

CASE NOTE*

CHINESE WALLS IN BRUNEI: *PRINCE JEFRI BOLKIAH v KPMG*

I. INTRODUCTION

The last decade has witnessed the dramatic rise of large firms of professionals operating internationally and offering an enormous range of services to their clients.¹ This has led to a corresponding rise in the risk of former client conflicts of interest, where a firm that has acted for one client subsequently acts for another client with adverse interests. This risk has been manifested in the large number of conflicts of interest cases that have recently come before Australian courts.²

While the courts have been called with increasing regularity to consider this problem, their treatment of it has often been unsatisfactory or inconsistent. There are a number of conflicting judgments that fail to establish a clear process for determining whether a firm should be disqualified from acting for a subsequent client.³ The House of Lords in their recent judgment in *Prince Jefri Bolkiah v KPMG (A Firm)*⁴ has adopted a refreshingly straightforward approach which offers useful guidance for Australian law in this area.

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1 C Edmonds, "Trusting Lawyers with Confidences – Conflicting Realities (A Review of the Test and Principles Applying to Lawyers Conflicts of Interests)" (1998) 15 *Australian Bar Review* 222 at 224; S Ross, *Ethics in Law* (2nd ed, 1998) p 322.

2 See *Yunghanns v Elfic Ltd* (unreported, Vic SC, Gillard J, 3 July 1998); *Unioil International Pty Ltd v Deloitte Touche Tohmatsu* (1997) 17 WAR 98; *Incentive Dynamics Pty Ltd (in liq) v Robins* (unreported, Federal Court, North J, 25 July 1997); *Farrow Mortgage Services Pty Ltd (in liq) v Mendall Properties Pty Ltd* [1995] 1 VR 1; *Wan v McDonald* (1992) 33 FCR 491; *Mallesons Stephen Jacques v KPMG Peat Marwick* [1991] 4 WAR 357; and *Fruehauf Finance Corporation Pty Ltd v Feez Ruthing (a firm)* [1991] 1 Qd R 558.

3 See A Mitchell, "Whose Side Are You On Anyway? Former Client Conflicts of Interest" (1998) 26 *Australian Business Law Review* 418; Edmonds, note 1 *supra*; S Donaghue, "Acting Against a Former Client: Reforming a Misconceived Disqualification Standard" (1995) 1 *Newcastle Law Review* 11.

4 [1999] 2 WLR 215, (*Bolkiah*).

II. THE FACTS

A. Audit of the Core Funds

KPMG, a large firm of chartered accountants, performed an annual audit of the core funds of the Brunei Investment Agency (BIA) from its inception in 1983. The BIA was formed, in part, to hold and manage the General Reserve Fund of the Government of Brunei, and was valued at many billions of dollars. Prince Jefri, a brother of the Sultan of Brunei, was a chairperson of the BIA for many years. While he held this position, a number of large capital transfers ('the special transfers') were made out of the core funds, and the board of the BIA including Prince Jefri, directed KPMG not to audit these transfers.

B. Project Lucy

For 18 months between 1996 and 1998, one of Prince Jefri's other companies retained KPMG to undertake an investigation relating to litigation in which Prince Jefri was involved. This litigation was against the Manoukian brothers, his former advisers. The investigation was code named Project Lucy and involved KPMG's forensic accounting department. That department provided extensive litigation support services and performed a number of tasks usually undertaken by solicitors such as interviewing witnesses. In the course of Project Lucy, KPMG acquired extensive confidential information about Prince Jefri's assets and financial affairs. The project was discontinued on 14 May 1998.

C. Project Gemma

In June 1998, following a fallout between Prince Jefri and the Sultan,⁵ the Government of Brunei appointed a Financial Task Force (FTF) to conduct an investigation into the BIA. In July of that year, the BIA instructed KPMG to investigate the destination and present location of the special transfers. This investigation was code named Project Gemma and it was clear that it might lead to proceedings against Prince Jefri.

KPMG erected an information barrier, or Chinese wall, to protect the confidential information of Prince Jefri which it had acquired through Project Lucy. This involved ensuring that the staff on Project Gemma did not include anyone who had obtained confidential information from Project Lucy and preventing the acquisition of confidential information from Project Lucy by those on Project Gemma. There were also a number of administrative arrangements such as the segregation of papers, computer file servers, and (within the limits imposed by the fact that the majority of them worked in one department) staff.

⁵ This fallout culminated in the Sultan removing Prince Jefri as chairman of the BIA and stripping him of his control over a number of telecommunications companies: F Penn, "Party Never Ends for Pampered Playboy" *New York Post*, 27 December 1998, p 4.

III. CASE HISTORY

A. High Court

On 15 September 1998, Prince Jefri sought an injunction before Pumfrey J in the High Court of Chancery to restrain KPMG from continuing to work on Project Gemma.⁶ KPMG offered a voluntary undertaking not to use or disclose any confidential information acquired in the course of Project Lucy and stated that only a limited number of firms possessed the necessary skills and resources to perform such an investigation.⁷ Pumfrey J first considered the nature of the work performed by KPMG's forensic accounting department. His Lordship stated that in relation to forensic services at least, accountants were subject to the same obligations as solicitors:⁸

[I]n relation to the supply of forensic services; in relation to the performance of tasks which can be and often are undertaken by solicitors; and in relation to the giving and receiving of advice, in relation to the conduct of litigation or threatened litigation, I can find no rational basis for drawing any distinction between the duty owed by an accountant to his client and that owed by his solicitor or counsel.⁹

His Lordship recognised that it is the substance of the service performed, rather than who performs it, that determines the obligations imposed.¹⁰ This was largely accepted in the appeals to the Court of Appeal¹¹ and the House of Lords.¹² The significance of this approach is that, even though this case was limited on its facts to accountants, its reasoning applies equally to lawyers.

Having determined that KPMG owed the same duty of confidentiality to Prince Jefri as solicitors owe to their clients, Pumfrey J considered whether client confidences were threatened in this context. His Lordship stated that while KPMG had taken all steps which could be expected to avoid the disclosure of Prince Jefri's confidential information, this was insufficient to ensure the security of that information:

6 *Bolkiah v KPMG* (unreported, High Court, Pumfrey J, 15 September 1998).

7 *Ibid* at 6.

8 *Ibid* at 9-10.

9 *Ibid* at 10.

10 T Holland, "Whispering Chinese Walls" (1998) 95(45) *Law Society's Guardian Gazette* 16 at 16; A Davis, "New Jersey and the House of Lords" *New York Law Journal*, 4 January 1999, p 4.

11 *Bolkiah v KPMG* (unreported, Court of Appeal, Lord Woolf MR, Otton and Walker LJJ, 19 October 1998) at 3 per Lord Woolf MR, at 28 per Waller LJ, cf at 14 per Otton LJ.

12 *Bolkiah v KPMG* [1999] 2 WLR 215. Lord Hope of Craighead at 217: "I consider that the nature of the work which a firm of accountants undertakes in the provision of litigation support services requires the court to exercise the same jurisdiction to intervene on behalf of a former client of the firm as it exercises in the case of a solicitor". Lord Millet at 224: "an accountant who provides litigation support services of the kind which they provided to Prince Jefri must be treated for present purposes in the same way as a solicitor".

[T]he intrinsic difficulty with Chinese Walls, is that, while they are well adapted to deal with foreseeable or deliberate disclosure of information, they are not well adapted to deal with disclosure which is accidental, inadvertent or negligent.¹³

His Honour felt that unless there were powerful reasons to the contrary, which he could not find, a former client should not be exposed to the risk of such disclosure.¹⁴

B. Court of Appeal

The majority of the Court of Appeal (Lord Woolf MR and Otton LJ) preferred the approach of the Court of Appeal in New Zealand in *Russell McVeagh McKenzie Bartlett & Co v Tower Corporation*¹⁵ to that of Pumfrey J in the High Court. Drawing heavily on the New Zealand judgment,¹⁶ the majority identified three issues for consideration:

- whether there was confidential information which if disclosed was likely to affect Prince Jefri's interests adversely;
- whether there was a "real or appreciable risk" that the confidential information would be disclosed; and
- whether the nature and importance of the former fiduciary relationship meant that the confidential information should be protected by an order of the kind sought.

In view of the undertaking offered by KPMG, the majority held that continuation of the injunction would "set an unrealistic standard for the protection of confidential information" which would create unjustified impediments in the way large professional firms conduct their business.

IV. THE DECISION OF THE HOUSE OF LORDS

A. Basis of the Jurisdiction

A number of possible bases have been suggested for a court's jurisdiction to intervene in matters involving subsequent adverse representation. These include the court's equitable jurisdiction to restrain a breach of a lawyer's fiduciary

13 *Bolkiah v KPMG*, (High Court), note 5 *supra* at 14.

14 *Ibid.*

15 [1998] 3 NZLR 641 (*Russell McVeagh*); D Coull, "Conflicts of Interest and Chinese Walls" [1998] *New Zealand Law Journal* 347. For a discussion of the position in New Zealand see also D Coull, "Typhoid Marys: The Ethical Dilemma of Lawyers Who Switch Firms" (1998) 28 *Victoria University of Wellington Law Review* 41.

16 See *Russell McVeagh*, note 15 *supra* at 651, per Richardson P, Gault and Henry JJ.

duties and the court's jurisdiction over its own officers.¹⁷ However, Lord Millett, delivering the unanimous judgment of the House of Lords, found that the court's jurisdiction is based on protection of confidential information.¹⁸

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

Once it is accepted that the central concern is the protection of confidential information, the basis for the court's intervention becomes clear.²⁰ First, the court has equitable jurisdiction to prevent a threatened breach of confidence.²¹ Secondly, since there is also an implied duty of confidentiality in the contract of retainer,²² the client may also sue to prevent a threatened breach of contract.

B. Primary Disqualification

It is settled law that a lawyer who has acquired relevant confidential information from a former client cannot subsequently act against that former client and is automatically disqualified.²³ However, decisions have varied as to whether the lawyer will be presumed to have received confidential information from the former client or whether such receipt must be shown or inferred from the circumstances.

Lord Millet required that the client establish: (a) that the client has disclosed confidential information to the lawyer; and (b) that the information may be

17 Edmonds, note 1 *supra* at 229-30; *Russell McVeagh*, note 15 *supra* at 647, per Richardson P, Gault and Henry JJ; *Black v Taylor* [1993] 3 NZLR 403. Clearly accountants, unlike lawyers, are not officers of the court, so in this case the jurisdiction to restrain KPMG could not be based on the court's jurisdiction over its own officers.

18 See also *Rakusen v Ellis, Munday & Clarke* [1912] 1 Ch 831 at 845; *David Lee & Co (Lincoln) Ltd v Coward Chance (a firm)* [1991] Ch 259 at 268A-C; *Re a firm of solicitors* [1992] 1 QB 959 at 974; *Re a firm of solicitors* [1997] Ch 1 at 9; and *Russell McVeagh*, note 14 *supra* at 648, per Richardson P, Gault and Henry JJ.

19 *Bolkiah v KPMG* [1999] 2 WLR 215 at 225. Cf. *Bolkiah v KPMG*, (High Court), note 5 *supra* at 6, where Pumfrey J stated that the relevant conflict was: "the conflict of interest between obtaining the new retainer and the existing duty to the existing client"; *Wan v McDonald* (1992) 33 FCR 491 at 513: "a solicitor's duty of loyalty ... cannot be treated as extinguished by the mere termination of the period of his retainer".

20 *Bolkiah v KPMG* [1999] 2 WLR 215 at 224.

21 *Moorgate Tobacco v Philip Morris* (1984) 156 CLR 414; A Mitchell, "The Jurisdictional Basis of Trade Secret Actions: Economic and Doctrinal Considerations" (1997) 8 *Australian Intellectual Property Journal* 134.

22 *Parry-Jones v Law Society* [1969] 1 Ch 1 at 7, 9.

23 *Re a firm of Solicitors* [1997] Ch 1 at 10; *Macquaire Bank Ltd v Myer* [1994] 1 VR 350 at 359; *Re a firm of Solicitors* [1992] QB 959.

relevant to a subsequent adverse representation.²⁴ Although this approach is consistent with that adopted by Australian courts,²⁵ it gives clients an improper choice between probable or possible disclosure of confidential information if they do not apply for disqualification, and a certain disclosure of confidential information if they do.²⁶ If the matter is taken to court, the plaintiff is forced to establish the existence, nature and relevance of confidential information, thereby disclosing it in detail to both the court and the opposing party. In those circumstances, the plaintiff may prefer to allow the adverse representation to go ahead and take the risk of the confidential information being disclosed.

It is submitted that it would be better for the client to be required to show simply that there was a substantial relationship between the matters in the former and current representation and, upon establishing such a relationship, for the receipt of confidential information to be presumed.²⁷ This substantial relationship test acknowledges that general knowledge about a former client's way of doing business does not, on its own, disqualify a firm from acting, even though it might be relevant to a subsequent adverse representation.²⁸

C. Secondary Disqualification

(i) *Presumption of Imputed Knowledge*

After the initial disqualification of a lawyer, the court must decide whether to disqualify the lawyer's firm as well. Courts have often answered this question by using the presumption of imputed knowledge, which presumes that the disqualified lawyer shared the confidential information of the former client with the entire firm.²⁹ The foundation of this presumption is uncertain,³⁰ is

24 This second requirement is found in a number of cases, eg: *D & J Constructions Pty Ltd v Head* (1987) 9 NSWLR 118 at 124; *Murray v Macquarie Bank Ltd* (1991) 33 FCR 96; *MacDonald Estate v Martin* [1990] 3 SCR 1235, (1990) 77 DLR (4th) 249 at 267.

25 See *Carindale Country Club Estate Pty Ltd v Astill* (1993) 115 ALR 112 at 120-1: "It is a basic requirement that before material will be recognised as having the character of confidential information, the information in question must be identified with precision and not merely in global terms. The requirement is insisted upon even though it may necessitate disclosing to the court the very information the confidentiality of which it is sought to preserve by the action. The requirement has its foundation in the need for the court to be able to frame a clear injunction, should relief against misuse of confidential information be granted" (references omitted).

26 See also *Bolkiah v KPMG*, (Court of Appeal), note 10 *supra* at 20, per Waller LJ; *T C & Theatre Corporation v Warner Bros Pictures* 113 F Supp 265 at 269 (1953); *Realco Servs v Holt* 470 F Supp 867 at 872 (1979).

27 Cf the test proposed in *Re a firm of Solicitors* [1997] Ch 1 at 11: "The solicitor must show ... not merely that he is not in possession of any relevant confidential information, but that there is no real risk that he has such information".

28 See for example *Russell McVeagh*, note 14 *supra* at 644, per Richardson P, Gault and Henry JJ, where the former client alleged that in acting for it on tax matters, the firm obtained information valuable to a hostile bidder like the subsequent client about its method of operations, its negotiating style, its corporate culture and structure and the personalities of members of its management team.

29 See for example, *Mallesons Stephen Jaques v KPMG Peat Marwick*, note 2 *supra* at 373, where Ipp J stated that: "ordinarily the knowledge of a partner will be imputed to the other members of the partnership".

30 Edmonds, note 1 *supra* at 235-49.

“unrealistic in the era of the mega-firm”³¹ and, through its ‘transfer’ effect as lawyers change firms, can lead to ridiculous outcomes if followed to its logical conclusion.³² Therefore, Lord Millet’s statement in *Bolkiah* that “there is no cause to impute or attribute the knowledge of one partner to his fellow partners”³³ is a victory for common sense.³⁴

(ii) *The Extent of the Duty*

The duty to preserve confidentiality is unqualified: “[i]t is a duty to keep the information confidential, not merely to take all reasonable steps to do so”.³⁵ Lord Millet stated:

The former client cannot be protected completely from accidental or inadvertent disclosure. But he is entitled to prevent his former solicitor from exposing him to any avoidable risk; and this includes the increased risk of the use of the information to his prejudice arising from the acceptance of instructions to act for another client with an adverse interest in a matter to which the information may be relevant.³⁶

This means that even though knowledge will not be imputed to the remainder of the firm, the onus is upon the firm to show that the relevant knowledge has not been transferred and that there is no risk that it will be.

(iii) *The Disqualification Approach*

While common law jurisdictions have agreed that the former client’s confidential information should not be put at risk, they have been divided over how strict this standard should be. As stated by the Supreme Court of Canada in *MacDonald Estate v Martin*,³⁷ in determining whether to disqualify a firm, jurisdictions have used one of two broad approaches: either the *probability* of real mischief test or the *possibility* of real mischief test, where mischief refers to the misuse of confidential information by a lawyer or firm against a former client.³⁸ The possibility of real mischief has become the predominant approach in Australia, the United States and Canada, and was the approach adopted by the House of Lords in *Bolkiah*, overruling the probability approach of the early

31 *MacDonald Estate v Martin* [1990] 3 SCR 1235; (1990) 77 DLR (4th) 249 at 268.

32 Mitchell (1998), note 3 *supra* at 428-30; Donaghue, note 3 *supra* at 30; P Finn, “Fiduciary Law and the Modern Commercial World” in Ewan McKendrick (ed), *Commercial Aspects of Trusts and Fiduciary Obligations*, Clarendon Press (1992) p 29. See discussion below.

33 *Bolkiah v KPMG* [1999] 2 WLR 215 at 225.

34 See also *Bolkiah v KPMG*, (Court of Appeal), note 10 *supra* at 26, per Waller LJ. His Lordship goes on to state that: “[t]here would simply be no reason for examining Chinese walls and their effectiveness if knowledge of one partner is to be imputed to another placing the other partner under an embargo from acting”. This is not exactly true. It is possible to view the imputation of knowledge as the application of the presumption of shared confidences which could be rebutted by the existence of appropriate information barriers or Chinese walls.

35 *Bolkiah v KPMG* [1999] 2 WLR 215 at 225.

36 *Ibid.*

37 (1990) 77 DLR (4th) 249.

38 *Ibid* at 257, per Sopinka J; cited also in *Russell McVeagh*, note 14 *supra* at 649, per Richardson P, Gault and Henry JJ.

English Court of Appeal decision, *Rakusen v Ellis, Munday & Clarke*.³⁹ Lord Millet stated:

[T]he court should intervene unless it is satisfied that there is no risk of disclosure. It goes without saying that the risk must be a real one, and not merely fanciful or theoretical. But it need not be substantial.⁴⁰

This statement reflects the possibility of real mischief approach.

(iv) *Chinese Walls*

The possibility approach obviously means that it is highly unlikely that firms will be able to do work for a subsequent client with an interest adverse to a former client when they possess relevant confidential information from that former client. However, Lord Millet indicated that this would be possible if the firm could show that: “there is no risk that the information will come into the possession of those now acting for the other party”.⁴¹

The typical means of preventing the flow of confidential information within firms is through the use of an organisational device called a Chinese wall. This may incorporate a number of mechanisms including: structural mechanisms, such as ensuring that the lawyers work in different departments; geographical mechanisms, such as placing the lawyers in different buildings or States; and procedural mechanisms, such as limiting access to files and databases.⁴² His Lordship stated that there “is no rule of law that Chinese walls or other arrangements of a similar kind are insufficient to eliminate the risk”.⁴³ However, as stated in decisions of other courts,⁴⁴ his Lordship said that they would be viewed with suspicion.

In the circumstances of *Bolkiah*, the House of Lords was not satisfied that KPMG’s Chinese walls had eliminated the risk of misuse of Prince Jefri’s confidential information. Lord Millett identified three particular concerns.

39 Note 17 *supra*.

40 *Bolkiah v KPMG* [1999] 2 WLR 215 at 226. See also *Re a firm of Solicitors* [1997] Ch 1 at 11 where Lightman J stated: “the burden must (in the absence of informed consent of the client) surely be upon any person who was a partner in a firm which was retained whilst he was a partner in the firm and which in the course of such retainer became possessed of confidential information, to establish that there is no risk of his misusing confidential information before he can thereafter act against that client”.

41 *Bolkiah v KPMG* [1999] 2 WLR 215 at 227.

42 Law Commission, *Fiduciary Duties and Regulatory Rules*, Consultation Paper No 124 (1992) pp 144-51.

43 *Bolkiah v KPMG* [1999] 2 WLR 215 at 227.

44 In Australia, *Fruehauf Finance Corp Pty Ltd v Feez Ruthning* [1991] 1 Qd R 558 is the only recent case where a Chinese Wall was accepted as adequate protection against the disclosure of confidential information. However, some of the comments of Ipp J in *Unioil International Pty Ltd v Deloitte Touche Tohmatsu*, note 2 *supra* at 108, might suggest that his Honour would be prepared to accept their use in appropriate circumstances. See also *Russell McVeagh*, note 14 *supra* at 654-5, per Richardson P, Gault and Henry JJ: “Although the concepts of Chinese walls and cones of silence 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”.

First, the teams on Project Lucy and Project Gemma each had a rotating membership, "involving far more personnel than were working on the project at any one time, so that individuals may have joined from and returned to other projects" making "the difficulty of enforcing confidentiality or preventing the unwitting disclosure of information ... very great".⁴⁵ This view may have significant implications for law firms. In particular, in many large law firms articulated clerks are rotated through various departments to broaden their knowledge and exposure to different areas of practice. This rotation process may prove detrimental to attempts by such firms to eliminate the risk of the transfer of confidential information by the use of Chinese walls.

Secondly, the Chinese walls in *Bolkiah* were erected within a single department between members "accustomed to work with each other".⁴⁶ Thirdly, the Chinese walls were established ad hoc. In other words, they were not permanent fixtures but were created as the need arose. To be effective, his Lordship stated that a Chinese wall "needs to be an established part of the organisational structure of the firm, [and] not created ad hoc".⁴⁷ These two concerns suggest that information barriers may have to be institutionalised within all departments of the firm. This would be extremely difficult to do in practice. For example, in a specialised department such as banking and finance, the department would need to be broken into separately resourced teams, each acting for only one major client.⁴⁸ It would also seem undesirable for clients, given that presumably one of the reasons they engage a large firm is to take advantage of the shared pool of knowledge of its professional staff. Institutionalised Chinese walls divide that pool, correspondingly limiting a client's access to the firm's knowledge capital.⁴⁹

V. FURTHER DISCUSSION

A. Inferred Consent

Lord Millet made some curious statements in relation to inferred consent in the case of simultaneous representation of clients with adverse interests. His Lordship stated:

There is a clear distinction between the position of a solicitor and an auditor. The large accountancy firms *commonly* carry out the audit of clients who are in competition with one another. The identity of their audit clients is *publicly* acknowledged. Their clients are taken to consent to their auditors acting for competing clients, though they must, of course keep confidential the information obtained from their respective clients.⁵⁰

45 *Bolkiah v KPMG* [1999] 2 WLR 215 at 228.

46 *Ibid* at 229.

47 *Ibid*.

48 Barlow Lyde & Gilbert, "Institutionalising Chinese Walls" BLG Briefing Note, 22 January 1999, p 4; J Griffiths-Baker, "Further cracks in Chinese Walls" (1999) 149 *New Law Journal* 162.

49 "Walls of silence" *European Accounting Bulletin*, 29 January 1999, p iv.

50 *Bolkiah v KPMG* [1999] 2 WLR 215 at 225 (emphasis added).

This passage suggests that the client's consent is based on the frequency of such adverse simultaneous representation and/or that the identity of the clients is made public. Neither of these explanations for the client's consent is entirely satisfactory.

In relation to the first basis, the fact that simultaneous adverse representation has become commonplace can only be because it has been allowed to become so by the conflict rules. This observation fails to address the fundamental preceding question, namely: on what basis did clients impliedly consent to their firm's acting for a competitor before simultaneous adverse representation became common?

The public acknowledgment of the identity of clients is also insufficient to infer consent. Both accounting and law firms publicly acknowledge many of their clients. In recruitment brochures aimed at students it is common for both types of firms to list their key clients. However, neither accounting nor law firms would publicly detail the nature of the work undertaken.⁵¹ There is no "clear distinction" between the position of solicitor and auditor as his Lordship states.

B. Using all Available Skill and Knowledge

Certain cases have suggested that a lawyer is under an obligation to put not just her or his skill and knowledge at the client's disposal but also that of the entire firm, irrespective of whether the relevant information had been provided in confidence.⁵² Such a duty would not seem to accord with general community expectations, particularly given the size of modern law firms. This view has been doubted by several judges and commentators.⁵³ Although the House of Lords did not mention this duty in *Bolkiah*, it was briefly discussed in the Court of Appeal. While Otton LJ agreed that such a duty existed,⁵⁴ Lord Woolf MR approved of the decision in *Baden Barnes Groves & Co (a firm) v Bristol West Building Society*,⁵⁵ which held that there is no duty to disclose such information.⁵⁶ Chris Edmonds recommends similar limitations be put on the

51 In *Bolkiah v KPMG*, (High Court), note 5 *supra* at 7, an extract from a letter that KPMG sent to Price Jefri's solicitors is included. It states in part: "The duty of confidentiality owed to clients makes it inappropriate for this firm to give you or anybody else acting for or purporting to act for any party any information whatsoever in relation to any work we may or may not undertake for any other party".

52 *Bolkiah v KPMG*, (Court of Appeal), note 10 *supra* at 14, per Otton LJ; *Russell McVeagh*, note 14 *supra* at 656, per Thomas J; *Spector v Ageda* [1973] Ch 30, 48; *Moody v Cox* [1917] 2 Ch 71; *Yunghanns v Elfic Ltd* (unreported, Vic SC, Gillard J, 3 July 1998) at 6-7, 11. See also J Holland (ed), *Cordery on Solicitors*, (9th ed, 1997) F[126]; M Connock, "Restraining Lawyers from Acting in the Face of a Conflict: Discussion and Advice in Australia" (1995) 12 *Australian Bar Review* 244 at 244.

53 See *Unioil International Pty Ltd v Deloitte Touche Tohmatsu*, note 2 *supra* at 110-11; *Re a firm of solicitors* [1992] 1 QB 959 at 973, per Staughton LJ dissenting; and Edmonds, note 1 *supra* at 251.

54 *Bolkiah v KPMG*, (Court of Appeal), note 10 *supra* at 14, per Otton LJ.

55 Unreported, Chadwick J, High Court UK, 22 November 1996. Referred to in *Darlington Building Society v O'Rourke James Scourfield and McCarthy* (unreported, Court of Appeal, Nourse and Waller LJ, Sir Iain Glidewell, 3 November 1998) citing also at 5 *Mortgage Express Ltd v Bowerman & Partners* [1996] 2 All ER 836 at 841D.

56 *Bolkiah v KPMG*, (Court of Appeal), note 10 *supra* at 2, per Lord Woolf MR.

solicitor's duty to put all relevant skill and knowledge at the client's disposal. He describes the duty as being simply "to disclose to his client relevant information acquired by him in the course and for the purposes of his retainer or known to him from non-confidential sources".⁵⁷ This formulation reinforces client faith that their confidences will be maintained and aligns the scope of the duty in law with the understanding of lawyers as to their duty in this regard.

C. Lawyers Moving Firms

One important question not considered in any of the *Bolkiah* decisions, or many of the other decisions of adverse subsequent representation, is the situation of lawyers moving firms.⁵⁸ Assume that Jane is a lawyer working in a firm where other members of the firm acquire confidential information from a client, ForCom. Jane, working in a different department, acquires none of this information either directly or indirectly. The ForCom matter ends. Jane moves to another firm. Can she act against ForCom in a new matter? Even if Jane does not act in the matter, could Jane's firm be disqualified from acting on the basis that there is a risk that Jane acquired confidential information in her former position and has passed this information on to her new firm?

These questions arise from a strict application of the subsequent adverse representation rules such that the risk that information has been disclosed exists in relation to both the former firm and the new firm.⁵⁹

Thus there is a conflict with respect to every matter handled by the old firm that has a substantial relationship with any matter handled by the new firm irrespective of whether the moving lawyer had any involvement with it.⁶⁰

Disqualifying lawyers in these circumstances may be necessary to ensure that there is *no* risk of disclosure of confidential information. However, on this basis, few movements of lawyers between large firms in one city or country would be needed before they would all be disqualified.⁶¹ This suggests that the standard favoured by the House of Lords is unrealistic, or should at least be qualified in these circumstances.

D. A Proper Balancing of the Competing Interests?

The High Court, Court of Appeal and House of Lords all considered to some extent the different policy considerations that are relevant to the issue of former client conflicts of interest.⁶² The two competing values which are central to this

57 Edmonds, note 1 *supra* at 251 (emphasis removed).

58 A case on this issue is *Bank of Nova Scotia v Imperial Developments (Canda) Ltd* (1989) 58 Man R (2d) 100, [1989] 3 WWR 21 (QB).

59 P Perell, *Conflicts of Interest in the Legal Profession*, Butterworths (1995) p 23.

60 *MacDonald Estate v Martin* (1991) 77 DLR (4th) 249 at 268.

61 Mitchell, note 3 *supra* at 430; J Paterson, "Conflicts of interest and confidential information" (1997) 71(11) *Law Institute Journal* 46 at 48; Donaghue, note 3 *supra* at 30.

62 *Bolkiah v KPMG*, (Court of Appeal), note 10 *supra* at 7, per Lord Woolf MR: "it is important to note the strong policy flavour which emerges from the judgments".

issue are the need to maintain high standards in the profession (in particular by protecting client confidences), and the need to permit clients to choose their legal representatives based on considerations other than conflicts and confidentiality. The differences between the judgments of the Court of Appeal and the House of Lords can be largely explained by the different weight placed on these competing values. It is submitted that the balance adopted by the Court of Appeal better reflects modern day realities.

(i) *Protecting Clients' Confidential Information*

Lawyer client confidences require protection, not only because of the law's concern to protect confidential information in general, but also due to "the practical needs of the practice of law and of the administration of justice".⁶³ Thomas J in *Russell McVeagh* referred to these considerations as follows:

The freedom for a client to divulge its affairs to its solicitors in confidence is an important factor in the public interest and underlies the fiduciary relationship of solicitor and client. Knowledge that information which is imparted will be kept confidential and not placed at risk of disclosure to others reassures the client and leads to the free and full exchange of information essential for the conduct of legal affairs.⁶⁴

(ii) *Client Choice*

The mega-firms which exist in many countries may too easily be prevented from acting for subsequent clients if the rule is that they will be disqualified unless they can show there is *no* risk of the disclosure of confidential information.⁶⁵ It must be remembered that the emergence of large firms is a response to client needs. There are some matters that only large firms have the necessary resources and expertise to handle.⁶⁶ Further, such disqualification rules may limit the scope for multi-disciplinary practices, seen by some consumers of legal services as the way of the future.⁶⁷

Given that public confidences could be damaged as much by inflexible rules resulting in unnecessary restrictions on choice of lawyer as by the misuse of confidential information,⁶⁸ a better approach to disqualification may be to allow

63 Perell, note 54 *supra*, p 15.

64 *Russell McVeagh*, note 14 *supra* at 665, per Thomas J (dissenting). See also Mitchell, note 1 *supra* at 419-20. Cf S Goldberg, "The Former Client's Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly" (1987) 72 *Minnesota Law Review* 227 at 275-7, where it is suggested that clients are not thinking about future conflict situations when talking with their lawyers and therefore this is a non-issue. However, as stated by C Dunnigan, "The Art Formerly Known as the Chinese Wall: Screening in Law Firms: Why, When, Where, and How" (1998) 11 *Georgetown Journal of Legal Ethics* 291 at 305, this assumes a lack of sophistication in clients that would not seem to be reflected in corporate counsel. Further, the reason for such thoughts may be precisely because it is assumed that confidences are protected.

65 See Dunnigan, note 62 *supra* at 296, discussing the use of disqualification motions as a tactic in litigation in the United States.

66 *Re a firm of Solicitors* [1992] 1 QB 959 at 974; Griffiths-Baker, note 46 *supra*.

67 R Kingston, "Invasion of the bean-counters; Are the ethics of accountancy and law too at odds for a shared practice?" *The Independent* (London, UK), 11 February 1999, p 12.

68 M Keith, "Information Barriers must stand tough tests" (1993) 15 *Law Society Bulletin* 23 at 26.

a firm to continue to act if the firm has taken all reasonable measures to protect client confidences and the disclosure of confidential information is not probable. This approach provides a less strict standard, as suggested by the majority in *Russell McVeagh*:

In making a final determination as to whether enjoinder in the nature of disqualification is appropriate, the Court will also need to take into account the competing factors of a person's right to the services of a solicitor of choice, and the corresponding right of the solicitor to offer his or her services to the public generally. Mobility within the profession, as it is sometimes termed, is relevant. Access to specialist services and market competition are also matters relevant to the public interest. A balancing exercise of this kind, 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 imposed by the Court.⁶⁹

However, the rule suggested in *Bolkiah* provides clients and lawyers with more certainty than an approach which seeks to balance the competing interests at stake on a case by case basis, as proposed by the majority in *Russell McVeagh*.

VI. CONCLUSION

Bolkiah represents the latest decision on the increasingly litigated issue of subsequent adverse representation. While the decision is clear and rejects a number of problematic presumptions and duties imposed in other cases, its test is too stringent and unduly interferes with the client's right to choose his or her firm of lawyer. It is submitted that if a firm has taken all reasonable measures to protect client confidences and disclosure of confidential information is not probable, then the firm should be able to continue to act. The matter of Chinese walls has been considered by the highest Courts in Canada,⁷⁰ New Zealand⁷¹ and England. Now we need to wait for the High Court to clarify this area of the law in Australia.

69 *Russell McVeagh*, note 14 *supra* at 651, per Richardson P, Gault and Henry JJ.

70 *MacDonald Estate v Martin* [1990] 3 SCR 1235; (1990) 77 DLR (4th) 249.

71 *Russell McVeagh McKenzie Bartlett & Co v Tower Corporation* [1998] 3 NZLR 641.