address the commercial concerns of their clients, whether they were advising on whether to litigate at all, on whether to engage in some form of alternative dispute resolution, or on whether to make any application (tactical or otherwise) for disqualification of a firm acting for the opposition.

Associate Professor Aitken's fifth point is that, as long as general proprieties are observed (so that, for example, a lawyer who had been acting for a bidder on Friday does not turn up acting for the target on Monday), no-one will complain about the multiple conflicts which currently exist. I agree that, unless an actual conflict arises (in the case of consensual concurrent representation) or a firm holding relevant confidential information switches sides in successive representations, then it is likely that no-one will complain. This is, however, because there would usually in such circumstances be nothing to complain about as the firm will not be in breach of any of its duties.

I make three other comments on Associate Professor Aitken's paper. The first relates to the section of his paper on mediation. He says that mediation is less attractive to "purist, black-letter lawyers", as mediation necessarily lacks the formal structure of court proceedings and it is unfulfilling to apply the "fuzzy" logic of a day-long, rolling mediation to a case.

In my experience, far from finding mediation distasteful, most lawyers have embraced the concept.⁷⁷ One note of caution for lawyers engaging in mediations, however, may arise from the case of *Carter Holt Harvey Forests Ltd v Sunnex Logging Ltd*.⁷⁸ In that case, the New Zealand Court of Appeal restrained a lawyer from acting for other plaintiffs against Carter Holt because he had taken part in a confidential mediation process on behalf of another plaintiff in similar proceedings.⁷⁹ Both plaintiffs brought claims against Carter Holt arising out of the termination of certain contractual arrangements and there were areas of overlap between these claims. The Court emphasised that Carter Holt had contracted for total confidentiality in agreeing to mediate and settle the first proceeding. In this case, it had not been demonstrated that there was no risk of a future breach of confidentiality occurring accidentally or unconsciously.

The second additional comment on Associate Professor Aitkin's paper relates to his discussion of the New Zealand Court of Appeal's decision in *Norbrook Laboratories Ltd v Bomac Laboratories Ltd*.⁸⁰ The allegation in that case was that Bomac had misused confidential information provided to it by Norbrook by disclosing it to an alternative supplier. Norbrook sought to persuade the Court that, once Norbrook proved the possession of confidential information by Bomac, then the onus of proof should shift to Bomac to prove that there had been no misuse of that information. Thus the Court was being asked to apply the test propounded in *Bolkiah* in a commercial context.

The Court said, referring both to *Russell McVeagh* and *Bolkiah*, that a different approach has been followed in cases involving the obtaining of

⁷⁷ There are also many styles of mediation, not all of which sideline the law in the manner Associate Professor Aitken postulates.

⁷⁸ [2001] 3 NZLR 343 (CA).

⁷⁹ As the first instance judge whose decision was overturned by the Court of Appeal I cannot resist pointing out that Hollander and Salzedo (at para 7.11 at 141- 142) describe the case as a "very dangerous precedent". This is on the basis that the case can be interpreted as holding that the very participation in the mediation in *Sunnex* gave rise to the inability to act for future plaintiffs. Hollander and Salzedo note that this could have ramifications even for without prejudice discussions. I think the better view may be, however, that the result in *Sunnex* was reached because of the specific confidentiality obligations entered into by the lawyer in that case. The Court placed heavy emphasis on the confidentiality agreement and the fact that this agreement could be breached appears to have been the main basis for the decision. However, the Court did say that the position may well have been much the same even without an express confidentiality clause due to the "without prejudice" nature of mediation and said that the particular agreement signed was consistent with the confidentiality implicit in any mediation.

⁸⁰ [2004] 3 NZLR 49 (CA).

information by a lawyer whilst in a lawyer/client fiduciary relationship than in ordinary actions for breach of confidence.⁸¹ The Court refused to apply the *Bolkiah* test (or for that matter the *Russell McVeagh* test) in a commercial context where the relationship between the parties did not give rise to fiduciary obligations.⁸² Where there are no fiduciary obligations, the Court held that the onus remained on a plaintiff to prove that a defendant is about to make, or has made, an unauthorised disclosure or use of the confidential information.⁸³ It was in the context of commercial relationships (and not in the context of lawyer/client relationships) that the comments about not unduly limiting competition quoted by Associate Professor Aitken in his paper were made.⁸⁴

The final comment relates to the case of *MacDonald Estate v Martin*.⁸⁵ Associate Professor Aitken says that the *MacDonald Estate* case provides a possible foretaste of the sort of tactical applications which too rigorous a requirement of the duty of confidentiality may engender. For myself, I would not have categorised the application at issue in *MacDonald Estate* as tactical. Nor do I find the decision reached by the Supreme Court particularly surprising. The case concerned a junior member of a firm which had been acting for a defendant. The junior solicitor had been actively engaged in the defendant's file and had been privy to many confidences. Some years later the junior solicitor joined the firm representing the plaintiff. The defendant objected and the firm was restrained from acting. The majority held that there

⁸¹ For a discussion on the differences between the general law on confidentiality and the approach in *Bolkiah*, see Stafford "Chinese Walls and Confidential Information" at 307-308. He says that in an ordinary claim for breach of confidence the remedy is almost always less draconian than in cases involving confidential information imparted to a fiduciary. Usually it suffices to offer undertakings not to use or divulge the information. The claimant is also required to define the confidential information with some particularity and explain why it is confidential, the burden never shifts to the defendant to show that there is no real risk of disclosure, the courts will rarely grant injunctions if the information is in the employee's head, the risk of inadvertent disclosure is rarely, if ever, seen as a justification for intervention and, even where it is proved that there is a threat to confidential information, any injunction will involve a balancing exercise to ensure that the relief is proportional to the risk.

⁸² There are commentators who consider that breach of confidence is in fact a species of fiduciary obligation – see for example the discussion by Daniel Bayliss in "Breach of Confidence as a Breach of Fiduciary Obligations: A Theory" (2002) 9 Auckland UL Rev 702. For a contrary view see La Forest J's judgment in *LAC Minerals v International Corona Resources* (1989) 61 DLR (4th) 14 at 35 - 36. See also Millett LJ "Equity's Place in the Law of Commerce" (1998) 114 LQR 214 at 220 – 222.

⁸³ See at paras [22] – [27] of *Bomac*.

⁸⁴ Professor Aitkin was quoting from *Bomac* at [27] where this Court stated that it "[did] not accept that contractual obligations of confidentiality in a commercial context require that there should be a legal or evidential onus on a party in possession of confidential information to satisfy the Court that it has not misused it. Any other approach would unduly inhibit competition..."

⁸⁵ [1990] 3 SCR 1235 (SCC). The majority judgment was given by Sopinka J writing for himself, Dickson CJ and La Forest and Gonthier JJ.

is a rebuttable presumption that confidential information will have been communicated in the course of the former retainer. The Court should draw the inference that lawyers who work together share confidences unless there was clear evidence that all reasonable measures (such as information barriers) had been taken to ensure that no disclosure had taken place and that no disclosure would take place.⁸⁶ Undertakings, which were all that had been provided in the *MacDonald Estate* case, did not suffice.⁸⁷

Conclusion

Returning to the theme of the session as set out in the conference brochure, it is clear that there is nothing to stop firms acting for multiple parties as long as there is informed consent and no actual conflict has arisen. Thus the tension between firms and corporate counsel referred to in the brochure is not a matter of legal (or even ethical) impediments but one of negotiation with the client. There are, however, risks for both parties in multiple representation and these should be carefully weighed against any perceived benefits.

Moving to successive representation, it is ironic that, in these more business oriented times, the test has become more stringent than in the early part of the twentieth century. There may be room for debate whether it is necessarily appropriate in these days of large multi-jurisdictional law firms and lessening client loyalty that commercial clients should have more protection for confidential information in the hands of their lawyers than they would in any other commercial situation. Given the attitude of the courts and that of the relevant professional bodies, any changes are not, however, likely in the short term.

⁸⁶ Indeed, the test in *MacDonald Estates* only requires all reasonable steps to have been taken, arguably a less stringent test than in *Bolkiah*, which requires proof that such steps were effective to remove the disclosure risk.

⁸⁷ The minority, consisting of Wilson, L'Heureux-Debé and Cory JJ (delivered by Cory J), in that case took a more stringent view. They would not have allowed a firm to act even with information barriers in place.

Appendix One

Ethical rules governing the legal profession in New Zealand

The legislation

A new Act regulating the legal profession, the Lawyers and Conveyancers Act 2006, received the Royal Assent on 20 March 2006. It is expected to come into full force by 1 July 2008. Under s 4 of the Act every lawyer must comply with the following fundamental obligations:

- (a) the obligation to uphold the rule of law and to facilitate the administration of justice in New Zealand:
- (b) the obligation to be independent in providing regulated services to his or her clients:
- (c) the obligation to act in accordance with all fiduciary duties and duties of care owed by lawyers to their clients: and
- (d) the obligation to protect, subject to his or her overriding duties as an officer of the High Court and to his or her duties under any enactment, the interests of his or her clients.

The Act requires the New Zealand Law Society (NZLS) to have rules that provide for standards of professional conduct and client care. These ethical rules will be a reference point for discipline and will focus on, but need not be limited to, the duties of lawyers as officers of the High Court, the duties of lawyers to their clients and the duties imposed on lawyers by their fundamental obligation to be independent.

Rules of Professional Conduct

Rule 1.01 of the NZLS Rules of Professional Conduct for Barristers and Solicitors (7th Edition) sets the scene by stating that the relationship between practitioner and client is one of confidence and trust, which must never be abused. Rule 1.03 provides that a practitioner must not act for any person where there is a conflict of interest between the practitioner on the one hand and an existing or prospective client on the other hand. Rule 1.04 states that a practitioner shall not act for more than one party in the same transaction or matter without the prior informed consent of all parties.

Rule 1.05 states that a practitioner must not act for a client against a former client when, through prior knowledge of the former client or his or her affairs which may be relevant to the matter, to so act would be or would have the potential to be to the detriment of the former client or could reasonably be expected to be objectionable to the former client.⁸⁸ The commentary to this rule refers to the conflict between Rule 1.08 relating to confidentiality and Rule 1.09 requiring full disclosure.

Rule 1.07(1) sets out the steps that a practitioner is required to take in the event of a conflict or likely conflict of interest among clients. The practitioner must: advise all clients involved of the areas of conflict or potential conflict; advise the clients involved that they should take independent advice, and arrange such advice if required; and decline to act further for any party in the matter where so acting would or would be likely to disadvantage any of the clients involved. Rule 1.07(2) emphasises that, if acting further for any party would or would be likely to disadvantage any of the clients involved, it is not acceptable for practitioners in the same firm to continue to act for more than one client in a transaction, even though a notional barrier known as a Chinese Wall may have been constructed. Such a device does not overcome a conflict situation.⁸⁹

⁸⁸ This latter requirement appears wider than the strict legal position – see Webb at para 9.3 at 310.

⁸⁹ The New Zealand position relating to Chinese Walls may contrast with the Guidelines of the Law Society of New South Wales although the New Zealand Rules appear to be concerned only with a position of actual conflict rather

Rule 1.08 states that a practitioner has a duty to hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship. The Rule goes on to list specific situations in which such information can be divulged, including that the client authorised the disclosure or that the practitioner has an overriding duty to a court or tribunal.

Rule 1.09 is also relevant. This Rule states that, in most circumstances, a practitioner is bound to disclose to the client all information received by the practitioner, which relates to the client's affairs. The commentary to Rule 1.09 states that a practitioner should take all reasonable steps to prevent a situation arising where confidential information is received on a basis that it is not to be disclosed to a client.

Relationship between rules and disqualification

In *Russell McVeagh* the Court made observations regarding the interaction between ethical and legal rules. The majority⁹⁰ commented that it is important to keep in mind that moral and ethical obligations do not necessarily equate to legal duties enforceable by the Courts, including fiduciary duties. Professional bodies properly undertake supervisory functions over their members, and lay down and enforce codes of conduct. The Court has a separate and independent function and will provide a remedy when there has been a breach of a duty recognised at law.⁹¹

Blanchard J commented more extensively on the relationship between ethical and legal rules.⁹² He referred to the ethical rules and stated that these rules balance the requirement that practitioners be available to advise and appear in their chosen fields (the "cab rank" principle) against a restriction on their doing so when that might be antithetical to the legitimate interests of an existing or former client. He said the Court is not of course acting as an

than successive representation. The NSW/Victorian guidelines only apply to successive representation. See Appendix Two.

⁹⁰ See at 649 of the majority's judgment.

⁹¹ See also the discussion in *MacDonald Estate* at 1244 where the Supreme Court of Canada stated that the professional ethics codes contain an important statement of public policy with respect to the conduct of barristers and solicitors.

arbiter of ethics or morals. Ethical questions are for the law society. Nevertheless, they may inform the judgment of the Court and on his analysis the relevant ethical rules are broadly the same as the legal obligations which the Court will enforce against lawyers by ordering a disqualification.

It is clear, therefore, that, as the Rules of Professional Conduct are not a source of jurisdiction, they do not bind the courts. The Rules do, however, provide the courts with guidance when considering comparable legal obligations. Although the ethical rules and legal obligations are often largely parallel, the ethical rules are, for the most part, likely to be less stringent than the legal requirements. There may, however, be situations when the Rules impose more stringent requirements.

⁹² See at 676 - 677 of Blanchard J's judgment.

Appendix Two

Guidelines on Information Barriers

Professional bodies for lawyers in a number of jurisdictions have provided guidelines for effective information barriers.

Australia

The New South Wales Law Society and the Law Institute of Victoria have promulgated guidelines on information barriers.⁹³ I summarise these below.

1. The law practice should have documented protocols for setting up and maintaining information barriers. In all matters the law practice should carefully control access to any client information by personnel in the law practice in view of the possible requirement for an information barrier in the future.⁹⁴
2. The law practice should nominate a compliance officer to oversee each information barrier.
3. The law practice should ensure the client in the current matter acknowledges in writing that the law practice's duty of disclosure to that client does not extend to any confidential information which may be held within the law practice as a result of the earlier matter and consents to the law practice acting on that basis.

⁹³ The full text of the guidelines is available on the website of the Law Society of New South Wales at <http://www.lawsociety.com.au/page.asp?partid=18004> (last accessed 4 September 2006). The Guidelines have been adopted by both the Law Society of NSW and the Victoria Law Institute.

⁹⁴ If taken seriously, this appears to require a change in the operations of firms, with access to information kept on a "need to know" basis. The guidelines appear to require procedures to be put in place for ensuring the limited flow of information even when there is no other client in prospect. This would limit some of the advantages of large firm practice (information sharing and thus the building up of expertise, ability to bounce ideas off colleagues etc). It may also have implications for peer review and risk management.

4. All screened persons should be clearly identified and the compliance officer must keep a record of all screened persons.⁹⁵
5. All screened persons should provide an undertaking to the law practice and the law practice should where appropriate provide an undertaking to the court confirming that they will not be involved with staff working on the current matter, that they have not and will not disclose any confidential information about the earlier matter to any person and that they will report any breach or possible breach of this undertaking to the compliance officer.
6. Personnel involved with the current matter should not discuss the earlier matter with, or seek any relevant confidential information about the earlier matter from, any screened person. They also must provide undertakings to that effect.
7. Contact between personnel involved in the current matter and screened persons should be appropriately limited to ensure that the passage of information or documents between those involved in the current matter and screened persons does not take place.
8. The law practice should take steps to protect the confidentiality of all correspondence and other communications related to the earlier matter.
9. Any files held by the law practice relating to the earlier matter should be stored in a secure place where they can only be accessed by screened persons and/or the compliance officer. Access to any electronic files the law practice should be restricted.
10. The law practice should have an ongoing education program in place.

⁹⁵ This presupposes that all those involved in the earlier matter have been clearly identified and this will include administrative and support staff. Usually no specific record will have been kept of all staff involvement (and there are particular risks with support staff from other firms). This too will require major changes in practice.

The position in the UK⁹⁶

The Guidance to the Solicitors' Practice (Confidentiality and Disclosure) Amendment Rule 2004 gives assistance as to what safeguards may prove to be adequate. It says it is unlikely that safeguards could ever be adequate where:

- (a) a firm has only one principal and no other qualified staff;
- (b) the solicitor possessing, or likely to possess, the confidential information is supervised by a solicitor who acts for, or supervises another solicitor in the firm who acts for, a client to whom the information is or may be relevant; or
- (c) the physical structure or layout of the firm is such that confidentiality would be difficult to preserve having regard to other safeguards which are in place.

It then suggests the following for information barriers:

- (a) that the client who or which might be interested in the confidential information acknowledges in writing that the information held by the firm will not be given to them;
- (b) that all members of the firm who hold the relevant confidential information ("the restricted group") are identified and have no involvement with or for the other client;
- (c) that no member of the restricted group is managed or supervised in relation to that matter by someone from outside of the restricted group;
- (d) that all members of the restricted group confirm 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

⁹⁶ This Guidance applies only where consent cannot be obtained (although, where consent is given, it would normally be necessary to agree similar measures). The guidelines appear to cover both concurrent and successive representation. For some criticisms of these guidelines see Hollander and Salzedo at 11-23G – K.

discuss it with any other member of the firm unless that person is, or becomes, a member of the restricted group, and that this obligation shall be regarded by everyone as an on-going one;

- (e) that each member of the restricted group confirms when the barrier is established that they have not done anything which would amount to a breach of the information barrier; and
- (f) that only members of the restricted group have access to documents containing the confidential information.

The following arrangements may also be appropriate, and might in particular be necessary when acting where there is no client consent:

- (g) that the restricted group is physically separated from those acting for the other client, for example, by being in a separate building, on a separate floor or in a segregated part of the offices, and that some form of “access restriction” be put in place to ensure physical segregation;
- (h) that confidential information on computer systems is protected by use of separate computer networks or through use of password protection or similar means;
- (i) that the firm issues a statement that it will treat any inadvertent breach of the information barrier as a serious disciplinary offence;
- (j) that each member of the restricted group gives a written statement at the start of the engagement that they understand the terms of the information barrier and will comply with them;
- (k) that the firm undertakes that it will do nothing which would or might prevent or hinder any member of the restricted group from complying with the information barrier;

- (l) that the firm identifies a specific partner or other appropriate person within the “restricted group” with overall responsibility for the information barrier;
- (m) that the firm provides formal and regular training for members of the firm on duties of confidentiality and responsibility under information barriers or will ensure that such training is provided prior to the engagement being undertaken; and
- (n) that the firm implements a system for the opening of post, receipt of faxes and misattribution of e-mail which will ensure that confidential information is not disclosed to anyone outside the restricted group.

The term member, in the context of this paragraph, applies to principals and all staff members, including secretaries, but does not apply to any staff member (not having any involvement on behalf of any relevant client) whose duties include the maintenance of computer systems or conflict/compliance procedures and who is subject to a general obligation of confidentiality in relation to all information to which he or she may have access in the course of his or her duties.

Canada

The Canadian Bar Association’s Code of Professional Conduct⁹⁷ contains guidelines which apply where a member transfers from one law firm and:

- (a) the new law firm represents a client in a matter which is the same as or related to a matter in respect of which the former law firm represents its client (“former client”); and
- (b) the interests of those clients in that matter conflict; and

⁹⁷ Although Canada does not have a national law society, the Canadian Bar Association adopted a Code of Professional Conduct in 1974 which has been adopted by the provincial law societies. The Code can be found on the CBA’s website at <http://www.cba.org/CBA/activities/code/> (last accessed 4 September 2006).

- (c) the transferring member actually possesses relevant information respecting that matter.

The Code sets out 11 guidelines which apply in such a case. These include, among other things, that the screened member should have no involvement in the current matter and should not discuss the current or prior matter with any member of the new law firm; that the files of the current client should be physically segregated from the new law firm's regular filing system, specifically identified, and accessible only to those who are working on the matter; and that the screening measures should be stated in a written policy, supported by an admonition that violation of the policy will result in sanctions.

United States

The American Bar Association Model Rules of Professional Conduct⁹⁸ permit the use of information barriers only in the case of former government officers and employees. The Model Rules state that where a lawyer has formerly served as a public officer or employee of the government and is disqualified from representation due to the rules governing former clients, a firm with which that lawyer is associated may only represent in such a matter if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom and written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the rule.

Under the Model Rules, "screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect.

The commentary to the Model Rules explains the rationale behind the limited use of information barriers. This states that the rules governing lawyers

⁹⁸ California, Maine, and New York are the only States that do not have professional conduct rules that follow the format of the ABA Model Rules of Professional Conduct. New York follows the predecessor ABA Model Code of Professional Responsibility, and California and Maine developed their own rules. The Model Rules can be viewed on the ABA website at http://www.abanet.org/cpr/mrpc/model_rules.html (last accessed 4 September 2006).

presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer to and from the government. The provisions for screening and waiver are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service.