# CONFLICTS OF INTEREST AND PROFESSIONALS

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CONFLICTS OF INTEREST - THE BUSINESSMAN AND THE PROFESSIONAL

Fiduciary law is something of a new industry in the courts of the Commonwealth. Its burden, inevitably, has fallen on the professional and the businessman. In this country one need only point to Farrington v Rowe, McBride and Partners,[1] Westpac Banking Corporation v Savin,[2] Pacifica Shipping Co Ltd v Anderson[3] and Mid-Northern Fertilisers Ltd v Connell, Lamb, Gerard & Co.[4] In Canada it has been embraced enthusiastically, if not always orthodoxly,[5] with occasionally stunning results.[6] In Australia the judicial response has been somewhat more circumspect,[7] though this, perhaps, is associated with a shift of a more profound nature - the severance of equitable remedy from its current reliance on fiduciary law[8] and the open espousal of a law of unjust enrichment.[9] Equitable remedy, particularly the constructive trust and the account of profits, is at the heart of the matter. The bounty these can bring to a successful claimant can make a damages claim in tort or contract appear a trifling thing. But prophylactic remedies alone are not the sole attraction of fiduciary law. Presumptions of wrongdoing, the common reversal of the onus of proof and the minimisation of the importance of such familiar common law concepts as causation and foreseeability[10] have their own lure.

I cannot in a short paper attempt to chronicle the implications of all of this. So I have narrowed my focus. I

have no unifying theme. All that I will do is consider an apparently eclectic group of topics falling under the fiduciary rubric and which have no greater claim to consideration than that they are of some importance to professionals and businessmen and particularly to those who render client services through corporations and partnerships of some size. The use and abuse of information will be a recurrent concern. And I will, of course, advert to the device looked to, perhaps forlornly, by many as the solution to many of such fiduciaries' ills - the "Chinese Wall". But my primary concern will be with the law as it is and with how it may develop. And I will suggest its present inadequacy both in accommodating modern business and professional organization and in reassuring the public that client interests are properly safeguarded in situations of apparent conflict of interest. I am not unmindful that much of what I have to say may not be particularly pleasing to you.

Fiduciary law came of age in a world that knew little of the complexity and complication that besets us today in business and social organisation. Though it spoke, and speaks, of what are undoubtedly important values in human dealings, its models - and the rule system which expresses them - possess a remarkable simplicity. To overstate the point slightly the law would seem to have had in mind a fiduciary - let us say an agent - who personally served one client at a time in a relatively simple and specific matter and who had, if not in his own head, then at least readily accessible to him, all of the information relevant to that matter. The paradigms

were the custodian trustee with quite narrow powers of investment and the agent acting for a vendor or a purchaser in a specific property dealing. The advent en masse particularly in this century of the limited liability company threw great strains upon fiduciary law's simple conceptions. Traditional methods of analysis simply could not cope with some range of the fiduciary problems that the company spawned. The conflict of duty and interest rule, for example, could work tolerably well in regulating dealings between a director and his company.[11] But it was quite unequal to the task of determining when and why a director should be accountable to his company for pursuing a profit making opportunity on his own account. As a result, and influenced somewhat by United States developments, we seem to be in the process of evolving a "line of business" test which artificially sterilises a sphere of activity from the private concerns of directors.[12] We have here, then, the adaptation of fiduciary law to a problem of some complexity. But of note for what I am to say later it has not been achieved at the price of any reduction in the rigorous standards that fiduciary law has traditionally exacted.[12]

Today, in a quite different sphere, a similar adaptation is being called for. The problem evoking this arises from modern changes in the structuring, practices and pursuits of business and professional enterprises. It is not easy of resolution, the more so as it confronts directly the simple fiduciary model I mentioned earlier. Increasingly we are witnessing financial and professional "businesses" operating through corporate or large partnership forms, employing large numbers of persons in

the provision of a multiplicity of client services (some but not necessarily all being fiduciary ones) and becoming the repositories of information on scales not previously envisaged.

For the purposes of fiduciary law, this phenomenon raises three rather basic issues which, previously, it has addressed only imperfectly. The first arises because of client proliferation with the point now commonly being reached where "fiduciary businesses" wittingly or unwittingly are servicing clients who themselves have potentially adverse or conflicting interests (the problem of "client conflict"). The second is a product of the inevitable information garnering of such businesses in the conduct of their diverse activities, the law as it now stands imposing conflicting obligations on them in respect of the aggregation and the segregation, on the use and non-use, of such information (the "information" problem). The third is, for us, a novel issue. As businesses grow they can generate their own institutional interests and institutional loyalties in their members and employees: career prospects, business profitability and client attraction and retention, for example, are here possible matters of moment. This in turn can mean that the interests of the business and of those engaged in it can be factors which may intrude into the manner in which client services are rendered in individual cases, leading, for example, to the temptation to favour some clients and to be less concerned for the welfare of others (the problem of "institutional interests and loyalties").

What is distinctive with this trio is that, unlike with the company director problem noted earlier, they do not relate exclusively to any one specific fiduciary rule. Accordingly I will not address them individually but will, rather, talk of fiduciary law in general though giving particular emphasis to the conflict of duty and duty rule - the "duty of loyalty" - where these problems surface most commonly. I will for the most part confine myself to the purposes and techniques of fiduciary law for it seems to me that an understanding of these is a prerequisite for any successful adaptation of the law to modern conditions.

## 1. THE PURPOSES OF FIDUCIARY LAW

At the risk of some slight inaccuracy one can say by way of generalisation that the prime object of fiduciary law is to safeguard the interests of beneficiaries in fiduciary relationships.[13] This is not surprising. A fiduciary, after all, is simply someone (a) who in his relationship with another has assumed to act in that other's interests in some particular matter or matters[14] or (2) whose power over, and the corresponding reliance placed upon him by another in, that other's affairs are such that he should be taken to have assumed so to act.[15] By that assumption or with that power the fiduciary will, perforce, be possessed of some capacity great or small to affect those interests for good or for ill, be this through his own decisions or through his influence upon, or involvement in, the decisions of that other.[16] In

its rule system, fiduciary law seeks to ensure that that capacity is not used otherwise than in the beneficiary's interests. But it does this in a quite distinctive way. Where wrongdoing is alleged it does not in the individual case seek to inquire whether the beneficiary has in fact been adversely affected. Its concern is with possibilities and tendencies. This is the enduring product of the seminal decision of Keech v Sandford.[17] And so the interests of beneficiaries have been protected in the main by rigid proscriptions subject to consent based exceptions. The primary purpose of these proscriptions is, doubtless, to maintain the integrity of fiduciary relationships themselves. Or to use the contemporary U.S. description, the purpose is "instrumental."[18]

It is, perhaps, important to mention here in passing that fiduciary relationships are not confined to fixed types of legal relationship, for example, trustee and beneficiary, principal and agent, and the like. Their existence, wherever, is simply a question of fact. It is for this reason that as the nature of the functions performed by a person or body change over time that change can bring in its wake fiduciary responsibilities not previously an encumbrance upon that person or body. So one can note that the growing propensity of banks, for example, to give advice in association with loan transactions is, increasingly, rendering them vulnerable to fiduciary challenges. The Canadian courts in particular have been sensitive to this.[19]

But let me continue with the purposes of fiduciary law. Beneficiary protection apart, another more subtle purpose seems also to be at work in the conduct regulation of at least some types of fiduciary. This warrants emphasis. In some spheres conduct regulation would appear to be becoming an end in itself and this because there can be a public interest in reassuring the community - not merely beneficiaries - that even the appearance of improper behaviour will not be tolerated. The emphasis here seems, in part at least, to be the maintenance of the public's acceptance of, and of the credibility of, important institutions in society which render "fiduciary services" to the public.[20]

We encounter often enough the observation that fiduciary duties are "more intense" in some relationships than in others. We likewise are familiar with the notion that the courts will exact from court officers standards more stringent than those imposed on others.[21] Often the "intensity" observation merely signifies that the opportunity for impropriety is the greater with some types of fiduciary than with others and that supervision will therefor be the more vigilant. But in some instances, as also with court officers, the law is, I suggest, in fact committed to imposing standards of behaviour more severe than is usual with the ordinary run of fiduciary - and, I propose, for the public interest reason I mentioned earlier.

I have laboured this point because it seems to me to be at the heart of the controversy over when lawyers in particular

can act against former clients. And I will later suggest that the "public interest" may be a factor which may dissuade courts from too ready an acceptance of "Chinese Wall" defences in legal and financial institutions and this because an apprehended community scepticism about the efficacy of such devices may lead to an erosion of public confidence in such institutions. But I would like for a moment to dwell on the lawyer acting against a former client.

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. This duty knows limited exceptions, that alone of note for present purposes being that information so acquired cannot be used or disclosed without the client's consent. The duty, furthermore, is one which subsists after the termination of the professional-client relationship.[22] It has traditionally been considered that it is this duty, primarily,[23] which sets the limits to when a lawyer can act against a former client. The difficulty lies in determining how that duty should be applied in favour of clients and against lawyers.

A considerable body of conflicting, often unconvincing, nineteenth century English authority failed to yield an authoritative answer to this question.[24] For reasons given below these cases should be allowed to sink into oblivion. For the purposes of the law of the Commonwealth, the 1912 English Court of Appeal decision of Rakusen v Ellis, Munday, &

Clarke[25] has been taken as stating the modern law. The court there refused to lay down any general rule which would preclude a solicitor from acting against a former client in the same or in a related matter. Whether he could or could not was to be a question of fact in each case, the court only interfering if a breach of confidence was, in the circumstances a "mischief ... rightly anticipated."[26] Cozens-Hardy M.R. was of the view that -

> "solicitors of the highest honour and integrity may frequently be perfectly able to act in the same matter for a new client, and at the same time may be perfectly able to avoid disclosing secrets without putting any strain upon their memory, conscience and integrity."[27]

Comforting as this view may be it has long since been abandoned in the United States,[28] it is under siege in parts of Canada[29] and is, in my view, untenable today. Its vices are at least four-fold.

First it was formulated when our law of breach of confidence was in an embryonic state. In particular it paid no heed to the now well accepted phenomenon of "unconscious plagiarism" or unconscious use of information.[30] United States courts early acknowledged this to be a real possibility to be guarded against in lawyer-client cases at least where the later representation was of an interest adverse to the former client,[31] as did Lilley C.J. in a perceptive judgment of the Full Court of Queensland in 1882.[32] Secondly, with the onus

now being on the former client to prove not merely that his former lawyer acquired information in confidence but also that there is a real likelihood that some or all of that information will be misused, the Rakusen ruling does in effect "tear aside the protective cloak drawn about the lawyer-client relationship"[33] and underlines the policy informing both client secrecy and the related doctrine of legal professional privilege. It may be that in some cases this difficulty can be obviated by using such devices as in camera proceedings etc to assist in the maintenance of secrecy.[34] But this can become an unrealistic possibility if the prior retainer involves a matter of some magnitude and complexity.[35] Thirdly, Sir Robert Megarry has suggested in Spector v Ageda that[36] -

> "A solicitor must put at his client's disposal not only his skill but also his knowledge, so far as is relevant; and if he is unwilling to reveal his knowledge to his client, he should not act for him. What he cannot do is to act for the client and at the same time withhold from him any relevant knowledge that he has" -

If, as is well accepted, a solicitor cannot pray in aid a duty of confidence to justify his non-disclosure to his client of relevant information he possesses,[37] then the assumption underlying the Rakusen rule conflicts with the duty of a lawyer to his second client. And one can well understand the reason for that duty. Assume that S in a previous retainer acquires information that his then client X is destined for insolvency. S is later retained by Y for advice on a terms contract he is

entering into with X, X having continuing payment obligations to Y. S, consistently with Rakusen could advise without disclosing his knowledge of X's circumstances. But can that information properly be withheld from Y if S, having accepted Y's retainer, is to discharge his duty to Y?

Fourthly, and consistently with the policy informing legal professional privilege,[38] the rule adopted must eliminate, as the Rakusen rule does not, the apprehension a member of the community might have that disclosures he may make to a lawyer might somehow become available to third persons. To allow that apprehension is to prejudice the possible utilisation of legal services.[39]

I am conscious that while criticizing Rakusen I have neither proposed an alternative rule nor considered the complications wrought by professional practice being conducted through often very large partnerships. I will deal with the second of these matters separately at a later place in this paper.

As to an alternative rule, it is clear that any rule more stringent than Rakusen can have the dual effects (a) of reducing client choice of lawyers and (b) of "shutting lawyers out from some subsequent business"[40] - this latter effect snowballing as lawyers change firms and as firms amalgamate.[41] I would not, of course, presume to suggest to you the weight that should be given to these effects in your country if an alternative to Rakusen is to be adopted. It

does, however, seem to me that your courts have three possibilities from which to choose.

1. To retain the Rakusen rule subject though it may be to the vices and the liability hazard I have identified.

2. To raise a rebuttable presumption that a prior retainer has resulted in the acquisition by the lawyer of confidential information so that he cannot act in the same or in a substantially related matter for an interest adverse to his former client unless the former client consents to his so doing or unless the Court is satisfied that no confidential communications of possible relevance to that matter were in fact made, the onus of proving this being on the lawyer.

This approach, while not automatically disqualifying a lawyer, accepts the possibility of unconscious use of information in the situation where such is most likely to occur, i.e. in the representation of an adverse interest; it minimises to an extent greater than is so under the Rakusen rule, the need for confidences to be revealed for the purposes of determining whether a lawyer should be restrained from acting; and it eliminates the possibility of a lawyer being held liable on the basis of the Spector v Ageda rule for non-disclosure of relevant information.

3. To raise an irrebuttable presumption and thus an automatic disqualification in the circumstances of 2. above.

This approach has been adopted in the United States. When coupled with a related "imputation" rule which transfers the disability imposed on a lawyer to all affiliates in his firm[42] it can make an industry out of applications for lawyer-disqualification. It would, if a like imputation rule were to be adopted, be unworkable in countries such as our own given the size - and disposition of our respective legal professions.

The attraction of this approach is that it does not require the client to prove, or the lawyer to disprove, that relevant confidences were communicated in the prior retainer thus reinforcing the policies informing client secrecy. For my own part I would advocate this rule although, as will be seen below, I would propose a different and less stringent imputation rule for law firms from that which is used in the United States.

## 2. THE CONSENT BASED EXCEPTIONS TO FIDUCIARY OBLIGATIONS

There are several, not merely one, fiduciary duties - though their precise number most likely varies depending upon the Commonwealth country with which one is concerned.[43] But whatever their number, what they share in common is that they have each been cast in a fashion which acknowledges that, within their respective spheres, beneficiaries have the right to determine how their own interests are to be served when the fiduciary's conduct is such as to activate a rule. This has

been achieved by allowing a beneficiary, upon full disclosure by a fiduciary, to consent to action which would otherwise be wrongful. We are quite familiar, for example, with the idea that a company director must disclose any personal interest possessed in a proposed contract with the company or his wish to pursue on his own account an opportunity falling within the company's sphere of interest.[44] The point, however, to be emphasised is that as each fiduciary duty has its own distinctive purpose, so the disclosure and consent requirement differs from one duty to another. Thus (a) a fiduciary subject to the presumption of undue influence can only retain a gift or a contract with his beneficiary if he can show his beneficiary's consent to it was "the independent and well understood act of a man in a position to exercise a tree judgment based on information as full as that of the [fiduciary]";[45] or (b) a fiduciary in a position of conflict of duty and interest must disclose "all material information "known to him so that his beneficiary on the basis thereof, and having regard to his own interests, can determine whether or not to consent to the fiduciary's acting in the way proposed.[46] I should add that where a fiduciary relationship arises because the fiduciary is retained <u>to advise</u> the beneficiary, then unless the beneficiary is independently advised in the matter which requires his consent, the fiduciary, apart from making the requisite disclosure, will carry the <u>cumulative</u> obligation of giving all that reasonable advice against himself that he would give if advising his beneficiary in a dealing etc with a third person.[47]

The disclosure rule which remains contentious today and which I would like to examine in a little detail is that imposed on a fiduciary who, in the same matter or in separate matters, owes potentially conflicting duties to different beneficiaries. The common example of this is the solicitor, stockbroker or finance agent acting two ways. By way of prefatory comment I should reiterate that the role of disclosure in the case of all fiduciary duties is to put the beneficiary in a position where he can make an informed decision concerning his own interests in the matter in which disclosure is required.

Conflict of duty, and duty (Client conflict). At the outset one must distinguish two separate situations:

(1) where the fiduciary acts for two unrelated beneficiaries in the same matter where the interests of the two are, or are potentially, adverse - the common example being the solicitor acting two ways in a conveyance: this type of conflict can be described as a "same matter conflict"; and

(2) where the fiduciary in acting or having acted for one client in one matter, acquires confidential information which is material or relevant to the service he is rendering to another beneficiary in a separate matter - the common example here being the financial institution providing investment advice to one client while being in possession of confidential information about the subject matter of that advice by virtue

of services independently rendered to another client: this can be described as a "separate matter conflict"..

These two situations raise quite distinct issues and need to be considered in turn.

Same matter conflicts. These are in the heartland of fiduciary law, raising as they do in an acute form, a fiduciary's duty of loyalty. Let me take the simple example of a lawyer or agent acting for both vendor and purchaser in a contract of sale. Ib each party, the lawyer or agent - the fiduciary - owes not only those common law duties appropriate to his function (care, skill and the like), he also owes fiduciary duties of disinterest and of loyalty. First, if he is being remunerated by either or both of the parties or if he has through one of the parties a direct or indirect pecuniary interest in the transaction,[48] the conflict of duty and interest rule requires him to disclose to each principal that he is being remunerated by the other (if such is the case)[49] as also his personal interest in the transaction. Failure so to do, as is well known, carries quite draconian consequences both for the fiduciary and in the resulting transaction. But disclosure of remuneration, if any, or of a personal interest, if any, is by no means the end of the matter. Until each client agrees to the contrary, or unless there is a legally acknowledged custom to the contrary,[50] each is entitled to, and is entitled to assume that he has, the undivided loyalty of the fiduciary he has retained. That entitlement finds its expression in a quite distinct fiduciary duty which is owed to

each client. It was expressed by an English judge in an agency case in terms that:

> "Fully informed consent apart, an agent cannot lawfully place himself in a position in which he owes a duty to another which is inconsistent with his duty to his principal."[51]

The object of the rule has been put happily in a Californian decision:

> The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent."[52]

The rule can, however, be relaxed by the beneficiary-client. The crucial matter for present purposes is, of course, the nature of the disclosure required to produce a "fully informed consent".

This much is clear. The disclosure is not limited simply to the fact of the double employment as such.[53] When one asks what here is the purpose of the disclosure, the answer I would venture to suggest is this. The disclosure is to appraise each beneficiary in turn as to the extent to which the fiduciary's

exertions on his behalf will or may be qualified or compromised, so that each beneficiary can then determine whether, in view of the adverse and possibly qualified representation, he should permit the fiduciary to continue so to act in the matter. Each beneficiary must be informed, in other words, of the extent to which the fiduciary will, by virtue of the double employment, act and be capable of acting in that beneficiary's interests given the possible conflicts which might arise in the matter. This point has again been well made in a United States decision involving a lawyer acting two ways in a conveyance:

> Full disclosure requires the attorney not only to inform the prospective client of the attorney's relationship to the seller, but also to explain in detail the pitfalls that may arise in the course of the transaction which would make it desirable that the buyer have independent counsel. The full significance of the representation of conflicting interests should be disclosed to the client so that he may make an intelligent decision before giving his consent. If the attorney cannot properly represent the buyer in all aspects of the transaction because of his relationship to the seller, full disclosure requires that he inform the buyer of the limited scope of his intended representation of the buyer's interests and point out the advantages of the buyer's retaining independent counsel.[54]

But the matter does not even end here. If the beneficiary-client does in fact accept a qualified

"representation" he cannot, subject to what I will suggest below about consents, complain if he is not served by the fiduciary in a matter expressly excluded from the representation. But irrespective of whether the representation is or is not qualified, if an actual conflict does arise within the scope of the double engagement, all material facts bearing on that conflict must then be disclosed. If it is not made - the onus being on the fiduciary to prove that it has - the fiduciary will automatically be in breach of the rule. Accordingly I would suggest that the conclusion reached by Thorp J. in the Mid-Northern Fertilisers case, it at first sight arresting, is unexceptionable,[55] although my reasoning may differ somewhat from his Honours. This disclosure requirement is unusual in fiduciary law in that it is a continuing one. The hazaro this raises for the fiduciary is that he might not recognize that a later duty to disclose has arisen simply because he does not realize that a conflict is there.

A phenomenon which quite commonly generates a conflict of duties is the acquisition in one relationship of confidential information which, if available for utilisation in the other, could possibly affect that other beneficary's consent to the fiduciary's continuing to act in the matter.[56]The fiduciary rule itself does not oblige the fiduciary actually to disclose the information to that other: it does not compel breaches of confidence as such.[57] Rather it signals that his ability to act in that other's interest is now compromised given the knowledge he possesses; that that other should be informed of

this; and that the relationship should be terminated.[58] If the fiduciary continues to act, he will be liable to that beneficiary and because of his non-disclosure.[59] I would emphasise that the liability arises from the non-disclosure itself as there has been some tendency in some cases to confuse this liability with the quite separate possible liability for negligence - a liability in which the non-disclosure may well be a very material element.[60]

Having indicated that the acquisition of confidential information may trigger a conflict, I should reiterate that this is merely one way in which a conflict may arise. Indeed the usual illustration of a conflict is where the fiduciary simply fails to advise one party on a matter potentially adverse to that party's interests where his duty to that party calls for that advice.[61] In most of these instances that failure will have been unwitting. But we do have reported instances where it has flowed from an actual favouring of one party.[62] I emphasize this simply to make the point that the duty of loyalty is not one concerned as such with the use and abuse of information. Its concern is with beneficiary loyalty and this, as I will indicate, has quite some bearing upon the question whether Chinese Walls are possible solutions to same matter conflicts.

The final comment I would like to make relates to beneficiary consent. I merely suggest that in some instances the point can surely be reached where, no matter how full the disclosure, the consent of the beneficiary cannot and should

not be regarded as binding. The subject matter in which a fiduciary's services are retained may be so complex or specialized, the beneficiary so untutored in that matter, that even with full disclosure he could not on his own make an intelligent judgment as to how his interests are best to be served. And that, after all, is the reason why many ordinary members of the community engage professional advisers.[63]

Separate matter conflicts. As a large United States literature indicates[64] the issue here is all but exclusively one of effect the possession of confidential information can have on the discharge of fiduciary responsibilities to others. Put briefly the issue is this: does the acquisition of confidential information in one client relationship,[65] which information is relevant to what a fiduciary or beneficiary is doing in another relationship, affect how the fiduciary must conduct himself in that other relationship. A financial adviser, for example, in one relationship acquires adverse confidential information concerning the liquidity of his client in that relationship. When consulted later by another client who seeks advice on the wisdom of, say, lending to the former client, how must the adviser act given the information he in fact possesses? A simple, but often unacceptable, answer would be that as the fiduciary's possession of that information is in a sense fortuitous, and as he is duty bound not to reveal the information, he should advise his client on the basis of the information he possesses other than that which he has received in confidence. But this quite obviously can be objectionable where the confidential information falsifies the information he

otherwise possesses. And as the much discussed United States decision of Black v Shearson, Hammill & Co[66] illustrates, to allow the fiduciary so to advise in such circumstances can be to allow the perpetration of frauds upon the later client. There a strockbroker allowed his agents to encourage clients to purchase shares in a company on the basis of positive information available about that company when he, in fact, was in possession of confidential information which indicated that the company's situation was parlous. The stockbroker was held liable for fraud.

As in any situation involving the need to reconcile the conflicting interests of separate persons who repose trust in the same individual, the divining of an acceptable solution is by no means easy. Insofar as the original confider, the first client, is concerned any unauthorised use of the information by the fiduciary will, of course, be actionable. And that, with respect to those who yearn for the contrary, is equity's answer to the insider trader. The more difficult problem is the fiduciary's potential liabilities to the second client arising from the non-use of the confidential information. One here can advance at least a series of propositions which go some way towards a solution.

(1) The fiduciary cannot use the information, nor should he be held liable for its non-use, simply because the use of that information could have secured a positive advantage to the second client.[67] There can, nonetheless, be the problem here for large multiple service enterprises in demonstrating that

the information has not in fact been used when one of its departments innocently does an act, for example, makes an investment, which suggests that it has been used. Here, as noted below, proponents of Chinese Walls find a use for that device.

(2) Where the information is such that its use could avert a loss to the second client a more complex set of issues emerges. (a) At least where the fiduciary has an advisory function, a Commonwealth court would most likely hold him to be guilty of fraud when, by maintaining confidence, he knowingly misleads his beneficiary into adopting a loss occasioning course of action.[68] (b) The actual duties at law of some types of fiduciary require them, as part of their duty of care, to make available to their beneficiaries all "relevant knowledge" including confidential information.[69] If they are not able to do this - and they are not where the information is confidential - they should refuse to act. But if they do act without complying with this duty, they render themselves potentially liable in negligence to their clients for the loss suffered as a result. Solicitors fall within this class of functionary[70] as, most likely, do all whose function is to advise. The matter of note in this liability is that, unlike in same matter conflicts,[71] it is founded upon negligence and not upon breach of fiduciary duty. (c) A variant on the negligence liability can, most likely, arise with trustees. Assume that a trustee has trust funds invested in a company's shares. He learns in confidence from his dealings with a third party that that company is insolvent. It is arguable, to say

the least of it, that if he does not then sell the shares (which later become valueless) he would be held liable to the beneficiaries for that loss,[72] notwithstanding that a sale would have required a breach of confidence.[73]

The emerging issue in the above situations for large scale multiple service business and professional enterprises is whether they should be permitted to avoid these potential liabilities through the artificial contriving of a state of ignorance in the person or persons who actually render the service to the second client. It is necessary now to turn to this question.

MODERN ENIERPRISE ORGANISATION AND "WALLS"

Commonwealth courts to date have been less than sympathetic to the argument that an enterprise should be exonerated from a breach of fiduciary duty where its wrong arises from the cumulative effect of the separate actions of several of its officers each of whom has acted in ignorance of the activities of the others.[74] A corporate fiduciary's duty of loyalty, for example, will be violated if two departments of that company act for adverse interests in the same transaction notwithstanding that each department was unaware of the other's engagement.[75] Ignorance here has been seen as a vice not a virtue. The courts likewise have been resistant to the view that legal recognition be given to the de facto fragmentation of large enterprises: a company is one person in law no matter

how many and dispersed its various departments;[76] a person who engages the services of a partner acting as such[77] engages the services of the whole firm and not merely of the persons who actually render the service.[78] This is a distinctly unpropitious environment in which to advocate the cause of Chinese Walls - not that I will be doing that. It must, however, be acknowledged that the cases we have are few; that they have been ones limited to questions of conflict of duty and interest or of the duty of loyalty; and that, perhaps importantly, the "ignorance" condemned in them was not the result of a deliberate contrivance in the internal organization of the respective enterprises themselves - a feature of Chinese Walls.[79]

I do not here intend to discuss the possible combination of factors and practices which together can make up a Chinese Wall.[80] I will merely indicate that a Wall is an organizational contrivance within an enterprise designed to prevent the flow of confidential information to or from a part or parts of that enterprise. Its alleged purpose is to prevent it being able to be said that an "insulated" area of a firm or company has in fact used or will be in a position to use confidential information possessed by another part of the same firm or company. What I wish to do briefly is to consider here the utility which Walls may have in the three areas I have considered in a little detail in this paper - the lawyer acting against a former client; same matter conflicts; and separate matter conflicts.

1. Former clients

The evidentiary value of a Wall in any attempt to convince a court that a former client's confidences are not in danger of abuse will depend in the first instance upon which of the possible "disqualification rules" I earlier mentioned, is adopted.

(a) If Commonwealth courts continue to adhere to the rule in Rakusen v Ellis, Munday & Clarke[81] - a course I have criticized - then the possession by all or any number of members of a law firm of the confidences of a former client will not of itself prevent that firm or those members from acting against that client in the same matter or in a matter substantially related to the previous retainer. The sole issue is simply one of fact: is a misuse of confidential information a "mischief rightly anticipated" in the circumstances. Obviously to the extent that it can be shown that the lawyer or lawyers in the firm who are to be responsible for acting against the former client have not, in fact, actual knowledge of or access to that client's confidences, the burden of that client in establishing a Rakusen claim is intensified. But as I have argued the Rakusen rule has little to commend it.

(b) If the second approach I have mentioned is adopted, that is, that it should be rebuttably presumed that by virtue of the previous retainer a lawyer received confidences such that he cannot act against that client in the same or in a substantially related matter, then an immediate problem arises

for lawyers engaged in or by a partnership. An additional rule has here to be moulded to deal with the position of those partners and employees who were not actual parties to the rendering of services to the former client. Consistently with the approach I am suggesting it seems to me that there are two possibilities. The one is to put all members of the firm in the same position as the previous service provider so that if he cannot rebut the presumption that he received confidences, all others in the firm are to be treated likewise. This would in fact mirror the "automatic imputation" rule adopted by the American Bar Association in its Model Rules of Professional Conduct.[82] An alternative approach would be to raise against those others a rebuttable presumption that they have received or have access to the former client's confidences, the onus being on the persons who are to act in the second retainer to prove that such has not been and will not be the case. This alternative may have some attractions in countries such as our own, given the size and distribution of our respective professions. It does, potentially, give some scope for the use of Chinese Walls, such being merely an evidentiary factor of greater or lesser cogency in rebutting the presumption I propose. Having said this I must admit to quite some scepticism as to the likely readiness of a court to find the proposed presumption rebutted given (a) that the firm has to guard itself against a contingency which may well be by no means likely at the time of the initial retainer; (b) that adventitious disclosures at least to colleagues in a shared working environment are difficult to discount; (c) that the

firm's interests or institutional loyalties may in individual instances incline those involved in the second retainer consciously or unconsciously to seek out information from within the firm favourable to the later client; and (d) that the court should, it is suggested, concern itself for public interest reasons, with allaying the apprehension that client confidences might find their way into the hands of third persons.

(c) If the third approach I earlier mentioned is adopted, that is that the prior retainer is irrebuttably presumed to have resulted in the acquisition of client confidences so that disqualification is automatic in cases of adverse representation,[83] the same issue as in (b) above arises in relation to disqualification of an entire firm.

The view the writer would advocate is that in (c) but subject in the case of the firm to the rebuttable presumption discussed in (b) above.

2. Same matter conflicts

Though, as has been seen, a same matter conflict can arise as the result of the acquisition of confidential information, the objection to such conflicts is not one concerned with information use and abuse but is with the compromising of a fiduciary's duty of loyalty. Chinese Walls are not a loyalty engendering device - a matter often acknowledged in United States literature[84] - and they simply do not address the vice which inheres in a concurrent adverse representation. They

provide no substitute for the informed consent requirement of the duty of loyalty. A beneficiary is entitled to be informed, first, of the possible conflicts in the proposed transaction which would render separate representations advisable and, secondly, of such actual conflicts as do arise within the agreed representation. A wall cannot and should not deprive him of that.[85] Furthermore the assertion that a wall between the separate parts of the firm acting for the several parties produces, in effect, separate representations for them, does not overcome the institutional interest in the firm of retaining both clients and of carrying the matter to its completion.

3. Separate matter conflicts

In the same way that conflicts of this variety are, instrinsically, the most difficult for the law to solve satisfactorily, so also the potential role of walls within them is controversial. At the heart of separate matter conflicts, as noted earlier, is the affect that the possession of confidential information acquired in one relationship can have upon the manner of discharge of another. Here the purpose of a Wall would be to contrive an ignorance in those members of a firm or corporation involved in the second relationship, of information obtained by other members of the same firm or corporation acting in the first. But as the issues which can arise in separate matter conflicts vary, so must the efficacy of this device.

Here one can only advance a series of propositions for consideration.

(a) First, the nature of the enterprise and the varying functions it is performing may well be an important matter in determining whether or not it would be appropriate to allow internal organisational practices - Walls - to be the instruments which are to assuage such public suspicion as there may be as to the propriety and probity of that enterprise's behaviour given the potential for conflicts that exist, in its operations. For example, what may be considered appropriate, for a multi-branch bank, may not be considered appropriate for a merchant bank or for a firm of accountants. What I am suggesting is that different types of enterprise may raise different public interests in this matter.

(b) Where the sole wrong alleged against a fiduciary is that it has used information acquired in confidence, its conduct being suggestive of such a use, Walls may well have a role to play, subject to what has been said in (a) above, in showing that the apparent use of that information did not occur and that the action suggesting the misuse was perfectly innocent. Section 128(7) of the Australian Securities Industry Act, 1980 is premissed upon such a use of Walls in cases of apparent insider trading.

(c) Notwithstanding that a Wall does produce the desired state of ignorance in those rendering a particular client service, if the enterprise itself is possessed of adverse

information which falsifies that upon which the insulated area is relying, a problem of some difficulty arises.

(i) If those responsible for the oversight of the enterprise's operations know or have reason to know that the insulated area is acting upon false information, for example, in recommending investments to clients, the enterprise itself must be quite vulnerable to allegations of fraud.[86]

(ii) If merely those who receive the adverse information have reasonable grounds for believing that other and "walled" parts of the enterprise might be acting or advising in matters in ways which they would not do if they in fact possessed the information, then the enterprise itself will have some difficulty in avoiding a liability in negligence for client losses occasioned by the walled area if the enterprise itself is one that is subject to a common law duty either to make available to clients all relevant knowledge it possesses or to abstain from acting if it cannot.[87]

(iii) If the circumstances do not fall within (i) or (ii) the sole issue becomes one as to whether such an enterprise may be held liable to a client on the basis that, though the actual service providers acted reasonably given the information available to them, the enterprise itself possessed information which, if known to them, would have rendered their actions negligent. Here, I would suggest, there is no simple answer. The size of an enterprise may be such, or the functions it performs so disparate, that it would be unreasonable to say

that its fortuitous possession of information in one activity should render it liable for services rendered in another given that even without a system of Walls that information could not reasonably be expected to be accessible to the service provider whose actions give rise to the claim. One need merely consider the problems such a potential liability would raise for banks with numerous branches. When, however, one reached the point where a Wall artificially limits the range of information to which a person in the position of the service provider could reasonably be expected to have access then, perhaps, the client may have grounds for complaint. I am conscious that I am not here suggesting much in the way of guidance. But the area is one into which we will enter, I suspect, with very tentative steps.

By way of conclusion it must be said that I do not see devices such as Walls as having wide ranging and ameliorative effects upon potential enterprise liability at least in the areas that I have considered. I am not unmindful of the economic and efficiency arguments which can favour the growth of large enterprises; I am not unmindful of the desire enterprises may have to provide a complete range of services to clients. But I am equally not unmindful of the fragility of the trust that clients and the public repose in institutions rendering fiduciary services. The maintenance of that trust has to be weighed against the pursuit by such institutions of their own interests. And it is here appropriate to recall, as Sir Gerard Brennan has recently done,[88] the words of Sir Owen Dixon:

"Unless high standards of conduct are maintained by those who pursue a profession requiring great skill begotten of special knowledge, the trust and confidence of the very community that is to be served is lost and thus the function of the profession is frustrated."[89]

1 [1985] 1 N.Z.L.R. 83.

2 [1985] 2 N.Z.L.R. 41.

3 (1985) 1 B.C.R. 721.

4 N.Z. High Ct., 18 Sept., 1986, Thorp J.

5 Cf Standard Investments Ltd v Canadian Imperial Bank of Commerce (1985) 22 D.L.R. (4th) 410; and see the commentary thereon by R.P. Austin in (1986) 12 Can. B.L.J. 96.

6 See e.g. International Corona Resources Ltd v Lac Minerals Ltd (1986) 53 O.R. (2d) 737 where the judgment given was for $700,000,000 (Can).

7 See e.g. Hospital Products Ltd v United States Surgical Corporation (1984) 58 A.L.J.R. 587; Daly v Sydney Stock Exchange (1986) 65 A.L.R. 193.

8 See e.g. Muschinski v Lodds (1986) 60 A.L.J.R. 52 esp. per Deane J.

9 See e.g. Pavey & Matthews Pty Ltd v Paul, High Court of Aust, 4 March 1987.

10 See e.g. Mid-Northern Fertilisers Ltd v Connell, Lamb, Gerard & Co., supra; Re Dawson (1966) 84 W.N. (Pt.1) (N.S.W.) 399; and for an unusual example see Guerin v The Queen 13 D.L.R. (4th) 321.

11 Though even here fine, often unconvincing, distinctions had to be drawn: see e.g. P. & O. Steam Navigation Co v Johnson (1937-1938) 60 C.L.R. 189; Burland v Earle [1902] A.C. 83.

12 For a discussion see R.P. Austin, "Fiduciary Accountability for Business Opportunities", in Finn (ed.), Equity and Commercial Relationships, Law Book Co., Sydney, (1987).

13 The inaccuracy stems from the extended thrust of the conflict of duty and interest rule which proscribes profitting from a position of trust irrespective of whether the beneficiary's interests are anyway involved in the matter: see e.g. the two "themes" identified by Deane J. in Chan v Lacharia (1984) 58 A.L.J.R. 353, at 361.

14 See Hospital Products Ltd v United States Surgical Corporation (1984) 58 A.L.J.R. 587. A person can likewise be a fiduciary if he is negotiating with another to that end: see United Dominions Corporation Ltd v Brian Pty Ltd (1985) 60 A.L.R. 741.

15 See Johnson v Buttress (1936) 56 C.L.R. 113, at 134-136; see also Coleman v Myers [1977] 2 N.Z.L.R. 225.

16 This capacity, though seen by some as the touchstone of fiduciary relationships - see e.g. E.J. Weinrib, "The Fiduciary Obligation", (1975) 25 U. Toronto L.J. 1 - does, of course, inhere in many relationships which are not, and are never likely to be designated, fiduciary ones e.g. in contracts, mortgages, leases and shareholder relationships.

17 (1726) Sel. Cas. Ch. 61; 25 E.R. 223.

18 See e.g. "Developments - Conflicts of Interest in the Legal Profession", (1981) 94 Harv. L.Rev. 1244, at 1253.

19 See e.g. Hayward v Bank of Nova Scotia (1984) 45 O.R. (2d) 542; offd. (1985) 51 O.R. (2d) 193; Standard Investments Ltd v Canadian Imperial Bank of Commerce (1985) 22 D.L.R. (4th) 410; see also M.H. Ogilvie, "Banks, Advice-Giving and Fiduciary Obligation", (1985) 17 Ottowa L.R. 263.

20 See e.g. the observations of Street J. in Bonds & Securities (Trading) Pty Ltd v Glomex Mines N.L. [1971] 1 N.S.W.L.R. 879, at 891; Re Regina and Speid (1983) 3 D.L.R. (4th) 246, at 249; and on community expectations see Sir Gerard Brennan, "Pillars of Professional Practice: Functions and Standards", (1987) 61 A.L.J. 112, at 117.

21 See e.g. Rakusen v Ellis, Munday & Clarke [1912] 1 Ch.831, at 840 per Fletcher Moulton L.J. Officer of the court liabilities extend, of course, beyond a mere concern for fiduciary principles: see generally Cordery on Solicitors, 115 et seq, 7th Ed., London, Butterworths, (1981).

22 On this duty see generally Finn, Fiduciary Obligations, Ch.19, Law Book Co., Sydney, (1977).

23 An aspect of the fiduciary's duty of loyalty would seem to have some part to play where a solicitor discharges himself from a retainer and then acts against his former client: see Cholmondeley v Lord Clinton (1815) 19 Ves. 261; 34 E.R. 515.

24 For an excellent analysis of some number of the English cases see the United States decision, In re Cowdery 10 P. 47 (1886); see also Parratt v Parratt (1848) 2 De G. & Sm. 258; 64 E.R. 116; Lewis v Smith (1849) 1 Mac. & G. 417; 41 E.R. 1326; Hutchinson v Newark (1850) 3 De G. & Sm. 727; 64 E.R. 116 - an extraordinary decision; In re Holmes (1877) 25 W.R. 603; Little v Kingswood Collieries Co (1882) 20 Ch.D. 733.

25 [1912] 1 Ch. 831.

26 Ibid., 841.

27 Ibid., 839.

28 See (1981) 94 Harv. L.Rev. 1244, at 1315 et seq.

29 See Re Regina and Speid (1983) 3 D.L.R. (4th) 246; Steed & Evans Ltd v MacTavish (1976) 68 D.L.R. (3d) 420; Fahr v Fahr [1985] 3 W.W.R. 261; but for a strong reaffirmation of the Rakusen rule see Aldrich v Struk [1986] 3 W.W.R. 341.

30 See e.g. Talbot v General Television Corporation [1980] V.R. 224. 31 See e.g. T.C. & Theatre Corp v Warner Bros Pictures 113 F. Supp. 265. 32 Mills v Day Dawn Block Gold Mining Co Ltd (1881) 1 Q.L.J. R.62. 33 T.C. & Theatre Corp v Warner Bros Pictures, supra, at 269.

34 Such was suggested by Lord Eldon in Bircheno v Thorp (1821) Jac. 300; 37 E.R. 864.

35 Cf Consolidated Theatres Inc v Warner Bros Circuit Management Corp 216 F.2d 920 (1954).

36 [1973] Ch.30, at 000.

37 See e.g. Moody v Cox & Hatt [1917] 2 Ch.71. This proposition is not limited to solicitors: see e.g. North and South Trust Co v Berkeley [1917] 1 W.L.R. 470; Standard Investments Ltd v Canadian Imperial Bank of Commerce (1985) 22 D.L.R. (4th) 410; Black v Shearson, Hammill & Co 72 Cal. Rptr. 157 (1968).

38 Baker v Campbell (1983) 57 A.L.J.R. 749; Commissioner of Inland Revenue v West-Walker [1954] N.Z.L.R. 191.

39 This view has regularly been put in privilege cases in the Commonwealth, as also in confidence cases in the U.S.: see e.g. T.C. & Theatre Corp v Warner Bros Pictures 113 F. Supp. 265, at 269 (1953); see also Re Regina and Speid (1983) 3 D.L.R. (4th) 247, at 249.

40 Cf Little v Kingswood Collieries Co (1882) 20 Ch.D. 733, at 738. This decision was overruled in Rakusen.

41 This phenomenon has received considerable attention in U.S. literature: see e.g. The Chinese Wall Defense to Law - Firm Disqualification", (1980) U. Penn. L.R. 677; see also the American Bar Association's Model Rules of Professional Conduct, Rule 1.10 (1983).

42 See A.B.A. Model Professional Conduct Rules, Rule 1.10; and see the landmark decision T.C. & Theatre Corp v Warner Brothers Pictures Inc, supra.

43 The Canadians, for example, appear to be in the process of evolving a fiduciary duty of "disclosure of material facts" cast upon advisers, e.g. solicitors and banks, which sounds in damages for its breach, see e.g. Jackson v Packham Real

Estate Ltd (1980) 109 D.L.R. (3d) 277; Hayward v Bank of Nova Scotia (1984) 45 O.R. (2d) 542; aff'd (1985) 51 O.R. (2d) 193.

44 E.g. N.Z. Netherlands Society v Keys [1973] 1 W.L.R. 1126.

45 Johnson v Buttress (1936) 56 C.L.R. 113, at 135 per Dixon J.

46 See e.g. B.L.B. Corporation of Australia Establishment v Jacobsen (1974) 48 A.L.J.R. 372.

47 The modern progenitor of this adviser obligation was Lord Eldon's judgment in Gibson v Jeyes (1801) 6 Ves. 266; 31 E.R. 1044.

48 See e.g. Davey v Wooley, Hames, Dale & Dingwall (1983) 133 D.L.R. (3d) 647 - an instructive decision.

49 See e.g. Barr, Leary & Co v Hall (1906) 26 N.Z.L.R. 222; Fullwood v Hurley [1928] 1 K.B. 498, at 502.

50 Cf Jones v Canavan [1972] 2 N.S.W.L.R. 236.

51 North & South Trust Co v Berkeley [1971] 1 W.L.R. 470, at 484-485 per Donaldson J.

52 Anderson v Eaton 293 P. 788, at 780 (1930) - a case involving an attorney's representation of both claimant and insurer.

53 See Mid-Northern Fertilizers Ltd v Connel, Lamb, Gerard & Co, H.C. of N.Z., 18 Sept. 1986, Thorp J.

54 In re Kamp 194 A 2d. 236, at 240 per Proctor J. There is a large American literature on this issue at least in relation to lawyers much of it concerned with judicially supervised rules of professional ethics: see e.g. "Developments - Conflict of Interest in the Legal Profession", (1981) 94 Harv. L.R. 1244, at 1303 et seq; see also the American Bar Association's Model Rules of Professional Conduct, Rule 1.7 (1983).

55 A clear conflict arose in that case between the interests of the vendor and of the purchaser in relation to the financier's security and disclosure of its nature and effect was not made to the vendor.

56 See e.g. Jacks v Davis (1982) 141 D.L.R. (3d) 355; affirming [1980] 6 W.W.R. 11; North & South Trust Co v Berkeley [1971] 1 W.L.R. 470; Neushul v Mellish & Harkavy (1966) 110 Sol. Jo. 792; Moody v Cox & Hatt [1917] 2 Ch.71.

57 See North & South Trust Co v Berkeley, supra.

58 The two contentious questions which can, on occasion, arise here are (a) should the fiduciary be obliged to terminate

both relationships (this will not always be a possibility as, e.g. where he is acting as a trustee in one and a solicitor in the other: cf Moody v Cox & Hatt, supra; and (b) whether the fiduciary should be liable to compensate his beneficiary for losses and outgoings occasioned by the abortive relationship.

59 See Jacks v Davis (1982) 141 D.L.R. (3d) 355; affirming [1980] 6 W.W.R. 11; Howard v Cunliffe (1973) 36 D.L.R. (3d) 212.

60 This, it is suggested, is the fatal flaw in the final part of the reasoning of Donaldson J. in the North & South Trust case, supra, at 486 where legal analysis is abandoned in favour of unilluminating "hat" metaphor. See Mid-Northern Fertilisers Ltd v Connell, Lamb, Gerard & Co, N.Z. High Ct., 18 Sept. 1986, Thorp J.; see also Caliguiri v De Lucia (1983) 25 Man. R. (2d) 98 for a negligence action in this context.

61 See e.g. How v Cannan [1931] S.A.S.R. 413; Goody v Baring [1956] 1 W.L.R. 448; Bank of Nova Scotia v Omni Construction Ltd [1981] 3 W.W.R. 301; Howard v Cunliffe (1973) 36 D.L.R. (3d) 212; and see Lysick v Walcom 65 Cal. Rptr. 406.

62 See Bank of Nova Scotia v Omni Construction Ltd, supra.

63 This point has been acknowledged in the U.S. in relation to lawyers: see 94 Harv. L.R. 1244, at 1311 et seq.

64 See e.g. E.S. Herman & C.F. Safanda, "The Commercial Bank Trust Department and the "Wall"", (1972) 14 B.C. Ind. & Com. L.R. 21; M. Lipton & R.B. Mazur, "The Chinese Wall Solution to the Conflict Problems of Securities Firms", (1975) 50 N.Y.U.L.R. 459; L. Herzel & D.E. Colling, "The Chinese Wall and Conflict of Interest in Banks", (1978) 34 Bus. L. 73; L. Herzel & D.E. Colling, "The Chinese Wall Revisited", (1983) 6 Corp. L.R. 116. It should be noted that insofar as these articles touch upon banker secrecy U.S. law on that subject is not most likely in as developed a state as it is in Commonwealth countries: see 10 Am. Juris 2d, "Banks", S332 and the 1986 Supplement thereto.

65 The relationship need not itself be one having fiduciary incidents other than a duty of confidence, e.g. a mere banker-customer relationship.

66 72 Cal. Rptr. 157 (1968).

67 Some U.S. writings, relying rather ambitiously on §231 of the Restatement of Trusts have suggested that a trustee's fiduciary duty positively obliges him to use confidential information in taking investment decisions: see e.g. (1978) 34 Bus. L. 73, at 77. This clearly is not the law in the Commonwealth, although see below for the situation

where the information could be loss averting.

68 Cf Black v Shearson, Hammill & Co 72 Cal. Reptr. 157 (1968), and see Brownlie v Campbell (1880) 5 App. Cas. 925, at 950; Fleming, The Law of Torts, 596 (6th Ed., 1983).

69 See e.g. Spector v Ageda [1973] Ch. 30, at 48. There is a growing but quite unorthodox tendency in the Canadian cases to transform this duty of disclosure into a fiduciary one reliance being placed for this upon Noctor v Ashburton [1914] A.C. 932; see e.g. Jacks v Davis (1982) 141 D.L.R. (3d) 355, at 359. In the writer's view this can only lead to further complication and exaggerate the already growing tension between negligence and fiduciary law.

70 Spector v Ageda, supra.

71 Where the duty of loyalty is all important.

72 See generally Jacoles' Law of Trusts in Australia, §2201, (5th Ed., 1986).

73 Perhaps ironically if the trustee was statutorily forbidden from dealing in those shares, e.g. under insider trading legislation, he would not most likely be held liable to the beneficiaries in such circumstances. As was said by the S.E.C. in Investors Management Co Inc (1970-1971) C.C.H. Fed. Sec. L.R. 80,514, at 80,522 - the obligations of a fiduciary do not include performing an illegal act.

74 See Harrods Ltd v Lemon [1931] 2 K.B. 157; Comeau v Canada Permanent Trust Co (1980) 27 N.B.R. (2d) 126; Standard Investments Ltd v Canadian Imperial Bank (1985) 22 D.L.R. (4th) 410.

75 Harrods Ltd v Lemon supra.

76 Ibid; Comeau v Canada Permanent Trust Co, supra.

77 There is some possible scope for special agreement to engage a partner to the exclusion of the partnership: se Rakusen v Ellis, Munday & Clarke [1912] 1 Ch.831; and see Cholmondeley v Clinton (1815) 19 Ves. 261, at 273; 34 E.R. 515 at 519.

78 See Davey v Wooley, Hames, Dale & Dingwall (1983) 133 D.L.R. (3d) 647; see also Davies v Clough (1837) & Sim. 262, at 268-269; 59 E.R. 105, at 107.

79 But cf Rakusen's case, supra, where the court was prepared to acknowledge the effectiveness of a deliberate segregation.

80 See fn 64 ante.

81 [1912] 1 Ch.831.

82 See R. 1.10.

83 Subject to prior client consent.

84 See "The Chinese Wall Defense to Law - Firm Disqualification", (1980) 128 U. Penn. L.R. 677.

85 For a discussion in the context of law firms see (1980) 94 Harv. L.R. 1244, at 1292 et seq.

86 Cf Black v Shearson, Hammill & Co 72 Cal. Reptr. 157 (1968).

87 See ante "Separate matter conflicts"; and Spector v Ageda [1973] Ch. 30, at 48.

88 "Pillars of Professional Practice: Functions and Standards", (1987) 61 A.L.J. 112, at 117.

89 Sir Owen Dixon, Jesting Pilate, 192, Law Book Co., (1965). X]