Conflict of Interest - *when to stay in and when to get out*[1]

Introduction

When considering whether or not a practitioner can act or continue to act for a client when a conflict is alleged, the starting point in family law matters has been the decision in 2000 of the Full Court of the Family Court in *McMillan & McMillan.*[2]

In *McMillan*, the Full Court said *"the client only need give evidence that he has provided confidential information to the solicitor...The client does not have to divulge the content of that information"* and adopted the approach of Frederico J in *Thevenaz v Thevenaz*[3], namely that there does not need to be a real possibility that confidential information will be misused and proof of prejudice is not necessary, as a "theoretical risk" is sufficient.[4] Their Honours adopted this approach substantially because of the "sensitive nature" of the family law jurisdiction.[5]

Accordingly, *McMillan* set a far stricter test than is set in other areas of law in terms of what an applicant will have to satisfy the Court of in making such an application.

In the 2015 case of *Osferatu & Osferatu*[6], the Full Court of the Family Court has reviewed the law in this area, and in doing so has shifted away from a "theoretical risk" being sufficient, as well as perhaps requiring better evidence as to whether relevant, confidential information has been provided to the conflicted practitioner.

It seems more is now required to satisfy the Court in support of an application to restrain a lawyer from acting for a client, bringing the test in family law closer into line with the test in other areas of law.

---

[1] We would both like to thank Michael Kearney SC from Waratah Chambers in Sydney for his very
[2] [2000] FamCA 1046.
[3] (1986) FLC 91-748.
[4] *McMillan, supra* at paragraphs 87-88.
[5] *ibid* at paragraph 54.
[6] [2015] FamCAFC 177.

In this paper we discuss:

- The principles underpinning the concept of 'conflict of interest';
- The English approach;
- The Australian approach:
    - *McMillan;*
    - The approach in other Australian Courts; and
    - The 2015 case of *Osferatu.*

as well as providing some general guidelines when faced with a possible conflict situation.

Principles underpinning the concept of 'conflict of interest'

The cases which we all consider to be "conflict" cases, being when one of the parties to proceedings objects to a lawyer acting on behalf of another party to the proceedings, are not really about a conflict of interests[7]. Rather, at their heart, these cases are about the tension between two duties that lawyers have, being:

- The ongoing duty a lawyer has to preserve the confidentiality of information imparted to him or her when they were acting for a client. Such a duty continues to exist even after the lawyer has ceased acting for that client (as distinct from a fiduciary duty, which ends when the retainer ceases); and
- The fiduciary duty all lawyers have not simply to use their skill and expertise, but to use all of their knowledge (including knowledge they may have obtained from or about another party) to advance their client's case. This is often referred to as the 'duty of loyalty.'

It is well established that a lawyer must not place himself or herself in such a situation, as there might be even an unwitting breach of a duty[8].

[7] A conflict of interest may arise, for instance, when a lawyer is acting for two different parties in the same proceedings, who may have conflicting interests.

[8] This observation was made by Lilley CJ in the 1882 Full Court of the Supreme Court of Queensland decision of *Mills v Day Dawn Bloch Gold Mining Co Ltd* (1882) 1 QLJ 62 ("*Mills*") and quoted with approval by the Full Court of the Family Court in *McMillan.*

The three bases upon which an injunction may be granted to restrain a lawyer from continuing to act were set out by Brereton J in *Kallinicos v Hunt*[9] and recently endorsed by the Full Court in *Osferatu,* as follows:

- **The inherent jurisdiction** or implied power of the Court to supervise and control the conduct of legal practitioners as officers of the Court.
- **Breach of a duty of loyalty** – 'where acting against a former client was said to be inconsistent with the solicitor's fiduciary obligation of loyalty to that former client'.
- **Breach of confidence** – "where to permit the solicitor to continue to act (usually, though not invariably, against a former client) would involved a risk that the solicitor might use, or be bound to use, information which he or she had subject to a duty of confidence to the former client."

Inherent Jurisdiction

The Court has the power to restrain a practitioner from acting, or to restrain a party from engaging a practitioner, as the Court has an inherent jurisdiction over its officers and to control its processes in the aid of the administration of justice[10].

The Full Court of the Supreme Court of Queensland in *Mills*[11] said the jurisdiction rested on the power of the Court to keep control over all its officers and that in an appropriate case both the solicitor and the new client could be restrained.

To restrain the party from engaging a certain lawyer, rather than to restrain the lawyer themselves (in that case a barrister), was the approach adopted by Benjamin J in *Vincenzo & Vincenzo*[12]. This is a relevant consideration when you are drafting orders for your application to the Court.

[9] (2005) 64 NSWLR 561 at paragraph 33.
[10] *Spincode Pty Ltd v Look Software Pty Ltd* (2001) 4 VR 501 (*"Spincode"); Kallicanos v Hunt (2005)* 64 NSWLR 561.
[11] *supra* at 63.
[12] [2014] FamCA 46.

Duty of Loyalty

A client has an entitlement to the undivided duty of loyalty of a fiduciary. It is the duty of a barrister and a solicitor to not place themselves in such a situation as there might be even an unwitting breach of his or her duties.[13]

As part of that duty of loyalty to a client, lawyers are required not only to use their legal skills but to also use all of their knowledge to advance a client's case. The Family Court in *Thevenaz & Thevenaz*[14] stated that a lawyer has "*a duty to put at his client's disposal not only his skill but also his relevant knowledge. If he is not prepared to make that knowledge available he should not act*"[15].

There is an inherent tension between the duty to maintain the confidence of one client (which never ends) and the duty of loyalty to another client (which ends when the retainer ends). It is arguably impossible to satisfy both simultaneously.

Walters FM (as he then was) referred to "getting to know you" factors in *Karapataki & Karapataki*[16] saying:

> *...the potential misuse of information which might not comfortably be described as 'confidential information' is also relevant. For example, legal practitioners can often learn a great deal about a client's personality, weaknesses or strengths, honesty (or perhaps dishonesty), fears and reactions (including reactions to pressure or tension). Similarly, legal practitioners can learn much about a client's attitude and approach to litigation.*

His Honour noted this sort of information about a former client could be of enormous significance where credit is an important issue or at the very least, a former client could be quite uncomfortable about being cross examined by a former solicitor.

[13] See the comments made by Lilley CJ in *Mills*, quoted with approval in *McMillan*.
[14] (1986) FLC 91-748
[15] *ibid* at 75-446.
[16] [2011] FMCAfam 6 at paragraph 36.

The right to confidentiality.

A client's right to confidentiality is fundamental to the lawyer-client relationship. Any lawyer given information by their client has a duty to keep that information confidential, and importantly, that duty of confidentiality does not end when that lawyer ceases to act for that client[17].

Tom Cruise's character, attorney Mitch McDeere, explained this concept beautifully to his tax evading mafia boss client the 1993 film, *The Firm*, when he described himself in the following way: *"I would say I am exactly like a ship carrying a cargo that will never reach any port. As long as I am alive, that ship will always be at sea, so to speak".*

The English Approach

Until relatively recently the Courts in the UK followed the test set out in the 1912 decision of *Rakusen v Ellis, Munday and Clarke.*[18] (*"Rakusen").*

The facts in that case were unusual. It concerned a small firm of solicitors, with only two partners. Although they were partners, they essentially carried on what amounted to separate practices, each with his own clients, without any knowledge of the other's clients, and with their own administrative staff. The plaintiff had consulted one of the partners in relation to a legal problem. After some time, the plaintiff terminated the solicitor's retainer. The defendant retained the other partner in the firm, who had never met the plaintiff, and was not aware that the plaintiff had ever been a client of the firm.

The judge at first instance granted an injunction to restrain the solicitor from acting for the defendant, but the Court of Appeal found that there was no risk of disclosure of confidential information, and discharged the injunction.

[17] *Mallesons Stephen Jaques v KPMG Peat Marwick* [1990] 4 WAR 357.
[18] [1912] 1Ch 831.

The Court of Appeal determined that to establish a conflict the Court had to be satisfied that a "*real mischief and real prejudice would in all probability result*" if the solicitor continued to act.

In 1999, the House of Lords took a different approach in *Prince Jefri Bolkiah v KPMG*[19]. This was a case where accounting firm KPMG erected an 'information barrier', or 'Chinese Wall', to protect the confidential information of Prince Jefri held by one of its departments. During the course of an 18 month long retainer on an investigation codenamed 'Project Lucy', this particular department undertook litigation support services, including interviewing witnesses, and gained extensive knowledge of the prince's business affairs and also extensive "getting to know you" information.

KPMG was later retained by the Government of Brunei ("Project Gemma") to investigate a financial taskforce named BIA, of which Prince Jefri had been the Chairperson for many years. Prince Jefri sought an injunction to prevent KPMG from continuing to work on Project Gemma.

KMPG offered an undertaking not to use or disclose any confidential information acquired in the course of Project Lucy, claiming that only a limited number of firms possessed the necessary skills and resources to perform the Project Gemma investigation. Further, they stated they had erected a 'Chinese Wall', which involved excluding any Project Lucy staff from working on Project Gemma and preventing the acquisition of confidential information from Project Lucy by those on Project Gemma. In addition, papers, computer file servers and (to the extent that it was possible even though most of them worked in one department) staff were segregated.

Lord Millett delivered a unanimous decision on behalf of the House of Lords. He was not satisfied that KPMG's Chinese Walls had eliminated the risk of misuse of Prince Jefri's confidential information. He overruled the case of *Raskusen,* finding that the preferred test expressed in *Bolkiah* was:

[19] [1999] 2 AC 222.

> *...[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.*

Importantly (and now more so in light of *Osferatu*), Lord Millett also said that:

> *Whether or not a particular individual is in possession of confidential information is a question of fact, which must be proved or inferred from the circumstances of the case...* (emphasis added).

Lord Millett then discussed at length, and advocated in favour of, a structured approach to dealing with how the alleged confidentiality of the information should be dealt with.

The Australian approach

Across the various Federal and State jurisdictions, there does not appear to be one universally applicable test. Rather, the appropriate test depends on the jurisdiction, the subject matter of the proceedings, and the facts in the case. Depending on the facts of your family law case, you may be able to draw on decisions made in other areas of law.

***McMillan v McMillan:* 2000 Full Court of the Family Court**

Up until *Osferatu,* the leading case was *McMillan,* in which the Full Court of the Family Court essentially adopted the earlier approach of Frederico J in *Thevenaz* stating (at 75,447):

> *Thus, a practitioner who wishes to cease acting for one party and to continue to act for the other party will be restrained from doing so by the Court if there is* ***any evidence*** *that confidential communications have been made to him by the party for whom he is ceasing to act. In such a case the Court will not weigh conflicting evidence as to confidence. It will act upon the evidence of the client who swears that he has made the confidential communication."*
>
> ... ...

It is my view that in this case [the lawyer] should not continue to act on behalf of [the wife]. It may well be that the risks where he to do so are more theoretical than practical...It is of the upmost importance that justice should not only be done, but should appear to be done. In the circumstances of the present case, there is a risk, which may well be merely theoretical but still exists, that justice might not appear to be done. (emphasis added).

This was a departure from the narrower English approach in *Rakusen* which suggested that a Court would only intervene when it was clear both that confidential information had been provided to a client *and* that there was a real probability this would be used against the client in the proceedings.

The facts in *McMillan* were as follows:

- The husband sought that the wife's solicitors cease to act in circumstances where a non-legally qualified law clerk who had worked at the firm of solicitors acting for the husband moved to work as a secretary to the wife's solicitors.

- The husband asserted that he had spoken to the law clerk, and provided him with instructions whilst he was employed by the husband's solicitor, and that he had worked on the husband's file, typing letters and the like. Accordingly, the husband asserted the law clerk was aware of many confidential matters, including the advice the husband had received as to the likely outcome of the proceedings.

- Notably, the husband's lawyer also filed an affidavit, in which she asserted the law clerk was significantly involved in the file, by way of taking instructions, drafting correspondence, and speaking with the husband on the telephone. She deposed that the law clerk would have had access to her notes setting out instructions received and advice given.

- In response, the wife's solicitors filed an affidavit from the law clerk, in which the law clerk deposed that he had not discussed any part of the matter with

anyone at the wife's solicitors; that his work on the matter had been minimal, and that he did not recall having had appointments or conferences with the husband or taking instructions in relation to contentious issues. Further, the law clerk asserted that if a conflict were found, this would impact on his capacity to find alternate employment, as the firms in question were in Morwell and the Latrobe Valley, and it would be difficult to move to another firm in that area without the same sort of issue arising.

- The wife's solicitor also filed an affidavit confirming that there had been no discussions between her and the law clerk regarding the file.

Wilczek J initially heard the matter, and granted the restraining order sought by the husband against the wife's solicitors. He also ordered that the wife pay the costs of and incidental to that application. His Honour said *inter alia*, that the Full Court had previously not determined whether the narrow or English approach was to be preferred, and that the appropriate approach may depend on the particular facts of the case. He distinguished this case, where the proceedings involved a large range of issues, and had been on foot for some considerable time, from the sort of case where a conflict is alleged arising out of a single conveyancing transaction (as was the case in *Thevanez)* or a single common law claim arising from a motor vehicle accident.

On appeal, the Full Court rejected the narrow or English approach that requires a real mischief and real prejudice to be shown in order to restrain a solicitor. Instead, their Honours confirmed that when considering whether or not to restrain a legal practitioner from acting for a party on the basis of confidential information the party seeking the restraint must satisfy a two-step test:

- First, the applicant must set out a prima facie case that confidential information has been provided to the legal practitioner and

- Second, the applicant must establish that there is at least a theoretical possibility that the confidential information could be used against them.

To satisfy those requirements, the Full Court in *McMillan* said that the party seeking the injunction must depose that they have provided confidential information to the legal practitioner, and depose that they believe, not unreasonably, that the confidential information may be used against him or her, *and* it is sufficient if there is only a theoretical risk of this occurring.

Their Honours were of the view that it made no difference that the employee was a law clerk and not a qualified lawyer.[20]

Importantly, in relation to the particular approach to be taken in family law matters, their Honours referred to comments made by Bryson J in *D & J Constructions Pty Ltd v Head & Ors* in that dealing with family law matters, which are sensitive and cover a wide range of confidential facts, a particularly careful view should be taken as taking "*...careful measures to secure not only that justice is done that also that it is apparent that it is done.*"[21]

Accordingly - in light of *McMillan* - it seemed a particularly guarded approach was appropriate in the Family Law jurisdiction, and applications since then to restrain a solicitor or barrister from acting have had to meet a fairly low threshold to get over the line.

The approach in other Australian Courts

The High Court

The test set out by the High Court in *Carindale Country Club Estate Pty Ltd v Astill ("Carindale")* is that the Court ought to intervene "*....unless it is satisfied there is no risk of disclosure. The risk must be a real one and not merely fanciful or theoretical but it need not be substantial.*"[22] The Full Court decision in *Osferatu* brings the family law approach in line with the approach adopted in *Carindale.*

[20] See also the decision of the English Court of Appeal in *Lord Ashburton v Pape* [1913] 2 Ch 469).
[21] (1987) 9 NSWLR 118 at 123.
[22] [1993] 115 ALR 112 at 118.

The test adopted in *Spincode*

Spincode is a 2001 decision of the Victorian Supreme Court of Appeal relating to a dispute between shareholders in various software companies. In this case the appellant sought to appeal a decision at first instance of Warren J to restrain MacPherson and Kelley from continuing to act as solicitors for Spincode. On appeal, Brooking JA said:

> *The danger of misuse of confidential information is not the sole touchstone for intervention when a solicitor acts against a former client. That danger can and usually will warrant intervention but it is not the only ground. There are two other possible bases for an interdict. In the first place, it may be said to be a breach of fiduciary duty of loyalty for a solicitor to take up the cudgels against a former client in a same or closely related matter. But even if there was no breach of this negative equitable obligation in this case, the solicitor's conduct was* ***so offensive to common notions of fairness and justice that they should, as officers of the Court*** *(emphasis added) be brought to heel notwithstanding that they had not infringed any legal of equitable right.*[23]

The "public interest ground"

Reliance can also be placed upon the decision in *Grimwade v Meagher*[24], another Victorian Supreme Court case in which Mandie J emphasised the 'public interest ground' (sometimes called the 'administration of justice' ground) when granting an injunction to restrain barrister Douglas Meagher from appearing for certain defendants in proceedings against Sir Andrew Grimwade.

Whilst his Honour said that it is a serious matter to prevent a party from retaining the counsel of their choice, he found that the circumstances were so unique in this case that it was necessary, in order to ensure the due administration of justice, that Mr. Meagher be restrained from acting. He said:

> *....It cannot be doubted that this court has an inherent jurisdiction to ensure the due administration of justice and to protect the integrity of the judicial*

[23] *supra at 552.*
[24] [1995] 1 VR 446. This statement echoes the same bases for an injunction set out by Brereton J in the NSW case of *Kallinicos v Hunt* referred to earlier in this paper, and has been further adopted in *Sent & Prime Life v. John Fairfax Limited (2002) VSC 429.*

process as part of that jurisdiction, in an appropriate case to prevent a member of counsel appearing for a particular party in order that justice ***should not only be done but manifestly and undoubtedly be seen to be done.*** (emphasis added).

Osferatu v Osferatu: 2015 Full Court of the Family Court

This case represents a significant swing away from the approach adopted in *McMillan*.

- At first instance the trial Judge restrained the appellant husband's solicitors from continuing to act.

- The basis for the injunction was that the solicitor, "Mr. F", who was now a partner in the firm of the husband's solicitors, had previously been a partner in the firm of solicitors acting on behalf of the wife.

- It was common ground that Mr. F had never dealt directly with the wife whilst at her firm. Mr. F left the firm in January 2012. The parties entered into final parenting and property orders in January 2014, but their dispute continued.

- Mr. F then started work at the husband's solicitor's firm in May 2014. The wife's solicitors at that time said they did not object to the husband's solicitors continuing to act, but they did require undertakings from Mr. F and said they might want to raise the conflict issue at a later stage should a further application be made.

- Mr. F provided a very detailed undertaking that he would not disclose any information at all or be involved with the matter in any way.

- Proceedings were issued in February 2015 and the wife initially said that she did not object to the husband's solicitors acting, but she subsequently did so object. The wife application to restrain the husband's solicitors from acting included a letter from the solicitors asserting Mr. F had been a "work director"

> at their firm and thus had active knowledge of all files, including this one, and that he took part in regular meetings where the matter was discussed, and accordingly he was privy to information as to advice received by the wife and instructions she has given as well as having had access to the wife's file.

The trial Judge relied upon the test in *McMillan* and concluded that as a result Mr. F's position at the firm and the information to which the wife's solicitors say he was privy, *"...it is readily apparent that the proper administration of justice is clearly indicative of the relief sought by the wife."*

The husband appealed and the Full Court said that the decision in *McMillan* really turned on the particular factual circumstances confronting the Court in that case and similar cases (such as *Stewart*) where there was a dispute between a solicitor and a party as to essential facts and as to whether confidential information was conveyed or not. In those cases, it is not appropriate for the Court to enter into an examination as to where the truth lies or to resolve issues of fact. All that is required is that the applicant deposes to having conveyed confidential information about the very matter before the Court, and it is not unreasonable to believe that information may be used against the applicant.

Importantly, the Full Court in *Osferatu* said all the cases are consistent in the requirement that the applicant seeking must discharge the burden of proof by adducing cogent and persuasive evidence[25]. That is – sufficient evidence needs to be adduced to adequately demonstrate confidential information has been imparted to a relevant person.

Establishing the risk of disclosure

Once the Court establishes that the solicitor (or such other relevant person) is in possession of confidential information, the Court then has to assess the risk of disclosure. The Full Court in *Osferatu* adopted the approach of the House of Lords in *Bolkiah*. That is – *the risk of disclosure must be a real one, and not merely fanciful or theoretical. But it need not be substantial.*

[25] *supra* at paragraph 9.

When determining whether to grant the injunction, the Full Court said the Court must balance and consider:

- the nature of the information against a consideration of the person to whom the information was given;
- when the information was given;
- the relevance of that information to the current proceedings;
- the risk of disclosure; and
- any proposed protective measures required before any determination can be made as to whether any relief is required and, if so, what is the appropriate relief[26].

The Full Court allowed the appeal and dismissed the application for restraint. Their Honours noted that the wife had not provided evidence that confidential information had been provided to Mr. F. They also noted she previously accepted any undertaking from Mr. F and had consented to the husband's solicitors continuing to act for some time after Mr. F commenced there.

The Full Court also took into account the measures that had been taken to quarantine Mr. F from having any contact with the proceedings within the husband's solicitors firm including undertakings being given to the Court by the other partner in the firm to maintain the quarantine measures that had been implemented.

Three-step approach

The Full Court adopted the three-step approach propounded by Goldberg J in *Photocure ASA v Queen's University at Kingston*[27], which requires the following questions to be considered:

- Does the firm have confidential information?
- Is that information relevant or may it be relevant in the proceedings? and

[26] *ibid* at paragraph 35.
[27] [2002] FCA 905 at paragraphs 50-51.

- What is the risk that the information will come into the possession of those persons in the firm working for the other party?

In determining whether the firm has confidential information, the Court will not engage in a fact-finding exercise, and cross-examination will not be allowed[28]. However, sufficient particularity must be provided to persuade the Court that confidential information has been imparted. This is a question of fact, and what will be sufficient – without actually disclosing what is to be protected – will depend on the particular circumstances of each case. If it is too broad, the Court will not be satisfied.

In drafting affidavit material, one should note:

- The Court needs sufficient particularity to determine if the information is actually confidential and whether it is relevant.[29]
- The Court will not automatically impute knowledge of those joining the firm to the other lawyers in the firm[30].

In determining if the confidential information is relevant, sufficient evidence needs to be provided to the Court. Not all confidential information is relevant. Cases, for instance, such as *L & L*[31], where a solicitor some 15 years earlier had been employed to undertake conveyancing for one party and was subsequently restrained from acting for the other party, would likely be determined differently if before the Court now.

Lastly, in determining the risk of disclosure or prejudice, as already set out, the Court needs to be satisfied of something more than a mere theoretical risk. In light of *Osferatu*, the Court now needs to be satisfied that there is a real risk of prejudice or disclosure. It may also be that steps can be taken to minimise the risk, such as putting in place Chinese Walls, or "information barriers", or the giving of undertakings, as was accepted in *Osferatu*.

[28] *McMillan, supra* at 102.
[29] See *Bolkiah, supra* and *Carindale, supra.*
[30] See *Newman v Phillips Fox* (1999) 21 WAR 309 at [29] per Steytler J, following *Bolkiah, supra.*
[31] [2003] FamCA 777.

Whilst not specifically rejecting the approach in *McMillan*, the Full Court in *Osferatu* regarded the references in earlier cases to a "theoretical risk" as *"unhelpful"*, and instead, explicitly endorsed the need for the Court to find that the risk of disclosure or prejudice is one that can properly be described as *"probably real and not fanciful"*.[32]

When should you raise the conflict point?

The case law also makes it clear the litigant should raise the issue of conflict at the earliest opportunity.[33]

Situations sometimes arise where it is clear there is a conflict of interest or the possibility of a future conflict on the horizon, but the party claiming the conflict is content to continue with negotiations in an attempt to resolve the matter, rather than insisting on the compromised solicitor ceasing to act, for instance, until the conclusion of a mediation.

In that scenario it would be advisable to ensure the conflicted solicitor confirms in writing that he or she will not rely on the delay in bringing the conflict to the attention of the Court should their client subsequently instruct them to continue acting. It may also be appropriate to seek that the solicitor provides a written undertaking. However you should bear in mind that allowing a solicitor to remain on the record with undertakings being given was a matter that the Full Court took into account in *Osferatu* when they declined to restrain the husband's solicitors from acting on his behalf.

What to do if you think there may be a conflict?

Whether you are a solicitor or a barrister, if there is any risk of a conflict, or even a possible future conflict, it would be prudent to consider doing the following:

- Seek advice immediately from senior colleagues in your firm and/or advice from counsel.

[32] supra at paragraph 39.
[33] See *McGillivray v Mitchell* and *Grieves & Tully* (2011) FamCA 617.

- Consider obtaining a ruling from your ethics committee (although we do not think these are always conclusive).

- Once you have determined you are in a position of conflict, you should immediately raise this with your client and advise them to terminate your retainer and engage someone else, unless you think that the conflict can be cured by way of appropriate undertakings to the other party and/or the Court.

- If you have determined that the opposing solicitor or barrister may be in a position of conflict, you should immediately raise this with your client. Remember that it is the client's decision whether or not they then wish to raise the point with the opposing side and insist that the lawyer in question cease to act. If they wish to raise the point, it should be done without delay.

- Any application seeking to restrain a party from instructing a solicitor or barrister on the basis of breach of confidentiality will need to be supported by a well drafted affidavit from the client providing sufficient detail to establish both that relevant, confidential information has been provided to the conflicted person as well as to establish the real risk of disclosure and/or prejudice.

- Do not fight to stay in a case when it is obvious that there is conflict and you must get out. The lost fees are irrelevant in the context of your career. Your duties to the Court and to your clients take precedence. Moreover, your reputation amongst colleagues is precious and will endure long after the client has found alternative representation.

ALICE CARTER
CAROLINE PATERSON
HOLMES LIST
22 FEBRUARY 2016