CONFLICTS OF INTEREST AND PROFESSIONALS

by Dr Paul Finn

Commentary by A.A. Lusk

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The perspective from which my comments are made is that of a lawyer with some experience of advising professionals and their underwriters in the defence of professional liability claims. If there is a bias in my experience, and in the remarks I later make, towards claims by clients against solicitors, it is for the obvious reason that it is that professional relationship that attracts the highest incidence of claims. It is also that relationship that best exemplifies the fiduciary relationship that is the subject of Dr. Finn's paper and it is not surprising that many of the authorities to which Dr. Finn refers are solicitor cases.

Before I pay tribute to Dr. Finn, as I must, for his very fine paper, I set the stage for my comments by referring to a remark made early in Dr. Finn's paper and I quote:

> "It is well known that lawyers, like all professionals, are subject to a legal and not merely an ethical duty to maintain the secrecy of information acquired from or about their clients when acting in their professional capacity."

I hope Dr. Finn will not think me quibbling if I disagree with that general observation. In my personal experience there is very limited knowledge in this country of the nature of the duty of confidentiality owed by professionals to their clients. Among lawyers I regret to say there is a lamentable lack of understanding of the fiduciary duty concept. Many lawyers and most accountants and bankers believe that the duty of confidentiality is an ethical one rather than a legal duty, with the inflexible characteristics and rigorous application so well described in Dr. Finn's paper.

It is well publicized by professional indemnity insurers that one of the categories of professional conduct of solicitors that most often gives rise to claims is where the same solicitor or firm has acted for multiple parties in a transaction. Those are the claims in which the informed Plaintiff's lawyer can best ensure a successful outcome by pleading breach of fiduciary duty. Before the Court of Appeal decision in Farrington v Rowe, McBride & Partners (1) I had seen only one proceeding involving a solicitor acting for multiple parties in which breach of fiduciary duty was even pleaded. That

was in the Mid-Northern matter referred to in Dr. Finn's paper and I have no doubt that senior Counsel for the Plaintiff in that case was alerted to the pleading by the decision at first instance in the Farrington case.

I assumed that the Farrington decision would be widely read and understood and that we could expect in the future that there would invariably be allegations of breach of fiduciary duty raised against solicitors who had chosen to act for both parties or more than one party in the same matter. That has not eventuated. Any careful consideration of Farrington and Mid-Northern (2) and Day v Mead (3) should leave Plaintiffs advisers in no doubt that an allegation of breach of fiduciary duty, properly raised, makes life rather difficult for the defence. Some of these difficulties I will refer to later. An obvious example however is the question of limitations. I know of two occasions in the last year or so when Plaintiffs have been advised they cannot proceed against their former solicitors because their claim based on contract (as it still must be in this country) had fallen foul of the six year statutory time limit from the date of the alleged breach. In both cases in my opinion an allegation of breach of fiduciary duty could have been made and neither claim was properly statute barred so far as that cause of action was concerned.

The point of these observations as to the comparative ignorance of our professionals of the whole concept of breach of fiduciary duty in the context of their own relationships with their clients, is to say how timely it is that Dr. Finn should have taken up his interest in this subject, albeit if the consequences may be unwelcome to those for whom I sometimes act. Dr. Finn's book "Fiduciary Obligations" was a trail blazer in this difficult area. It says much for its author and the value of the work itself that in those New Zealand cases that have considered fiduciary obligations in recent years, the work has been embraced by the Courts and treated as authoritative.

Dr. Finn will I hope, forgive me after that unsolicited commercial if I sound a caveat. Faced with the formidable difficulty of resisting an allegation of breach of fiduciary duty in a solicitor/client duty and duty conflict matter, and finding a comparative absence of useful case authority, I once had resort to

Dr. Finn's text as the authority for the compelling submissions I was advancing. The trial Judge, Mr Justice Thorp who has demonstrated a close and learned interest in the law relating to professional responsibilities, proceeded to hold that two of the submissions were based on passages in the text that were not supported by the authorities cited in the footnote. The third submission failed on the facts (for which I can hardly blame Dr. Finn). The Lusk/Finn defensive ploy was lost three nil and a breach of fiduciary duty was found in that particular case. On the question of damages, as I shall mention, we were jointly despatched to the boundary again.

It is to be hoped notwithstanding my personal setback that the legal profession will read carefully Dr. Finn's paper and become more familiar with this well established extensive and stringent legal duty.

Dr. Finn's paper is really in three sections. The first considers the purposes of fiduciary law. He then goes on to consider how a client's informed consent can sometimes reduce or eliminate a breach of a fiduciary obligation and finally he looks at attempts to circumvent the rigours of the duty by artificial contrivances such as Chinese walls.

It would be presumptuous of me to take issue with Dr. Finn as to his examination of the principles that emerge from the cases and I think he correctly cautions that those studying his paper are unlikely to be pleased by what they learn to be the law in this area. I do feel free to take some issue with him as to what the law should be and there are some respects in which I think the law as it is now applied should be criticised although I do not anticipate the Courts will be quick to change.

It is easy to understand, and I think we can all probably accept that there is a breach of fiduciary duty in a duty/personal interest conflict. The law is and needs to be fairly inflexible and is certainly harsh in penalising such a breach. However it is much more difficult to understand why the Courts have been so inflexible in the duty/duty conflict area. The principles are not as easy to extract from the authorities and it is not surprising that a number of them such as the Rakusen case (4) to which Dr. Finn refers,

emphasize that these cases need to be considered on a case by case basis.

I think none of us has much difficulty in recognising a duty/duty conflict in a litigation context. A lawyer or firm can only act for one party where adverse interest are involved. In other legal transactions it is not too hard in most cases to identify a conflict and that the rule applies when an individual attempts to act for two parties with adverse interests in the same transaction. Where I find much more difficulty in accepting the rule should be applied rigorously is where different lawyers or departments of the same firm or fiduciary organisation are involved in acting for the different interested parties.

In his first section dealing with the principles and purposes of fiduciary law Dr Finn refers to the English Court of Appeal decision in Rakusen. He extracts from that decision what he says to be a rule laid down by the English Court of Appeal in that case that solicitors may be able to act in the same matter for a new client without having to disclose confidences reposed in them by their first client. The Courts will only interfere if the first client can show a likelihood that there will be a breach of confidence. Dr. Finn advances four criticisms of that rule, but I suggest with respect that he shows a personal lack of sympathy with it and the general, almost philosophical arguments, with which he criticises the rule are unimpressive.

The Rakusen decision is of importance as being one of the few decisions of authority that have attempted to confine the rigorous application of the breach of confidentiality and loyality duties to cases where the breach is not just theoretical but actual. It is also important in the context of my remarks as one of the few cases where the alleged conflict arose because different solicitors in the same firm acted for the different clients.

I quote from the judgment of Cozens-Hardy M.R. at page 835:

> "I do not doubt for a moment that the circumstances may be such that a solicitor ought not to be allowed to put himself in such a position that, human nature being what it is, he cannot clear his mind from the information which he has confidentially obtained from his former client; but in my view we must treat each of these cases, not as a matter of form, not as a matter to be decided on the mere proof of a former acting for a client, but as a matter of substance, before we allow the special jurisdiction over solicitors to be invoked, we must be satisfied that real mischief and real prejudice will in all human probability result if the solicitor is allowed to act."

The facts of that case were that a member of a firm of solicitors accepted instructions to act in an arbitration for one party, he being completely unaware at the time that at an earlier stage, before he accepted instructions, his partner had been advising the other party to the same dispute. There was no question of the same firm acting for more than one party at the same time. There was no doubt that the second solicitor was not the repository of any confidence which his partner had obtained from the first client. The Court of Appeal declined to restrain the second solicitor from acting for the second client. With respect to Dr. Finn's criticism of the case it seems to me that it was undoubtedly correct on its facts and that the principle or rule that was the basis of the decision involves no inherent mischief and introduces a note of realism in an area of law where some other decisions fail so to do.

Rakusen has stood as a leading authority in the Commonwealth on this subject for 75 years. It was adverted to in passing in the Court of Appeal in Farrington v Rowe and escaped criticism. I submit it represents the law in this country. Although it was a successive engagement case rather than a contemporaneous dual engagement case it should stand as some encouragement to those who seek by the device of the Chinese wall, or other proper separation of interests, to avoid the harshness with which the fiduciary duty obligations have been imposed on the profession in the past to preclude multiple engagements.

There are three criticisms I would make of the current application of the law in the area of duty and duty conflicts of interest. I mention them, but time precludes me arguing them.

1. Why should not different partners in the same law firm act for different parties to the same transaction if they do so in a

manner that preserves the confidentiality of each client and each client receives the wholehearted loyalty of the solicitor who is acting for him? I am not concerned with adversary litigation, but refer to other common transactions in the property, financing and some commercial fields. Why should it be that firms taking on a multiple engagement in this type of transaction should "do so at their peril" to adopt the phraseology of certain English Judges who probably themselves never practiced in a firm and never assisted in any way in the conduct of a conveyancing or commercial property transaction. I find it artificial and unrealistic to suggest that the knowledge of one partner must be imputed to the other and that client A is entitled to be given by the firm all of the information that is known to the partner acting for client B and failure of the firm to do so is a breach of fiduciary duty. Yet that seems to be the way the Courts approach the matter at the present time. I prefer the Rakusen approach.

2. It is offensive to me that a technical breach of duty can sound in damages where a fiduciary is held to have failed to impart to the beneficiary all material information known to him or his firm, even though it is clear on the facts that the beneficiary would have acted no differently had the material facts been disclosed to him. The authorities are all one way to the effect that speculation as to the course the beneficiary might have taken on disclosure, is irrelevant. Brickenden v London Loan & Savings Co, (5) Farrington v Rowe McBride, Mid-Northern Fertilizers Limited v Connell. I do not presume to suggest that the judgment of Thorp J. in the Mid-Northern case was wrong in law. The single issue of breach of fiduciary duty that gave rise to a finding of liability was earlier pleaded as an allegation of negligence. The allegation was a failure to give a client material information about a lender's security. Like all other allegations of negligence in that case it was rejected under that head. His Honour found as a fact that while there was an obligation on the solicitor concerned to give his client the material information, the beneficiary in that case would have proceeded with the transaction even with the benefit of the appropriate advice. The same allegation when considered by His Honour as a breach of fiduciary duty was held to sound

in damages because the solicitor concerned was not able to argue that factually his failure to give the advice would have made no difference. If the judgment accords with legal authority, it departs from common sense and fairness in my respectful submission. To award damages to a person for non-disclosure of information which clearly would have made no difference to him in any event, does not seem to make good sense. Those were windfall damages for that plaintiff.

3. The damages or compensation that have been awarded can be unduly favourable to the beneficiary. Generally, the approach is that the beneficiary is entitled to be put back in the position he would have been in if the transaction had not proceeded at all. Dr. Finn does not develop this theme in his paper, so nor should I except to say that if equity is to be even handed there should be a proper relationship in a causative sense between the losses suffered and the damages awarded. Yet the authorities clearly suggest the beneficiary need not show such causation. See the review of this by Thorp J. in Mid-Northern. His Honour rejected a submission by the Defendants relying on a passage in Dr. Finn's book that the Plaintiff must show that loss was caused by the breach of duty before he could recover. The same was said in the Court of Appeal in Farrington. Further, because equitable damages are involved, common law restrictions arising from the concepts of foreseeability and remoteness, are not taken into account.

It is my hope, probably not shared enthusiastically by Dr. Finn that our Courts will realise that in the duty/duty conflict area the Court's rigid application of the strict fiduciary principles have been carried to an extreme. By a proper application of the Rakusen rule the Courts can ensure the purposes of the fiduciary duty concept are not circumvented and that high standards of professional behaviour maintained, while at the same time recognising that in the real world of professional practice multiple engagements will continue to be accepted and men of integrity will ensure their respective clients rights of confidence and of undivided loyalty are maintained.

I do not advocate total abrogation of the rule, but its relaxation on a case by case basis. The Chinese wall is not a defence, but a very good evidential indication in the context of a Rakusen argument, that as a matter of substance, rather than form, the law firm or organisation, has not caused and will be unlikely to cause real prejudice or real mischief.

Thank you Dr. Finn for a stimulating and scholarly paper.

FOOTNOTES

1. Farrington v Rowe McBride and Partners [1985] 1 N.Z.L.R. 83.

2. Mid-Northern Fertilizers Ltd and Anor v Connell Lamb Gerard & Co; N.Z. High Court, 18 September 1986, Thorp J.

3. Day v Mead; N.Z. High Court, 19 March 1986, Gallen J.

4. Rakusen v Ellis, Munday & Clarke [1912] 1 CL 831.

5. Brickenden v London Loan and Saving Co [1934] 3 DLR 465.