



## **Chinese Walls – Can they really exist?**

BY

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Trust and confidence are closely related. A hallmark of a client's relationship with a solicitor is that the client can safely trust and confide in his or her lawyer. In Taylor v. Blacklow (1836) 3 Bing (N.C) 235 Gaselee J stated that 'the first duty of an attorney is to keep the secrets of his client'. So evident is that duty that Gaselee J. observed that authority was not required to establish that proposition. Sometimes that proposition has been overstated. For instance, Buller J in Wilson v. Rastell (1792) 4 T.R. 753 said, in the context of confidentiality continuing after the professional retainer, that the 'mouth' of the attorney 'is shut for ever'. We all know that solicitors are required to disclose certain confidential information under compulsion of law. That particular issue is not considered here; this note explores the issue of the duty of confidentiality

to a client, particularly a former client, and considers in what circumstances can a firm successfully erect Chinese walls and therefore act for two parties arising out of related business matters or litigation.

### **The Prince Jefri Bolkiah Case**

Issues in relation to conflicts of interest and the extent to which Chinese walls can function legitimately were considered in a recent decision of the House of Lords in Prince Jefri Bolkiah v. KPMG [1999] 1 All ER 517. Although the facts related to a firm of accountants, the work engaged in by the accountants was litigation related. Accordingly, the principles enunciated by the courts in the Bolkiah case are relevant to solicitors. Lord Millett, who delivered the principal speech (judgment) in the case, noted that the question involved had become of increased importance with the emergence of huge international firms with enormous resources that operate on a global scale, offering a comprehensive range of services to clients.

The facts of the Bolkiah case may be stated. KPMG is one of the five largest firms of chartered accountants in the world. KPMG were employed as auditors of the core assets of the Brunei Investment Agency (the BIA) which had been established to hold and manage the general reserve fund of the Government of Brunei and its external assets. Prince Jefri Bolkiah, the third and youngest brother of the Sultan of Brunei, had been the chairman of BIA for some time until his removal in 1998. He had previously enjoyed a close relationship with the Sultan but had fallen out of favour.

Between 1996 and 1998, Prince Jefri, acting in a personal capacity, retained KPMG to act for him or one of his companies in private litigation in which

Prince Jefri was then engaged. KPMG provided extensive litigation support services of a type normally undertaken by solicitors. KPMG employed 168 persons on Prince Jefri's litigation. The litigation was settled in March 1998 and KPMG were paid approximately £4.6m for that work.

During the course of that litigation KPMG had been entrusted with and acquired extensive confidential information about Prince Jefri's financial affairs. Prince Jefri was subsequently dismissed as chairman of the BIA and the Brunei Government in June 1998 commenced an investigation into the conduct of the affairs of the BIA including matters relating to when Prince Jefri was the chairman.

### **Chinese Walls**

KPMG considered that they could accept instructions from the Brunei government as they had ceased to act for Prince Jefri more than two months previously and he was no longer a client. Aware of the possibility of conflict of interests, KPMG erected so-called Chinese walls, an information barrier, around the department carrying out the BIA investigation for the Brunei government. Prince Jefri sought an injunction restraining KPMG from continuing to work on the investigation. The case eventually went to the House of Lords.

### **Preservation of Confidentiality**

The House of Lords held in the Bolkiah case that like a solicitor, an accountant, providing litigation support services owed a continuing professional duty to a

former client, following the termination of the client relationship, to preserve the confidentiality of information received during the existence of the client relationship. That duty was unqualified and required the solicitor or accountant to keep the information confidential and also not to misuse the confidential information.

Lord Millet noted that a solicitor cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. The judge noted that his disqualification had nothing to do with the confidentiality of client information; it was based on the inescapable conflict of interest which is inherent in the situation. He continued

‘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.’

The House of Lords considered that the court should intervene unless it is satisfied that there is no risk of disclosure. While the risk must be a real one, it need not be substantial.

The Chinese walls established by KPMG were ad hoc and erected within a single department. The court noted that in the circumstances, the difficulty of enforcing confidentiality or preventing the unwilling disclosure of information

was very great. Erecting Chinese walls and separating the insolvency, taxation or other departments from one another was one thing, as such departments often worked from different offices and there may be relatively little movement of personnel between them. But to erect Chinese walls between members who are all drawn from the same department, and accustomed to working with each other, was a different matter. The court noted that physical segregation was not necessarily adequate, especially when it related to a single department within a firm.

The court in Prince Jefri's case concluded on the evidence that KPMG had not discharged the heavy burden of showing that there was no risk that information in their possession which was confidential to Prince Jefri and which KPMG obtained in the course of a former client relationship may unwittingly or inadvertently come to the notice of those working on the new investigation adverse to Prince Jefri's interests. Accordingly, the court granted an injunction restraining KPMG from continuing to carry out certain work for the Brunei Investment Agency.

## **Conclusion**

The case raises important issues about the effectiveness of Chinese walls as a means of restricting information between different persons of the same firm. Erecting Chinese walls within the same department, such as the litigation department, where there is no consent from the affected party is particularly difficult. Effective Chinese walls should involve an established organisational arrangement to preclude the passing of information from one part of the firm to another. This may involve a combination of physical separation including different dining arrangements, a recurring educational programme, emphasising

the importance of not improperly or inadvertently divulging confidential information, proper records, monitoring by compliance officers and disciplinary sanctions.

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