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Chinese Walls: Myth, Metaphor and Reality — Living with Fiduciary Duties in Resources Relationships

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SUMMARY

The most important relationships which attend resources projects are, by convention and agreement if nothing else, ones which attract fiduciary duties. Joint venture participants combine with one another with promises to be loyal, just and faithful. The manager or operator is appointed as an agent of the participants and on a similar basis. The participants separately appoint, and the venturers may jointly appoint, legal and other professional advisers on similar terms. Commercial conflict between these parties of any kind within or without the relationship always raises questions about whether there is a legal constraint on a party's freedom of action. Does a new business opportunity available to one venturer belong to all the participants in the venture? Can an operator/manager share its market knowledge with other companies in its corporate group for purposes unrelated to the venture? May someone who holds communal knowledge or private knowledge of another use that knowledge for themselves or act against the interests of that other while holding that knowledge? When fiduciary principles say not, a second practical question is, whether a fiduciary can divest itself of its disability by quarantining it, as behind a Chinese Wall. The answer is that such an edifice is not a panacea. This paper explores when Chinese Walls are useful and when they will not work and also pays particular attention to the no-profit rule and a fiduciary's duties with respect to business opportunities.

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PART 1: FIDUCIARY DUTIES IN RESOURCE RELATIONSHIPS

This paper is written with the benefit of having read Gino Dal Pont's paper, "Conflicts of Interest: The Interplay between Fiduciary and Confidentiality Law", and is intended to complement it. As my starting point, I adopt Professor Dal Pont's commentary on nomenclature, and speak of fiduciary duties which arise from certain relationships. It is salutary to be reminded that not all duties owed by a "fiduciary" are in fact fiduciary duties.[1] It helps us appreciate that contract and tort have not yet been superseded or subsumed entirely. The precision also underlines that while fiduciary duties may have a relatively fixed content, what that content applies to and how far the duties extend is greatly influenced by the variable contexts in which the relationships arise.

The clearest paradigms for fiduciary duties are trusteeship[2] and partnership.

In a trust, the rules are long-standing, severe and unbending.[3] They are shaped by the personal or domestic and dynastic imperatives which underpinned the use of trusts for centuries. Yet even in a trust, the rules governing fiduciary duties are subject to the express terms of the trust. The adaptation of the trust to general commerce, a "commercial monstrosity" which is nonetheless an especially Australian and widespread phenomenon,[4] has led to the exploration of the outer reaches of the power to exonerate a trustee from the rigours of equity's tender care.[5]

In a partnership, the assumption of fiduciary duties is an essential incident of the relationship and the prime regulator of the relationship between partners.[6] Sir Owen Dixon summarised it:

> "indeed, it has been said that a stronger case of fiduciary relationship cannot be conceived that that which exists between partners. 'Their mutual confidence is the lifeblood of the

[1] For example, duties of skill and care are tortious and/or contractual, not fiduciary, even when owed by "fiduciaries": *Breen v Williams* (1996) 186 CLR 71 at 93 per Dawson and Toohey JJ, at 111 per Gaudron and McHugh JJ; cf *Astley v Austrust Ltd* (1999) 197 CLR 1 at 20-23; *Pilmer v Duke Group Ltd* (2001) 75 ALJR 1067, 1082-1084; 38 ACSR 122, 142-144.

[2] Compare *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 68 per Gibbs CJ; cf Mason J at 96-97.

[3] See for example, *Bray v Ford* [1896] AC 44, 51-52.

[4] See H A J Ford, "Trading Trusts and Creditor's Rights" (1981) 13 MULR 1; J D Merralls, "Unsecured Borrowings by the Trustees of Commercial Trusts" (1993) 10 Aust Bar Rev 163.

[5] See for example, H A J Ford and I J Hardingham, "Trading Trusts: Rights and Liabilities of Beneficiaries" in P D Finn (ed), *Equity and Commercial Relationships* (1987), pp 56-58; T Cockburn, "Trustee Exculpation Clauses Furnished by the Settlor" (1993-1994) 11 Aust Bar Rev 163.

[6] Higgins and Fletcher, *The Law of Partnership in Australian and New Zealand* (7th ed, 1996), p 115.

> concern. It is because they trust one another that they are partners in the first instance; it is because they continue to trust one another that the business goes on' (per Bacon VC in *Helmore v Smith* (1886) 35 Ch D 436 at 444). The relation is based, in some degree, upon a mutual confidence that the partners will engage in some particular kind of activity or transaction for the joint advantage only. In some degree it arises from the very fact that they are associated for such a common end and are agents for one another in its accomplishment. Lord Blackburn found in this consideration alone sufficient reason for the fiduciary character of the partnership relation (*Cassels v Stewart* (1881) 6 App Cas 64 at 79)."[7]

As also with trusts, the fiduciary duty owed "is susceptible to limitation by agreement but [in contrast to private trusts] few partners discern an advantage to their relationship in freeing their co-partners from observing the main thrust of these duties".[8]

The stringency of fiduciary obligations and remedies for their breach makes the allegation of a fiduciary duty a potent one in the hands of disputants. No wonder it is in such vogue. However, the present High Court (perhaps under the influence of some classical equity and common lawyers among its midst) shows signs of wishing to contain the promiscuous pleading of fiduciary duties at the merest drop of a handkerchief. Thus:

> "From various decisions in recent years there appear attempts to throw a fiduciary mantle over commercial and personal relationships and dealings which might not have been thought previously to contain a fiduciary element. In some instances the forensic advantage sought to be gained has been that already referred to — less stringent time limitations. In others, the advantage sought has been the remedial constructive trust with the edge thereby conferred over unsecured creditors in an insolvent administration of the affairs of a defendant. A notable instance of such an attempt, in the end unsuccessful, is the litigation arising from dealings in bullion which was determined by the Privy Council in *In re Goldcorp Exchange Ltd* [1995] 1 AC 74. In *Hospital Products*, the apparent advantage to the plaintiff over counts in contract and deceit of the fiduciary duties said to arise from the exclusive distribution agreement was that specific equitable relief would enable the plaintiff to take over those businesses (a category of case referred to by Professor Goode, 'The Recovery of a Director's Improper Gains: Proprietary Remedies for Infringement of Non-Proprietary Rights', in

[7] *Birtchnell v Equity Trustees, Executors & Agency Co Ltd* (1929) 42 CLR 384 at 407-408.
[8] Higgins and Fletcher, op cit n 6 at p 115.

McKendrick (ed), *Commercial Aspects of Trusts and Fiduciary Obligations* (1992) 137, at pp 140-141). In *Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534, the claim to recover pecuniary loss from the solicitors was framed as one for breach of fiduciary duty rather than for breach of contract or in tort (for negligence or deceit) because of the apprehension that on none of those other bases could there be the recovery of a substantial sum (see the judgment of La Forest J in *Canson Enterprises* [1991] 3 SCR 534 at 565).

The present case stands apart from those just mentioned because it involves both a fiduciary relationship within a well-recognised category as well as the claim to a well-established remedy. Nevertheless, even here, to say that the appellants stood as fiduciaries to the respondents calls for the ascertainment of the particular obligations owed to the respondents and consideration of what acts and omissions amounted to failure to discharge those obligations: *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 73, 102; *In re Goldcorp Exchange Ltd* [1995] 1 AC 74 at 98; *Breen v Williams* (1996) 186 CLR 71 at 82-83."[9]

In a Resources Context

With this warning in mind, when and how do fiduciary duties arise for mining, petroleum, energy and infrastructure relationships structured as unincorporated joint ventures?

- Potentially, at least, in negotiating for a relationship in which, conventionally, fiduciary duties will be owed: *United Dominions Corporation Ltd v Brian Pty Ltd*[10] (negotiations for a partnership for land development, held: duties owed), *LAC Minerals Ltd v International Corona Resources Ltd*[11] (negotiations for a mining joint venture, held: duties not owed); *Ravinder Rohini Pty Ltd v Kriziac*[12] (negotiations for a partnership for land development, held: duties owed), *UDC v Brian* and *LAC v Corona* are paths well travelled for AMPLA conferees and I do not retrace the steps. Whether or not fiduciary duties are attracted depends on the extent and terms of the dealings between the parties.
- In the joint venture. Typically, this is first and foremost a product of the parties' intention as expressed in the contract itself. If there

[9] *Maguire v Makaronis* (1996) 188 CLR 449 at 463-464.
[10] (1985) 157 CLR 1.
[11] (1989) 61 DLR (4th) 14.
[12] (1991) 105 ALR 593 (FCAFC).

is no partnership[13] or agency within the JVA, there is no relationship which per se attracts fiduciary duties. However, there is a now time-honoured, standardised description of the incidents of the parties' relationship in which the parties expressly agree to act in good faith and to be just and faithful towards one another.[14]

How did this language arise and come to be adopted? Undoubtedly, United States[15] and United Kingdom[16] precedents influenced Australian drafters.[17] The summary of the partnership position, above, undoubtedly also inspired and supported the drafting: while legally the distinction between partnership and joint venture is clear (if only by virtue of long assertion[18]) and important, the underlying commercial drivers for the owing of mutual fiduciary duties ("mutual confidence and trust which underlie most consensual fiduciary relationships"[19]) are indistinguishable in the two cases.

Put one way, the contract creates a relationship of such intimacy and interdependency that fiduciary duties should be implied (subject to express denials of duties in any specified area). Alternatively, the parties have contractually mutually assumed such duties, there being nothing, in principle, to prevent fiduciary duties being created by contract:

[13] Occasionally there are resources partnerships, by accident or design. For example, the original Kalgoorlie Mining Associates agreement, the predecessor of the "Big Pit", was expressly a partnership. Other arrangements may constitute a partnership: cf a farm-in heads of agreement which contained a *profit* sharing clause: *Erlistoun Gold Pty Ltd v Worth Investments Pty Ltd* [1999] WASCA 3 (10 May 1999).

[14] For example: "Each Participant agrees to act in good faith towards the other Participants, including but not limited to being just and faithful in all activities and dealings with the other Participants in relation to the Joint Venture; attending diligently to the conduct of all activities in relation to the Joint Venture in which the Participants are involved; and accounting promptly for all funds received by it of behalf of the Joint Venture."

[15] The standard form joint operating agreement of the American Association of Professional Landmen current as of about 1970 was influential (personal communication from Michael Sharwood).

[16] See J D Merralls, "Mining and Petroleum Joint Ventures in Australia: Some Basic Legal Concepts" (1988) 62 ALJ 907 at 908 n 9.

[17] One of the earliest Australian mining joint venture agreements of which I am aware is the "Cleveland-Cliffs" (Robe River) joint venture agreement circa 1970, prepared, according to legend, in one longhand draft by Colin Trumble of Mallesons while on a trans-Pacific flight. A fascinating legal history project awaits a suitable chronicler or, more strictly, prosopographer (in view of the relatively small number of practitioners who developed the much-repeated key phrases of the ancestral joint venture agreements). The earliest, highly influential teaching and writing on joint ventures were papers given by Michael Chate in a course at Sydney University in 1969 and W D (Bill) Leslie at the Law Institute of Victoria in 1970, which laid out the key parts of joint venture agreements for Australian conditions: see R A Ladbury, "Joint Ventures – Commentary" in P D Finn (ed), *Equity and Commercial Relationships* (1987), p 37, n 2.

[18] Both positively in the standard JVA clause which expressly negates partnership and agency – see typical example quoted by Merralls, op cit, n 16 at p 907, n 3 – and adjectively through the work of learned practitioners since 1970: Ladbury ibid, pp 37-47.

[19] *United Dominions Corp v Brian* (1985) 157 CLR 1 per Mason, Brennan and Deane JJ.

"Recognition of the existence of fiduciary relationship in joint ventures which were not considered to be partnerships has occurred in a limited number of cases in Australia as well as New Zealand: *Noranda Australia Ltd v Lachlan Resources NL* (1988) 14 NSWLR 1; *Keith Murphy Pty Ltd v Custom Credit Corporation Ltd* (1992) 6 WAR 332; *Mount Isa Mines Ltd v Seltrust Corporation Pty Ltd* (unreported, Supreme Court of Western Australia, 27 September 1985, per Rowland J); *Auag Resources Ltd v Waihi Mines Ltd* [1994] 3 NZLR 571. An extensive consideration of the issue was given by Ryan J in *Pacific Coal Pty Ltd v Indemitsu (Qld) Pty Ltd* (unreported, Supreme Court of Queensland, 21 February 1992). Justice Ryan held that it was unnecessary to decide whether or not an Investigation Agreement relating to the mining of coal deposits could be categorised as a partnership agreement. Based on the form of the joint venture agreement and the obligations which had been assumed by the parties, His Honour held that, regardless of such a finding, a fiduciary relationship existed between the parties. ….

The particular terms of the joint venture agreement which Ryan J identified as relevant to the finding that a fiduciary relationship existed, included the parties' covenants to be just and equitable in all activities and dealings with co-venturers and to act bona fide in the interests of the joint venture's objectives; the imposition of an obligation of confidentiality; the provision that all liabilities, costs and expenses of the joint venture would be shared and that the assets of the venture were to be dedicated to the joint venture exclusively [at 16]. …

The scope and content of the fiduciary duties arising out of a non-partnership joint venture are to be determined by the terms of the agreement and/or the nature of the relationship between the parties. Clauses in the joint venture agreement are the principal source of any fiduciary obligations which may exist between the participants in the joint venture. Contractual and fiduciary relationships between the same parties may co-exist, provided that there is no inconsistency between the two sets of obligations

The court may also ground its findings that fiduciary obligations exist upon general equitable principles. These duties operate in addition to those obligations which, by their agreement, the parties impose upon themselves and must not be inconsistent with any obligations arising out of the contract. In *Noranda Australia Ltd v Lachlan Resources*

> *NL* (1988) 14 NSWLR 1 at 17, Bryson J held that, if additional fiduciary duties are found to have existed, they should be limited to those activities in relation to which the participants to the joint venture have mutual trust and confidence in each other."[20]

There are three qualifications to be noted. Although widespread, the "just and faithful"/"good faith" model has not been universally adopted.[21] In joint venture agreements in which it is absent and in which there is no partnership or agency created, fiduciary duties will not be owed.

Moreover, there is authority in New Zealand to the effect that even the "just and faithful"/"good faith" language does not create fiduciary duties: *Auag Resources Ltd v Waihi Mines Ltd*.[22] With respect, this case propounds too sweeping a principle in rejecting any fiduciary duties. While citing with approval the conclusions of Professor Finn[23] and Australian authority[24] that parties could contract for fiduciary duties in relation to a defined area of conduct and exempt themselves from such duties in all other respects,[25] *Auag Resources* adopts an "all or nothing approach" and should not be followed.

Finally, there are comments to the effect that "the parties" statement as to the character of the relationship is not determinative. Thus a partnership exists, even if called something else.[26] But that should not bear upon the duties owed by parties where they choose to express their obligations in the language of fiduciary duties or in terms which correspond to the duties owed by persons (partners and agents) who owe fiduciary duties.

[20] *Schipp v Cameron* (unreported, NSW SC, 9 July 1998) (Einstein J) (BC9804895) at [717], [719], [730], [731] (aff'd on appeal: *Harrison v Schipp* [2001] NSWCA 13 (20 February 2001)).

[21] It was absent from the earliest and most rudimentary of the WA iron ore joint venture agreements, the Goldsworthy joint venture (c 1962-1963) and from arguably the first "modern" Australian JVA, for the Mt Newman Iron Ore project (c 1968), and its descendant, the Agnew nickel project (personal communication from Ian Alfredson). The absence of the "just and faithful" language had an important bearing on court proceedings concerning the Agnew JVA in *Mount Isa Mines Ltd v Seltrust Mining Corp Pty Ltd* (unreported, SC of WA (Rowland J); Library No 6151; 5 July 1985). Modern examples continue in this vein. Cf skeletal heads of agreement in *Hallmark Consolidated Ltd v Centaur Mining and Exploration Ltd* [2001] WASC 190 (20 July 2001) (McLure J).

[22] [1994] 3 NZLR 571. I am grateful to Paul O'Regan of Chapman Tripp Wellington for drawing my attention to this case.

[23] P D Finn, "Joint Ventures – Good Faith, Unconscionability and Fiduciary Duties" (International Bar Assoc Energy Law Conference, 1990). Key passages are extracted at [1994] 3 NZLR 571 at 577-578.

[24] In particular *Noranda Australia Ltd v Lachlan Resources NL* (1988) 14 NSWLR 1. See also *New Zeeland Netherlands Society "Oranje" Inc v Kuys* [1973] 2 NZLR 163 at 166 (PC).

[25] [1994] 3 NZLR 571 at 577-578.

[26] *Canny Gabriel Castle Jackson Advertising Co Ltd v Volume Sales (Finance) Pty Ltd* (1974) 131 CLR 321.

- In the management and operation of the venture. The operator is appointed, by each participant severally, as agent of each participant to manage, supervise and conduct the project up to the point of taking the project's production.[27] The fiduciary duties arise as a consequence of this agency, whether or not it is an express appointment.[28] However, given the flexibility and range of acts and authorities which agency encompasses, the scope and extent of the fiduciary duties can only be determined after consideration of the terms of the agency.

- In advising the joint venture. It goes without saying, that lawyers owe fiduciary duties to their clients. The more interesting question, appreciating that the list of relationships giving rise to fiduciary duties is not closed,[29] is which other advisers owe fiduciary duties (as against contractual and tortious duties of care and contractual and equitable obligations of confidence)? Where do the merchant bankers, geologists, auditors and accountants stand?[30] The general principle enunciated in *Breen v Williams*[31] has been examined afresh and repeated by the High Court in the *Kia Ora* case, concerning an accountant's expert report given to shareholders of a listed mining company in respect of a related party transaction: *Pilmer v Duke Group Ltd (in liq)*.[32] The court held that the accountants owed no fiduciary duty to the Company or its shareholders in preparing their experts report.

As Professor Dal Pont says, what underlies the application of fiduciary duties is the notion that the law must intervene in certain circumstances to prevent one person from taking advantage of his or her position vis-

[27] In those (less frequent) cases in which some or all of the parties to the joint venture, having taken their separate product, each elect to market their share of product through a common sales agent, fiduciary duties owed to each seller will arise consequent on these agencies. In analytical terms, this is no different from each seller appointing a different sales agent. However, in practical terms, complications and conflicts may more readily arise: see below.

[28] Compare *Hallmark Consolidated Ltd v Centaur Mining and Exploration Ltd* [2001] WASC 190 at [48]: "it is to be accepted that there may well be a distinction between the duties which arise by virtue of a person's status as a participant in a joint venture and any role it undertakes as manager and operator. To the extent that a participant is a manager and operator and as such acts as agent for all joint venture participants, the usual fiduciary duties are likely to apply."

[29] *Tufton v Sperni* [1952] 2 TLR 516 at 522; *English v Dedham Vale Properties Ltd* [1978] 1 WLR 93, at 110; [1978] 1 All ER 382 at 398; *Hospital Products v United States Surgical Corporation* (1984) 156 CLR 41.

[30] Expert accountancy witnesses have been the subject of some recent cases, but based purely in contract and the protection of confidential information: *Young v Robson Rhodes* [1999] 3 All ER 524: see L Aitken, "'Chinese Walls', Fiduciary Duties and Intra-firm Conflicts – a Pan-Australian Conspectus" (2000) 19 Aust Bar Rev 116 at 123-125. In the US corporate takeovers, litigation to exclude merchant banks for conflicts of interest is frequent. Accountancy litigation support services have been aligned with legal advisers for the purposes of fiduciary duties in *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222; [1999] 1 All ER 517; [1999] 2 WLR 215: see below, Part 2.

[31] (1996) 186 CLR 71 at 98, 106-113.

[32] (2000) 75 ALJR 1067; 38 ACSR 122. Kirby J dissented at length on this point.

á-vis another person where the latter has recourse to no other (adequate) protection. Expressed at this level of generality, the motive force for the application of fiduciary duties has much in common with that which underlies restitutionary and equitable remedies for unjust enrichment and other unconscionable conduct.[33] It could lead to a suggestion that fiduciary duties will not be owed to parties big enough to look after themselves (and the majority's conclusion in *LAC v Corona* uses such language). The case of unstructured and voluntary disclosure of information in the course of negotiations may be a special case, but if it were put as a general rule, such a suggestion is obviously an error: notwithstanding some common foundations, fiduciary duties and unconscionability are not synonymous.

More specifically, in intervening under the rubric of fiduciary duties, the courts are intervening to impose a duty to avoid a conflict between the duty owed by the fiduciary to the other party and the fiduciary's own interest or between the duty to the first party and another duty the fiduciary owes to another party. Whatever the outer reaches of principle and the imprecision of the verbal formulae used to rationalise this area of law, the relationships and assumed obligations typical of the joint ventures with which resources lawyers regularly work are well within the ambit of the relations in which fiduciary duties exist or are voluntarily assumed.

No-Profit Rule

As a counterpart to Professor Dal Pont's examination of the interplay between conflicts of interest and confidentiality, I wish to draw attention to some of the cases on the other aspect of fiduciary duties, the no-profit rule[34] including the related or subsidiary rule against the misappropriation of property by a fiduciary.[35]

Simply put, it is a breach of duty for a fiduciary, without the consent of those to whom the duty is owed, to benefit personally by virtue of an asset or opportunity belonging to the person to whom the fiduciary owes a duty or to appropriate personally an advantage which accrues to the fiduciary by reason of the relationship giving rise to the fiduciary duty.

[33] See for example, *Muschinski v Dodds* (1985) 160 CLR 583 at 615-620 per Deane J; *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 162; *Commonwealth v Verwayen* (1990) 170 CLR 394, *Giumelli v Giumelli* (1999) 196 CLR 101; *Roxborough v Rothmans of Pall Mall Australia Ltd* [2001] HCA 68.

[34] I acknowledge the two rules can be collapsed into one – a duty of loyalty – but it remains useful to treat the two separately. There is a short and helpful treatment of the way the courts deal with the inter-relationship of the two in H A J Ford, R P Austin, I M Ramsay, *Ford's Principles of Corporations Law*, (10th ed, 2001) at [9.020].

[35] Ford, ibid [9.020].

There are well-known examples of this principle in trust law and in respect of directors' fiduciary duties to a company.[36] The case always taught at law school is *Keech v Sandford*,[37] the case of the trustee who renewed a lease in his own right when the landlord refused to extend it on trust because the infant beneficiary could not give a good guarantee. At the other end of complexity are the facts in *Phipps v Boardman*,[38] where a trust's solicitor and a beneficiary personally purchased control of a company in which the trust held a minority position, using information supplied by the trust. The trustees had no power to buy the shares but, because the solicitor owed a fiduciary duty to the trust and used trust information, the trustees were entitled to a constructive trust over the shares.

The corporate equivalents of these cases are also well-known: *Cook v Deeks*[39] (a corporate partnership or joint venture splits up in acrimony and the directors who have the direct relationship with the company's major customer set up a new entity to carry on the same business: held: new contracts held on trust for old company) and *Regal (Hastings) Ltd v Gulliver*[40] (a directors' duty case, where directors, who personally took up an issue of shares to fund a company's expansion when the company could not, were held to hold the shares issued to them on trust for the company).

Partnership examples of the no-profit rule may not be so widely known. In my view, they deserve close scrutiny, given the analogue between joint ventures and partnership and because the multiplicity of joint ventures potentially poses special problems. Factually, *Chan v Zacharia*[41] is the partnership equivalent of *Keech v Sandford*:[42] a partner took a renewal of lease in their own right rather than for the partnership. Legally, the case is principally notable for the fact that agreement to dissolve a partnership does not terminate fiduciary duties – these continue until the final accounting has been undertaken.

Overlapping Memberships of Partnerships/Joint Ventures

Duty not to compete/who entitled to business opportunity?

The position of joint ventures and partnerships with overlapping but not identical memberships is one which merits close attention, as

[36] Ford, ibid Ch 9, especially: [9.010]-[9.020]; [9.220]-[9.270]; [9.410]-[9.450].
[37] (1726) Sel Case Ch 61; 25 ER 223.
[38] [1967] 2 AC 46.
[39] [1916] 1 AC 554.
[40] [1942] 1 All ER 378; [1967] 2 AC 134.
[41] (1984) 154 CLR 178.
[42] The very point made in J G Starke, "The Durability of the Rule in *Keech v Sandford*" (1984) 58 ALJ 660.

it is a live situation. An old case, *Glassington v Thwaites*,[43] is a cautionary tale. There were four partners in a newspaper venture, publishing a morning newspaper, the *Morning Herald*. Three of the partners were members of a separate partnership publishing an evening newspaper, the *English Chronicle*. The two papers shared the morning paper's facilities (types and press), the evening paper paying a market rate for this. A scoop presented itself, obtained by the morning paper's correspondents and at its expense – and the question arose, were the three partners at liberty to direct the story to their evening paper before it was printed in the morning paper? The "morning paper partner" who held an interest of just under 10 percent sued the evening paper partners to restrain the use of the papers assets in the evening paper business. The court first noted that:

> "all newspapers are to some extent rivals. The competition is more immediate between two morning papers and two evening papers; but there is necessarily some degree of rivalry between a morning and an evening paper… It might, therefore, have been made a question, whether it would be a due act of management in the partnership concern of a morning paper, to assist with its property and its labour the publication of any other newspaper."[44]

Pausing here, transpose the industry and roll forward 180 years, to the following (hypothetical) example:

> all projects involved in producing the same mineral or petroleum are to some extent rivals. The competition is more immediate between two venturers in a project; but there is necessarily some degree of rivalry between (say) a Timor Sea project and a North West shelf project… It is therefore a question, whether it is a proper act of management in a joint venture, to allow its processing plant and pipelines to be used to assist the bringing to market of product of any other venture in which some of the participants of the first joint venture are also involved.

Returning to 1822 and the rivalry of the presses, the court held that it was not a breach of fiduciary duty for partners to make available the facilities of the partnership to a competing business, where:

1. The partnership had expressly consented to that course. The production facility-sharing agreement (which in fact pre-dated the overlap in ownership of the two papers) had been expressly agreed to by the plaintiff. The partnership agreement contained an express prohibition on the partners being interested in any

[43] (1822) 1 Sim & St 124; 57 ER 50.
[44] Ibid at 131; 57 ER 50 at 53-54.

other morning paper; its silence on the question of involvement in an evening paper left it open to the partners to be so involved.

2. Further the court said there was evidence which suggested a trade usage allowing such a practice. This raises all sorts of interesting possibilities. It might found one of the species of acquiescence.[45] It might be no more than a pragmatic obiter dictum: I do not recommend reliance on trade usage or industry practice as the sole ground for justifying the use by one venture of another's assets or information[46] without express agreement.

3. The amount paid for the use of the facilities in the court's opinion "outweighs the danger of increased competition". This proposition too is dangerous and may only be a comment by way of obiter. Indeed, later cases clearly establish that the mere fact that a partner sells goods or services to the partnership at a commercial, market rate, will not prevent the partner being liable to disgorge to the partnership the profits of the dealing if there was no disclosure of the dealer's interest: *Bentley v Craven.*[47]

On the other hand, the court granted the plaintiff an injunction to prevent the evening paper publishing news obtained by means of the morning paper's resources and expenses, as this was not encompassed by the terms of the facility-sharing agreement.[48]

Another case of the same type, from precisely the same era, is *Russell v Auswick.*[49] There, several members of a transport consortium were required to account to the other members for a contract granted to them which was similar to, but outside, the agreed ambit of the consortium's activities.

How Does the No-Profit Rule Work?

It was recognised in *Keech v Sandford,* just as much as in *Regal (Hastings) Ltd v Gulliver*[50] and *Phipps v Boardman,* that the no-profit rule may not be consistent with "commercial sense". *Bentley v Craven* (above) – where the partners paid the market rate – shows the same result. The no-profit rule is strict. It is founded on a precautionary

[45] See *Orr v Ford* (1989) 167 CLR 316 at 337-340 per Deane J.
[46] Even allowing for the well-known difficulty of proving the precise terms of any industry practice: pace *BHP Petroleum Pty Ltd v Balfou*r (1987) 180 CLR 474.
[47] (1853) 18 Beav 75; 52 ER 29.
[48] It is this aspect of the case which is noticed in the modern textbooks: Higgins and Fletcher, op cit n 6 at p 122.
[49] (1826) 1 Sim 52; 57 ER 498. Discussed by McPherson J in "Joint Ventures" in P D Finn (ed), *Equity and Commercial Relationships* (1987), at pp 26-27.
[50] [1967] 2 AC 134 at 144-145 per Lord Russell of Killowen.

principle and will be enforced even where no fraud or mala fides is shown:

> "It does not appear to me that this rule is, as has been said, founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances of, the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom [the fiduciary] is bound to protect."[51]

It clearly does not matter that the party owed the duty could not have taken up the opportunity for legal,[52] financial[53] or other reasons: "it is no defence that the plaintiff was unwilling, unlikely or unable to make the profits for which an account is taken or that the fiduciary acted honestly and reasonably".[54] The preferences of an unrelated contracting party (customer) are also irrelevant if the opportunity was available to or held by the fiduciary in that capacity.[55]

This aspect of the no-profit rule is entirely consistent with other aspects of the rules of equity applicable to fiduciaries. For the same reasons, the doctrine of contributory negligence does not apply,[56] nor, in the sense analogous with contract or torts, do questions of causation of loss,[57] nor is proof of damage or loss a necessary ingredient of obtaining at least some forms of equitable relief.[58] Further, the court will not allow argument that no loss was in fact suffered or that the fiduciary acted "fairly".[59]

Summary: Living with the No-Profit Rule

The restraints on the width of the rule that a fiduciary must not privately profit from its dealings with and for those to whom it owes fiduciary duties are:

[51] *Bray v Ford* [1896] AC 44 at 51 per Lord Herschell LC.
[52] So, *Phipps v Boardman* [1967] 2 AC 46.
[53] So, *Regal Cinemas* [1942] 1 All ER 378 at 389; [1967] 2 AC 134 at 149.
[54] *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 558; *Maguire v Makaronis* (1996) 188 CLR 449 at 468-469.
[55] So, *Keech v Sandford* (1984) 58 ALJ 660; *Cook v Deeks* [1916] 1 AC 554. This is likely to be important in some joint venture contexts – when adjoining projects with overlapping memberships are competing for sales contracts. I look at this in greater detail below.
[56] *Pilmer v Duke Group Ltd (in liq)* (2001) 75 ALJR 1067 at 1084-1085, 1101-1102; 38 ACSR 122 at 146-147, 169-171.
[57] *Re Dawson; Union Fidelity Trust Co Ltd v Perpetual Trustee Co Ltd* (1966) 2 NSWLR 211 at 214-215. A different type of causation may be relevant. This is explained in *Maguire v Makoronis* (1997) 188 CLR 449 at 467 which may qualify the rule in *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465: see also *Target Holdings Ltd v Redferns* [1996] 1 AC 421; *O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262; *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1.
[58] *Maguire v Makoronis* (1997) 188 CLR 449 at 465; *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 557-558.
[59] *Parker v McKenna* (1874) LR 10 Ch App 96 at 124-125, Ford, op cit n 34 [9.260].

(a) the express terms of the relationship;
(b) the extent of the duty found in any particular case; and
(c) any informed consent by parties to whom the duty is owed.

In addition in granting relief, the courts will:

(a) allow a fiduciary recompense for any value added by the fiduciary or costs incurred by it which benefits the plaintiff; and
(b) otherwise require the plaintiff to do equity.[60]

Of these, the most obvious point is that "the parties may protect themselves by their contracts".[61] That is, it is up to the parties to define how much or how little competition and leakage of joint venture information they may permit. It is for this reason that joint venture agreements typically contain some or all of clauses to the effect that

> "the joint venture is, unless the participants agree, strictly limited to the purpose set out in the purpose clause and is not to be construed as extending further by implication or otherwise; nothing in the agreement restricts in any way the freedom of a participant to conduct as it sees fit any business or activity whatsoever; a participant is not obliged to offer any business opportunity available to it to any other participant except pursuant to the provisions governing transfers of joint venture interests and any other specific provision agreed in the particular case".

Secondly, continuing the *Keech v Sandford* theme, the clearest example of the palliative effects of informed consent, and a clarion call to the full and complete disclosure by a fiduciary faced with conflicting interests or duties, is *Welzel v Kain*.[62]

Now, consider this example: partners in a land development project were finding it difficult to obtain the necessary planning consent on which the project depended. They agreed to terminate the venture and for one of the partners to buy-out the interest of the other partners in the property. Before settlement, the buyer learned that planning consent was likely to be granted after all. Is it a case of lucky purchaser and just poor timing and hard cheese for the sellers?

Transpose the facts:

> Participants in an exploration joint venture were not finding any worthwhile prospects. They agree to terminate the venture and for one participant to take over the tenements. Before approval and registration of any transfer, the tenement holder learns of a discovery on an adjoining property: the ground may be

[60] So in *Maguire v Makaronis* the client borrowers could set aside the mortgage taken by their solicitors in breach of duty only if the clients repaid the advance which it secured with interest at commercial rates: (1997) 188 CLR 449 at 474 - 476.
[61] *Glassington v Thwaites* (1822) Sim & St 124 at 132; 57 ER 50 at 54.
[62] (1927) 27 SR (NSW) 140; see Higgins and Fletcher, op cit n 6, pp 125-126.

prospective after all. Is it a case of lucky purchaser and just poor timing and hard cheese for the sellers?

The answer is that the fiduciary with the information which bears directly on the project or undertaking at the heart of the relationship holds that information for the benefit of all and must make it available to all the partners/joint venturers.[63]

Information or an opportunity at the heart of the project has been discussed. That phrase is used by way of rhetorical emphasis, but it highlights a third important but dangerous limit on the scope of the no-profit rule. What if the opportunity comes to the fiduciary in its private capacity, not its fiduciary capacity? There is language of that kind in *Regal (Hastings) Ltd v Gulliver* [64] which has founded a further possible exception to the no profit rule to the extent that the fiduciary can demonstrate that the opportunity did not come to it by reason of its position as a fiduciary. This formed the basis of the Canadian case *Peso Silver Mines Ltd v Cropper*[65] (referred to with apparent approval by Deane J in *Chan v Zacharia*[66]) and cases discussed in *Ford*.[67]

My own sense is that this kind of argument should be raised only in the clearest and most restricted of cases; that it is dangerous for a fiduciary to assert as the court will not look well on such a proposition except in a clear cut case.[68] It is patently open to manipulation.[69] One which did pass muster is *SEA Food International Pty Ltd v Lam*.[70] In that instance, the evidence showed that the business opportunity available to a director/joint venturer arose prior to the fiduciary duties being assumed (and with the full knowledge of the other party who became the joint venturer). After reviewing the authorities and commentaries, Cooper J held:[71]

[63] *Hogar Estates Ltd v Shebron Holdings Ltd* (1979) 101 DLR (3rd) 509; Higgins and Fletcher, op cit n 6 p 121.

[64] [1942] 1 All ER 378 at 389; [1967] 2 AC 134 at 149.

[65] (1966) 58 DLR (2d) 1.

[66] (1984) 154 CLR 178 at 204-205.

[67] Ford, op cit n 34 [9.250].

[68] Neither a trustee may retire from the trust for the purpose of circumventing the rule preventing trustees from purchasing trust property (G E Dal Pont and D R C Chalmers, *Equity and Trusts in Australia and New Zealand,* 2nd ed (2000), pp 632-634) nor may a director resign from a company for such purpose: *Canadian Aero Services Ltd v O'Malley* (1973) 40 DLR (3d) 371 at 382; Ford, op cit n 34 [9.270]. This may be because, as Professor Dal Pont argues, the fiduciary has confidential information belonging to another. However, it is equally justified by equity's attention to substance and not form and the desire to preserve the effectiveness of its controls over fiduciaries. There are many cases in which company officers are found to have commenced their competition with their former employer prior to their resignation: their breach of duty lies in these preparatory steps: see for example *Capital Investments Corporation Pty Ltd v Classic Trading Pty Ltd* [2001] FCA 1385 (28 September 2001) (Weinberg J).

[69] R P Austin, "Fiduciary Accountability for Business Opportunities", in P D Finn (ed), *Equity and Commercial Relationships* (1987), p 149-150; R D Meagher, W M C Gummow, J R F Lehane, *Equity Doctrines and Remedies*.

[70] (1998) 16 ACLC 552.

[71] (1998) 16 ACLC 552 at 557.

> "What is to be drawn from the authorities is that a director will act in breach of his fiduciary obligations to a company … if he or she takes up an opportunity for profit where there is a sufficient temporal and causal connection between the obligations and the opportunity. What is a sufficient connection will depend, in any particular case, upon a number of factors, including the circumstances in which the opportunity arises and the nature of and extent of the company's operations and anticipated future operations.
>
> Whatever is the precise expression of the formulation of the test which will provide reasoned guidance in drawing the line between those opportunities for profit it is permissible for the director (or officer) to take up and those which it is not, it is necessary at the outset to determine the scope of the fiduciary obligations owed by the director to the company in the circumstances of the particular case and to identify the conduct or failure to act, which is said to amount to a failure to discharge those obligations."

Lastly, there is the question of the role of Chinese Walls in managing the impact of fiduciary obligations.

PART 2: CHINESE WALLS

The Great Wall of China: Historical and Lexicographical

In 214 BCE Shih Huang-ti, the first emperor of a united China, connected a number of existing defensive walls into a single system of walls fortified by watchtowers, which served both to guard the rampart and to communicate with the capital by signal – smoke by day and fire by night. The principal enemy against whom the Great Wall was built were the nomadic tribes of the northern steppes.

The *Encyclopaedia Britannica* calls the Great Wall of China one of the largest building-construction projects ever carried out, running (with all its branches) about 6,400km east to west from the north-western arm of the Yellow Sea to a point deep in central Asia. The Great Wall was originally constructed partly of masonry and partly of earth and was faced with brick in its eastern portion. It was substantially rebuilt in the 15th and 16th centuries CE. The basic wall is generally about 9m high, and the towers are about 12m high. The oldest parts date from the 4th century BCE and it is always said that the Wall is the human structure most easily seen by the human eye from outer space. As a matter of historical record (sadly for present purposes), the Wall was not impregnable and the invading hordes eventually swept past its defences.

Undeterred by history (happily for present purposes), the *Oxford English Dictionary*[72] defines the figurative or metaphorical sense of "Chinese Wall" as an "impenetrable barrier". The earliest use of this sense in English is in 1907, referring to customs barriers (used by the Chinese?), an apt but rather literal metamorphosis of the edifice. The next use, freed of all geographic reference, is that of the poet T S Eliot[73] in a piece of historical and literary criticism half a century before it was applied in our current context. The modern uses, in the sense used in this paper, are recorded recently: in the United States in 1979[74] and 1984 in the United Kingdom[75] where it was asserted: "The increase in risk of conflict of interests arising from the conglomeration of financial activities can be contained by erecting 'Chinese Walls' among the various activities carried out by a single firm."

In one of the first Australian cases on the topic, Ipp J was not impressed with either history or metaphor:

> "The derivation of the nomenclature is obscure. It appears to be an attempt to clad with respectable antiquity and impenetrability something that is relatively novel and potentially porous. It is a practice that apparently emanates from the United States of America, having been devised by large firms of lawyers in an attempt to justify representation of conflicting interests at the same time."[76]

More recently, Gillard J asked whether the metaphor should be "Chinese Wall" or "Dutch dyke"[77] and a recent comprehensive survey by three Canadian lawyers, drawing on colleagues world wide through the International Bar Association, asked "are they really walls or Potemkin Villages?"[78] Is this a promising start?

[72] *Oxford English Dictionary*, 2nd ed (1999).

[73] Compare his famous line: "This is the way the world ends/…/not with a bang but a whimper" (Four Quartets), once inverted thus: "This is the way the world ends/all at the whim of a banker." The poetic dimension in the popularisation of the metaphor is not to be underplayed: the next use cited by the OED is by W H Auden (1941) and see Jorge Luis Borges, "The Wall and the Books", in *Labyrinths* (1970), p 221, cited in IBA, below, n 78.

[74] *American Banker* (25 Jan 1979): "The Chinese Wall question has been raised anew. But the Morgan spokesman says the bank sees no conflict". Presumably, the phrase was current informally before then. It became widespread in the US quickly: cf, "The Chinese Wall Defense to Law Firm Disqualification" (1980) 128 U Pa L Rev 677.

[75] *National Westminster Bank Quarterly Review* (Nov 1984).

[76] *Mallesons Stephen Jaques v KPMG* (1990) 4 WAR 357 at 371-372.

[77] That is, in terms of the popular story, a leaking levee, plugged rapidly by putting fingers in the holes: *Yunghanns v Elfic Ltd* (unreported, SC (Vic), 3 July 1998).

[78] That is, paper villages dressed up for appearances only: R S G Chester, J W Rowley, B Harrison, "Conflicts of Interest, Chinese Walls and the Changing Business of the Law" [2000] *Business Law International* 35 at 80 (IBA). I am grateful to Michael Sharwood for reminding me of this article. The same article records the debate (commencing, inevitably?, in California) about the political correctness of the ethnic adjective ("ethical barrier" is favoured instead).

Chinese Walls at Law and in Equity

Corporations Act

Before turning to the cases, let us not forget one other area in which Chinese Walls have a recognised function in Australian law. Insider trading in respect of securities and other financial products[79] is prohibited by s 1043A of the *Corporations Act*. These provisions prohibit communicating to another, or trading or procuring another to trade while possessing, not generally available information of the requisite (price sensitive) type.[80] A corporation or partnership is disabled from dealing if an officer or partner or employee has the information (ss 1042G, 1042H), except if a Chinese Wall is in place (ss 1043F, 1043G). No mere flimsy picket fence will do for that purpose: there must be "in operation arrangements" which are both apparently and truly effective to isolate the price-sensitive information away from decision-makers.[81]

Note therefore, that the Parliament first deems a corporation or partnership to have the knowledge of all its officers or members and employees; secondly, makes an exception to such imputed knowledge, where effective barriers are put in place; and thirdly and necessarily, is prepared to allow that such barriers can be effective (on pain of the corporation or partnership committing a criminal offence if they are not). Parliament's judgment on all three questions has not prevented the courts agonising over the very same points.

Cases

The Australian, United Kingdom and New Zealand cases on Chinese Walls concern lawyers or their close analogues (accountants offering litigation support services[82] and patent attorneys in multi-disciplinary partnership with lawyers[83]). They are treated alike. All the best firms have been involved in them. The cases form part of a wider class of cases concerning the fiduciary duties owed by lawyers (not all of which involve walls as such).

[79] As defined in s 1042A, *Corporations Act* 2001. This definition has resulted in the prohibition having, since 11 March 2002, a much wider scope than previously.

[80] Ford, op cit n 34 [9.600]-[9.650].

[81] In my view, the better view is that the exemption requires the arrangements to be in place and in operation prior to the information reaching the corporation or partnership.

[82] *Prince Jefri Bolkiah v KPMG* [1999] 2 AC 222; [1999] 1 All ER 517; [1999] 2 WLR 215.

[83] *World Medical Manufacturing Corporation v Phillips Ormonde & Fitzpatrick* [2000] VSC 196 (unreported, 18 May 2000) (Gillard J); *PhotoCure ASA v Queens University at Kingston* [2002] FCA 905 (unreported, 22 July 2002) (Goldberg J). Both these cases involved the left hand not knowing what the right hand was doing or had done. In the *Phillips Ormonde* case, the patent attorneys were acting in pursuing registration of a patent (acting, as the judge held, as a post-box) while, *on the same floor,* the lawyers were taking steps to invalidate the patent. Usually this proximity would be fatal. However, there being, on the facts, no confidential information actually at risk, the lawyers were allowed to proceed.

As noted by one commentator.[84]

> "In any examination of the subject of the restraint of a lawyer by reason of a conflict, one is immediately struck by the relative absence of case law on the subject prior to 1986 and the proliferation of cases and articles since then. In Australia in 1882 the Full Court of Queensland in *Mills v Day Dawn Block Gold Mining Co Ltd* [1882] 1 QLJ 62 confirmed by reference to earlier English case law that a solicitor who had advised a client in a particular matter might not subsequently act against him in the same matter by reason of a *possible* conflict between his duty of confidentiality and his duty to his new client. It is over a century before the next reported decision on the subject, in 1986, in *In the Marriage of Thevenaz* (1986) 84 FLR 10. Since then there has been a large number of cases in Australia dealing with the restraint of a lawyer from acting and numerous articles on the subject."[85]

The Walls arise for consideration in two instances:

- Where a firm seeks to act for a client having earlier acted in the same or related matter for a different client with an opposed interest ("successive client" issue).
- Where a firm finds itself acting in relation to opposing clients in the same or a related matter ("concurrent client" issues). When the clients are litigating, this kind of conflict is fatal. When their interests are opposed (in fact, but not necessarily on the court record) it is nearly always fatal. As stated by the House of Lords in *Prince Jefri Bolkiah v KPMG*, "a fiduciary cannot act at the same time both for and against the same client". Each existing client is owed a fiduciary duty of loyalty.

As Professor Dal Pont's paper shows, the House of Lords treats the successive client case purely as a matter of preserving confidential information previously imparted. The test is the risk of disclosure.[86]

[84] C Edmonds, "Trusting Lawyers with Client's Confidences – Conflicting Realities (A Review of the Test and Principles Applying to Lawyers' Conflicts of Interest)" (1997-1998) 16 Aust Bar Rev 222.

[85] Edwards refers to 30 Australian cases in his article. The articles he refers to are: P D Finn, "Fiduciary Law and the Modern Commercial World" in E McKendrick (ed), *Commercial Aspects of Trust and Fiduciary Obligations*; "Professionals and Confidentiality" (1992) 14 *Sydney Law Review* 317; "Conflicts of Interest and Professionals" (published by the New Zealand Legal Research Foundation in the Volume "Professional Responsibility"), 1987; S Longstaff, "A Question of Conflicts" (1991) (4) *Commercial Law Quarterly* 19; L Aitken, "'Chinese Walls' and Conflicts of Interest" (1992) 18 *Monash University Law Review* 91; J R Midgley, "Confidentiality, Conflicts of Interest and Chinese Walls" (1992) 55 *Modern Law Review* 822; R Teele, "The Necessary Reformulation of the Classic Fiduciary Duty to Avoid a Conflict of Interest or Duties" (1994) 22 ABLR 99; M Connock, "Restraining Lawyers from Acting in the Face of a Conflict: Discussion and Advice in Australia" (1995) 12 Aust Bar Rev 244; G E Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand* (LBC, Sydney, 1996), Chs 6-9 and S Ross, *Ethics in Law* (Butterworths, Sydney, 1998), Ch 12.

[86] Edwards, op cit n 85; L Aitken, "'Chinese Walls', Fiduciary Duties and Intra-firm Conflicts – a Pan-Australian Conspectus" (2000) 19 Aust Bar Rev 116.

Notwithstanding that, on its analysis, no fiduciary obligation was owed, the House of Lords rejected the Chinese Wall put forward by KPMG designed to keep separate its earlier work for Prince Jefri on the ownership and location of his assets and its current work for the Sultan of Brunei investigating the ownership and location of Prince Jefri's assets. The steps offered by KPMG included: personal undertakings of confidentiality; complete separation of personnel (although drawn from same department); teams to be in separate buildings (although in same city); teams to use separate computer systems; agreement by current client absolving the firm from the obligation to disclose its knowledge derived from the earlier client (essential to perform its duty to the current client as well as useful protection). These steps were also part of the Chinese Wall offered to and rejected by Ipp J[87] who rejected the wall on a mixture of grounds (fiduciary, confidential information and integrity of the legal system).[88]

The Victorian Supreme Court on the other hand has set a broader basis for restraining a law firm from acting for successive clients. In essence, this rests on preserving the integrity of the legal system.[89] This is a special sub-rule for lawyers or, putting it another way, may be a general rule applicable to all fiduciaries with multiple engagements. Unlike Professor Dal Pont, I do not find the creation of a special rule based on the protection of the legal system a problem: it is of a piece with other special rules, such as client-lawyer privilege and the immunity of advocates.[90]

For all the shared concern with the integrity of the legal system, it is not clearly agreed in Australia that this needs to form a separate basis for action. In the Federal Court and in the New South Wales,

[87] *Mallesons Stephen Jaques v KPMG* (1990) 4 WAR 357 at 371-372.

[88] His Honour changed his mind on one element of his reasoning: whether the knowledge of all partners is imputed to the firm. His Honour later adopted a more practical test of actual knowledge: *Unioil v Deloitte Touche Tohmatsu* (1997) 17 WAR 98 at 107-108. In that case, an enduring contractual obligation of confidence was recognised.

[89] In addition to the Victorian cases referred to in Professor Dal Pont's paper, see also *Westend Entertainment Centre Pty Ltd v Equity Trustees Ltd* [1999] VSC 514 (unreported, 10 Dec 1999), per Mandie J; *World Medical Manufacturing Corporation v Phillips Ormonde & Fitzpatrick* [2000] VSC 196 (unreported, 18 May 2000) per Gillard J. Note as well, *Australian Liquor Marketers Pty Ltd v Tasman Liquor Traders Pty Ltd* [2002] VSC 324 per Habersberger J (unreported). The theme of concern for the reputation and integrity of the legal system is longstanding and widespread and is not limited to Victoria. See for example, *D & J Constructions Pty Ltd v Head (t/a Clayton Utz)* (1987) 9 NSWLR 118 at 124-125; *Mallesons Stephen Jaques v KPMG* (1990) 4 WAR 357 at 368; *Murray v Macquarie Bank Ltd* (1991) 33 FCR 46 at 49; *Wan v McDonald* (1992) 33 FCR 491 at 513, *Carindale Country Club Estate Pty Ltd v Astill* (1993) 42 FCR 307 at 311. The key question is whether it is a separate principle or a compounding factor. The comparative study, IBA, op cit n 78, shows this concern (often expressed as based in "legal ethics") is a motivating force overseas as well.

[90] *Giannarelli v Wraith* (1988) 165 CLR 543; pace *Arthur J S Hall & Co v Simons* [2000] 3 WLR 543; 3 All ER 673 (HL).

South Australian, Western Australian and New Zealand Courts, the *Prince Jefri* analysis has been embraced.[91]

Chinese Walls on the mat and off the floor

Barely two years ago, Sydney barrister Lee Aitken concluded his conspectus of current prospects for Chinese Walls:

> "A large problem, however, for smaller jurisdictions (and Australia is certainly one of these) is the limited expertise which is generally available to handle any complex problem. … Very large firms of solicitors and accountants now dominate the legal landscape and are deployed indifferently, now on one side and now on the other, in most large-scale pieces of litigation. There may well be a general resource problem if it is not possible to use the services of a firm which has been joined by the former partner of a firm previously acting in the contrary interest. This sort of dilemma will raise nice questions, and, no doubt, provoke tactical applications. If such tactical applications become common (and are held to extend to the movement of ancillary staff who may nevertheless become aware of confidential information) the course of recent Canadian authority illustrates *in terrorem* the difficult interlocutory issues which will arise."[92]

At the same time, the IBA authors concluded: "A ruling in Western Australia has been reported as threatening the end for "Chinese Walls" in Australia",[93] referring to *Newman v Phillips Fox*.[94] This case concerned a law firm merger with most unfortunate consequences. The plaintiff's firm dissolved. Having acted for the plaintiff in a long-running building dispute for four years, the key partner and legal and support staff joined the defendant's firm and proposed erecting a Chinese Wall to permit Phillips Fox to continue to act for the defendant. On the facts, Steytler J regarded the risk of disclosure as too high and required the defendant to retain new solicitors. Troubled by the ad hoc nature of the Wall proposed (in particular that it was being erected five-six months after the staff transferred), the judge

[91] *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1 at 48 (CA); *Pradhan v Eastside Day Surgery Pty Ltd* [1999] SASC 256 (FC); *Carter Holt Harvey Forests Ltd v Sunnex Logging Ltd* [2001] 3 NZLR 343; *Newman v Phillips Fox* (1999) 21 WAR 309 at 315 (Steytler J); *Mark Foys Pty Ltd v TVSN (Pacific) Ltd* (2000) 178 ALR 322 (Conti J); *Colonial Portfolio Services Ltd v Nissen* (2000) 35 ACSR 673 (Rolfe J); *World Medical Manufacturing Corp v Phillips Ormonde & Fitzpatrick Lawyers* [2000] VSC 196 (Gillard J); *Belan v Casey* [2002] NSWSC 58 (Young CJ in Equ); *Waiviata Pty Ltd v New Millenium Publications Pty Ltd* [2002] FCA 98 (Sundberg J); *Bureau Interprofessionnel Des Vins De Bourgogne v Red Earth Nominees Pty Ltd (t/as Taltarni Vineyards)* [2002] FCA 588 (Ryan J); *PhotoCure ASA v Queen's University at Kingston* [2002] FCA 905(Goldberg J).

[92] Aitken (2000) 19 Aust Bar Rev 116 at 134.

[93] IBA, [2000] BLI 35 at 84.

[94] (1999) 21 WAR 309.

held that the proposal lacked an educative dimension and vital detail on monitoring and failed to extend to junior legal and support staff.[95]

Then suddenly, in a wave of cases in 2002[96] (two in July), Chinese Walls have made a comeback. Goldberg J in the Federal Court[97] explained it thus:

> "*D & J Constructions Pty Ltd v Head(t/a Clayton Utz)* [the first Australian rejection of an information barrier built on undertakings] was decided fifteen years ago and since that time the nature of legal practice has changed. The courts are now more prepared to accept the concept of 'Chinese walls' and the quarantining of information within an organisation as Lord Millett recognised in *Bolkiah*, Steytler J accepted in *Newman v Phillips Fox* and Ryan J accepted in *Bureau Interprofessionnel Des Vins De Bourgogne v Red Earth Nominees Pty Ltd (t/as Taltarni Vineyards)*."

If the early cases display a reluctance to accept barriers built on undertakings and a pessimism about their effectiveness, a key feature of the decision-making in this year's crop of cases is a greater preparedness of the courts to make a realistic (but not overly optimistic) assessment of the risk of disclosure within large national firms. In several cases, the fact that offices in separate cities were involved assisted the court in accepting the effectiveness of a Chinese Wall. The number of persons privy to the information is also significant.[98] Also detailed investigations of the firms' document retrieval and information management systems were undertaken and put in evidence.

Finally, some of the Chinese Walls are not invoked directly in respect of litigation between clients. For example in *Unioil v Deloitte,* Ipp J regarded the separation of Corrs Perth and Sydney offices as effective to prevent the existence of a duty of a Sydney partner to disclose information to a client of the Perth office.[99]

In *Cubic Transportation Systems Inc v NSW*[100] a losing tenderer challenged a government contract on the basis that Clayton Utz,

[95] (1999) 21 WAR 309 at [77]-[81].

[96] *Bureau Interprofessionnel Des Vins De Bourgogne v Red Earth Nominees Pty Ltd (t/as Taltarni Vineyards)* [2002] FCA 588 (9 May 2002) (*Taltarni*); *Cubic Transportation Systems Inc v NSW* [2002] NSWSC 656 (26 July 2002); *PhotoCure ASA v Queen's University at Kingston* [2002] FCA 905 (22 July 2002) (*PhotoCure*); *Australian Liquor Marketers Pty Ltd v Tasman Liquor Traders Pty Ltd* [2002] VSC 324 (14 August 2002).

[97] *PhotoCure* [2002] FCA 905 at [61].

[98] This is a consideration made possible by the breakthrough of not treating every partner as being imputed with the knowledge of every other partner: *Unioil v Deloitte Touche Tohmatsu* (1997) 17 WAR 98; *Prince Jefri* [1999] 2 AC 222 at 235.

[99] *Unioil v Deloitte Touche Tohmatsu* (1997) 17 WAR 98.

[100] [2002] NSWSC 656.

retained by the New South Wales Government as legal adviser, acted through interstate offices on unrelated (although substantial) matters for the winning bidder. The court held that there was no duty owed to the tenderer and no evidence of breach of the confidentiality was adduced. This was a case in which the Chinese Wall argument was well suited.

Of interest are the terms of the special conflicts procedures and engagement letters proffered by the firm to its various clients.[101]

The following remarks of Goldberg J provide an up to date conspectus of developments:[102]

> "Although the information barrier or Chinese wall created in the present case is an ad hoc arrangement,[103] I am satisfied that, taken in conjunction with the other matters to which I have referred, it is effective to ensure that there is no real risk of disclosure of any of [former client] PhotoCure's confidential information to the team [acting for the respondent in patent opposition proceedings].
>
> In this respect I have adopted a similar approach to that of Ryan J in *Taltarni* in which the Chinese walls had been erected on an ad hoc basis. Ryan J accepted that there was no principle of law that Chinese walls or arrangements designed to quarantine information to particular persons could never eliminate the risk of disclosure of confidential information and referred to Lord Millet's observation in this respect in *Bolkiah* .... Ryan J also noted the reluctance of courts to assume the efficacy of Chinese walls and information barriers where, without them, the risk is real and referred to *MacDonald Estate v Martin* 77 DLR (4th) 249 at 269 and *D & J Constructions v Head (t/as Clayton Utz)* (1987) 9 NSWLR 118, at 122-123. Notwithstanding that the Chinese walls were erected on an ad hoc basis, Ryan J was satisfied that there was no real risk that any relevant confidential information would come into the hands of those in the firm acting for the applicants.
>
> In *Newman v Phillips Fox* (1999) 21 WAR 309 Steytler J concluded that the Chinese wall proposed by the firm of solicitors was inadequate with the consequence that there was a

[101] On the question of undertakings, see those required by the court in *PhotoCure* which are annexed to the judgment in full and those in *Australian Liquor Marketers*, op cit n 89 at [27]. See also 15 points of a wall proffered by Corrs around a special counsel of the defendant's former firm who later joined the plaintiff's legal advisers in the *Taltarni* case: [2002] FCA 588 at [12] and [28], [29], [35], [36].

[102] *PhotoCure* [2002] FCA 905 at [78]-[80].

[103] In contrast to the criticism of such arrangements in the *Prince Jefri* case, affecting (as Goldberg J points out) some 168 KPMG personnel, in the *PhotoCure* case, only a handful of persons were involved. This made a big difference to the practicality of managing the risk of disclosure and, hence, to the outcome.

risk of inadvertent disclosure. Steytler J was particularly concerned with the expected interaction between the persons who had previously acted for the former client and the persons now acting for the other party whose interests were adverse to that former client. That extent of interaction does not exist in the present circumstances particularly having regard to the different cities in which Mr Jones and his team and Mr Muratore and his team work. The facts in the present case are distinguishable from those in *Newman v Phillips Fox*."

Chinese Walls in a Resources Context

A solution to the operator's and corporate group's dilemma?

So that lawyers do not have all the fun, let me put to you some suggestions for ways in which Chinese Walls may assist joint venturers and operators to avoid breaching their fiduciary duties.

The circumstance which I have in mind is that faced especially by operators who are integrated with a joint venture participant: for example, the operator is the same legal entity as the participant.[104] The operator inevitably obtains a great deal of special joint venture knowledge: not only about the whole range of technical information (such as geological, geochemical, engineering) but also information about each of the venture participants. Given all the principles discussed in this paper, there may be a need to rebut what might be allegations that a dominant group had succumbed, adapting words from 1822, to "the strong temptation to use the information obtained at the expense of the joint venture for the benefit of the parent group".[105]

If the issue had been foreseen, it could have been dealt with by drafting in the operations and management agreement and the joint venture agreement. It can always be dealt with by informed consent, based on timely full disclosure. Is a third alternative to ensure that there are demonstrable and effective barriers to the passage of confidential joint venture information from the operator to the parent group or from a joint venture participant to another group company?

[104] Merely incorporating a $2 subsidiary to perform the operator's role will not achieve much if the staff are all employed by the participant or some other group company which supplies staff to both the participant and the operator.

[105] *Glassington v Thwaites* (1822) 1 Sim & St 124 at 132; 55 ER 50 at 54.

CONCLUSION

Chinese Walls do not protect a fiduciary from a conflict of interest and duty or a conflict of two duties owed concurrently to opposed clients. In such circumstances, the fiduciary must uphold the client's interest and where, due to conflict between clients that is impossible, cease to act for both. Alternatively, the clients may consent to the fiduciary acting for one or the other. (In this case, disclosure is not the end but the means to this end.)

Where fiduciary duties are not owed (because, in the case of a lawyer, the client is a former client, or because, for a joint venture participant or operator or agent, the conduct concerned is outside boundaries clearly delineated in the contract), the test is whether there is a real risk of disclosure of confidential information of a party without its consent. In those circumstances, a properly constructed and defended Chinese Wall offers a tool for managing the risk.

To win judicial approval of the wall, proper construction will involve undertakings to the parties and the court of all concerned; clear evidence of physical separation of the teams with the relevant knowledge, attention to all levels within the firm or organisation (not just the chiefs), clear evidence of separation of information storage and retrieval. The wall is more likely to be sanctioned where it is a permanent feature rather than an ad hoc arrangement and it is more likely to be accepted where the numbers of staff with the relevant knowledge is small rather than extensive.

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