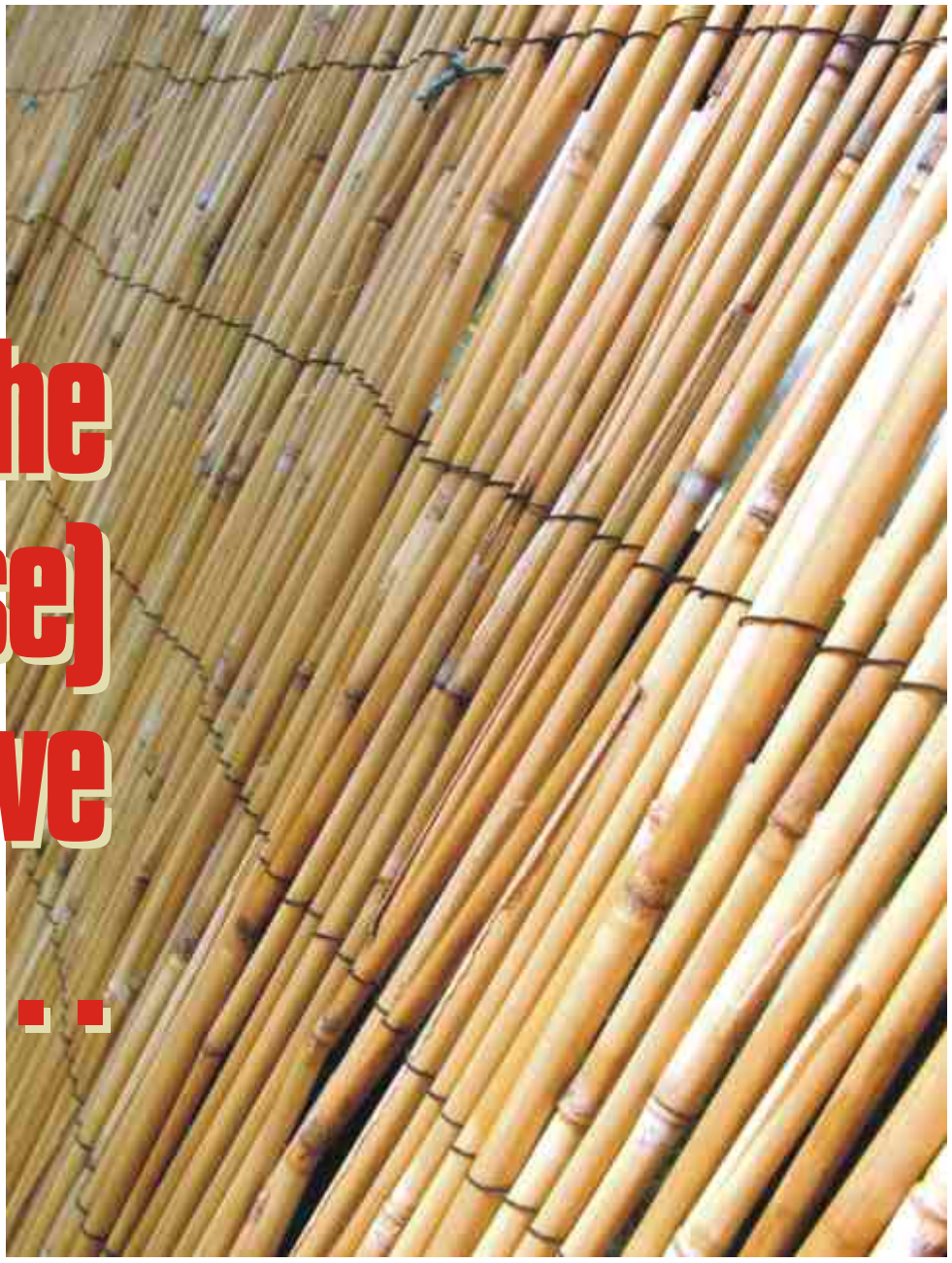
Even the best information barriers are very fragile structures. QLS ethics officer Neil Watt looks at the APT v Optus case.

Sshhh! The (Chinese) walls have ears . . .



Back when life was simple, water was plentiful and firms were small, all the partners in even large law firms knew each other and probably everyone else on staff as well.

There was never really any question in those days of acting against a former client. Quite apart from any concepts of loyalty, if the firm held confidential information about former clients which could potentially conflict with its duties to current clients, the rules and conventions were clear – avoid conflicts!

Some things haven't changed. Acting against a former client will still create a conflict if the firm has information on the former client that is both confidential and material to the current matter. Faced with this situation, a practitioner has a primary duty to avoid the conflict.

What has changed, however, is that now we have firms with offices across the nation and overseas. Partners can't possibly know all those who work in the same building, or all the clients they deal with, let alone in their other offices throughout the country. On top of that, the merging of firms and the ready movement of staff between employers means the possibility of having someone on staff who has acted against current or prospective clients is no longer a rarity.

But the rules against conflicts remain. Furthermore, the courts will generally impute the knowledge of one practitioner to the whole firm – unless you can prove otherwise.

Duty of confidentiality

So information barriers, or 'Chinese walls', were created to maintain the ongoing duty of confidentiality to former clients by quarantining confidential information and the staff who hold it from the rest of the firm. Generally speaking, information barriers have some combination of the following:[1]

- the physical separation of the various departments in order to insulate them from each other
- an educational program, normally recurring, to emphasise the importance of not divulging confidential information
- strict and carefully defined procedures for dealing with a situation where it is felt the 'wall' should be crossed, and well maintained records of such occurrences
- monitoring by compliance officers of the effectiveness of the wall
- Disciplinary sanctions for breaches of the wall.

It all sounds robust enough, but do these structures solve the conflict issues? The recent case of *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd*[2] provides a sobering reminder that even the best systems can fail.

In that case, APT sought to restrain Clayton Utz from continuing to act for Optus on the basis that Clayton Utz had confidential information about APT after acting for a related company in a previous matter. >>

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Two years earlier, APT had also sought an injunction against Clayton Utz on the same basis. In the earlier attempt Justice Bergin was persuaded that Clayton Utz had sufficiently rigorous policies in place to quarantine the confidential information it held on APT.[3] These policies included the giving of undertakings and the filing of affidavits by all lawyers involved in the earlier retainer that they would have no involvement in the current Optus matter.[4]

A Clayton Utz partner had acted on the earlier case and was therefore subject to these undertakings and the information barriers in relation to the current matter. All was well and good until February this year when a solicitor working on the Optus case needed a partner to sign a short minute of agreement between the parties. The short minute involved some dates in relation to discovery procedures. His supervising partner was away so he asked another partner to sign it. Unfortunately, he asked the partner who had acted in the earlier 'quarantined' matter.

The letter was a procedural document. The partner in question did not contribute to it prior to signing it, did not realise that it was in relation to the quarantined case, and the transaction did not divulge any confidential or material information in relation to the earlier APT-related matter.

But the mere momentary involvement of that partner in signing the minute was enough for Justice Bergin to grant APT's renewed injunction and remove Clayton Utz from the matter. A mere stroke of a pen was all it took to punch a hole in Clayton Utz's carefully constructed Chinese wall.

While Justice Bergin acknowledged that the partner's involvement was inadvertent and "of lesser significance than the provision of legal services of more substance",[5] her decision was consistent with the general approach of courts towards Chinese walls – that is, with extreme caution at best. Why? Because the court is concerned to ensure that not only deliberate breaches not occur, but inadvertent ones too. The standard is high, very high. While this standard may be highest in litigious matters, it is nonetheless rigorous in all matters.

'All effective measures'

In the leading case on Chinese walls, *Bolkiah*, Lord Millett stated: "The court should restrain the firm from acting for the second client unless satisfied on the basis of clear and convincing evidence that all effective measures have been taken to ensure that no disclosure will occur."[6]

Bear in mind, however, that his Lordship considered that, while the risk of disclosure had to be real, it did not have to be substantial or inevitable.[7] It is enough that there is a risk of inadvertent disclosure.[8] The decision in *Optus* is consistent with that guiding principle.

The Law Council of Australia's Model Rules reflect the position in *Bolkiah*:

4.1 A practitioner must not accept an engagement to act for another person in any matter against, or in opposition to, the interest of a person ("the former client"):

4.1.1 for whom the practitioner or the practitioner's current or former firm or the former firm of a partner, director or employee of the practitioner or of the practitioner's firm has acted previously and has thereby acquired information confidential to the former client and material to the matter; and

4.1.2 if the former client might reasonably conclude that there is a real possibility the information will be used to the former client's detriment.

While the Rules are a guide to what constitutes professional conduct, and that was never at issue in this case, the courts will have similar concerns regarding the 'real possibility' of disclosure when determining whether to restrain a firm from acting.

So where does this leave Chinese walls? The reality is that information barriers do have a place in modern practice, particularly in large firms. The earlier decision by Bergin J showed that the court is open to being convinced that the risk of disclosure has been sufficiently addressed. Small firms, however, are unlikely to have sufficient separation between practitioners to enable them to pass the 'inadvertent disclosure' test.

There are, however, some sobering reminders in the recent decision in *APT v Optus*:

- Firstly, it is a primary duty of all practitioners to avoid conflicts. This must be the starting point and any divergence from this must be done carefully and only if there are compelling reasons for doing so, and even then only if existing information barrier protocols are in place. The court will start from a presumption of conflict as it seeks to protect your duty of confidentiality to your former client. You must be able to convince a cautious court that the risk of disclosure is contained.
- Secondly, it is not enough to have good information barrier policies – even VERY good information barrier policies – if they are not strictly enforced and regularly brought to the attention of staff. Regular training and ongoing sensitisation is required.
- Thirdly, it is not only the confidential information that is quarantined from the current matter, it is the staff who hold that confidential information. Any involvement by 'quarantined' staff in the current matter, no matter how inadvertent or seemingly innocent, may be enough to see your firm removed from the case. Policies and processes are needed to ensure this does not happen.
- Fourthly, as pointed out by Justice Bergin, "the success of that quarantine depends upon the vigilance of not only the solicitors who acted in the [earlier] retainer, but also the solicitors who act . . . in the present proceedings adhering to the system and structure that is designed to prevent the inadvertent disclosure of confidential information."[9]

The QLS Ethics Committee is reviewing the 'Guidelines to Information Barriers' recently adopted jointly by the Law Society of NSW and the Law Institute of Victoria with a view to the adoption of these or similar guidelines in Queensland. I will keep you posted.

Notes

1 English Law Commission, Fiduciary Duties and Regulatory Rules, Consultation paper No.124 (1992) para 4.5.2.
2 [2007] NSWSC 350.
3 *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2005] NSWSC 550.
4 Above n2 at para 4.
5 Above n2 at para 46.
6 *Prince Jefri Bolkiah v KPMG (A Firm)* [1999] 2WLR 215.
7 Ibid at 226.
8 See for example Bryson J in *D & J Constructions Pty Ltd v Head & Ors trading as Clayton Utz* (1987) 9 NSWLR 118 at 123.
9 Above n2 at para 34.

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