Conflicts in family law proceedings – a more pragmatic test

Osferatu v Osferatu [2015] FamCAFC 177

Courts exercising family law jurisdiction are quick to restrain solicitors for a conflict of interest. Since the *McMillan*[1] case, hiring professional or support staff from opposing firms carried with it the risk that the new employer may be unable to act against the clients of the new hire's former employer.

However, since 2015 that risk has lessened. The Court now requires an applicant to demonstrate a real (as opposed to a theoretical) possibility that confidential information is at risk.[2] The Family Court has also been significantly more willing to accept an information barrier as a solution to the problem posed by a migratory solicitor.

The special sensitivities in family proceedings mean that an application restraining a firm from acting is still more likely to succeed, but some of the authorities applying *McMillan* must now be viewed with caution.

McMillan

In *McMillan,* a paralegal moved from the husband's solicitors to the wife's. He had worked on the husband's file to a limited degree and spoken with him on a number of occasions. The new employer deposed that he was not to be involved in the matter from their end, had not discussed it with anyone there and offered undertakings to quarantine the paralegal from the matter. A restraint was granted, upheld on appeal.

McMillan became the leading restraint case and was treated as authority for two significant propositions:

1. a firm should be restrained where there was even a "theoretical" risk of misusing confidential material; and
2. the party seeking to restrain need only swear that confidential information was imparted to someone, but need not particularise it or show any especial relevance to the current dispute.

In practical terms this made movement of staff between family law firms difficult, especially given that an undertaking and information barrier was usually treated as an insufficient response to overcome the "theoretical" risk of misuse.

Seidler

In *Seidler v Seidler,*[3] Solicitor E had carriage of a husband's matter for some years then moved to W&W, the firm acting for the wife. Both clients had invested significant funds with their solicitors (Approximately $200,000) and they resided in a small town with a limited pool of alternate practitioners. E proposed the usual undertakings not to disclose information in her possession and to be quarantined from the file. By the time of the hearing of the application, E in fact no longer worked for either firm and there was no evidence that she had disclosed confidential information. Nevertheless, W&W was restrained from acting further.

There are numerous similar examples of the strict application of the "*McMillan*" principles.

In both *McMillan* and *Seidler*, the Court accepted that strict application of the rule made movement of staff between firms in smaller towns very difficult, but reached the conclusion that this factor did not outweigh the perceived interests of the party asserting a threat to their confidentiality.

[1] *McMillan and McMillan* (2000) 159 FLR 1.
[2] *Osferatu v Osferatu* [2015] FamCAFC 177.
[3] *Seidler v Seidler* [2010] FMCA Fam 1394 (Willis FM).

Similarly, accepting instructions for one party where the firm has previously acted for a couple has been possible only if the prior retainer (and information provided) was of a very limited nature indeed,[4] a "vanilla" conveyance on joint instructions from the now estranged couple, for example[5]. Even where no confidential information is retained concerning the former client, "getting to know you" factors and intangible perceptions of them are a well-established basis to restrain the firm or individual solicitors.[6]

What has changed?

A recent Family Court of Appeal decision, *Osferatu v Osferatu* (Finn, Ainslie-Wallace & Aldridge JJ) marks a notable shift in approach to restraint applications – especially those relating to migratory solicitors - but no wholesale departure.

The position in family law proceedings will undoubtedly remain considerably stricter than other jurisdictions.

However, the door may now be open to using an appropriately constructed information barrier to protect the interests of a "former client"[7]. This is far more likely to be acceptable if the firm has good information handling and hiring practices, and an understanding of how an effective information barrier can be achieved.

The difference in approach – subtle, but significant

The test applied fairly consistently since 2000 has been that even a "theoretical" [8] risk of confidential information being misused (rather than the "*real and sensible risk*" [9] approach used in commercial jurisdictions) was enough to prevent a firm from acting further. This has created a significant difference in the practical outcome of restraint applications.

The "no theoretical risk" approach has meant that an undertaking not to disclose confidential information has usually not been accepted by the Family Court as an adequate response where "conflicted" persons joined a firm, [10] even if they were to have no role in the proceeding against their former client.[11] There are exceptions, however these are usually only where the information held was very limited[12] or only tangentially relevant.[13]

Osferatu

In 2011, the applicant wife instructed a mid-size firm with multiple offices (Watts McCray) in her property and children's matters. Both disputes were resolved by consent orders, in November 2013 and November 2014 respectively.

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[4] In *Royce & Royce* [2012] FamCA 400 one partner previously acted for both parties in commercial matter, the other partner had not read the file and stated that he would not do so – the restraint was granted; In *Wheller & Wheller* [2012] FamCA 356 an employee commercial solicitor who had subsequently left acted extensively for Husband's company. The wife sought to instruct the firm to act in Family Court proceedings against the husband. The company and associated trusts were the primary subject matter of the Family Court contest. Surprisingly, the solicitors concluded they had no conflict and resisted the application. Unsurprisingly, the Court did not agree.

[5] See *Cuoco v Cuoco* [2014] FamCA 611 for example, although contrast *L & L* [2003] FamCA 777.

[6] For example, *Magro v Magro* (1989) FLC 92-005; *Grieves v Tully* [2011] FamCA 627; *Haber & Mandel* [2011] FMCAfam 1564.

[7] Note that the definition of "former client" in the *Australian Solicitors Conduct Rules 2012* includes a person who instructed an employee's former law firm.

[8] Citing, with approval, *In the Marriage of R A and E Thevenaz* (1986) FLC 91-748; (1986) 11 Fam LR 95.

[9] *Farrow Mortgage Services Pty Ltd (In liq) v Mendall Properties Pty Ltd* [1995] 1 VR 1 at 5; *Carindale Country Club Estate Pty Ltd v Astill* (1993) 42 FCR 307 ("*real, as opposed to a theoretical possibility*"); *Mallesons Stephen Jaques v KPMG Peat Marwick* (1990) 4 WAR 357, 371 per Ipp J, *Prince Jefri Bolkiah v KPMG* (a firm) [1999] 2 AC 222, 236-237 per Lord Millett.

[10] For example, *Magro* (1989) FLC 92-005 per Rourke J.

[11] See *Seidler*, above at n. 3.

[12] *Billington v Billington No. 2* [2008] FamCA 409.

[13] *House v Altimas* [2012] FamCA 625.

Mr. F, a partner at Watts McCray, left that firm in 2012 and joined Barkus Doolan, a smaller specialist family practice with one office.

Mr. F had not been directly involved in the wife's matter, but had supervised the solicitors with carriage from time to time and had been exposed to the wife's confidential information during management meetings. The extent of his knowledge was not apparent from the judgment, but it can be regarded as tangible but not extensive. He offered detailed undertakings not to discuss the matter with his new firm and to be quarantined from the file. Watts McCray indicated that, as the matters were substantially resolved, they had no objection to Barkus Doolan continuing to act. They reserved their client's rights if further proceedings ensued.

Within a year further proceedings ensued in the form of a contravention claim. At the outset of these, both parties were self-represented. On 19 February Mrs. Osferatu consented to her former husband returning to Barkus Doolan for assistance with the matter.

By 9 March her position reversed. She was again represented by Watts McCray and objected to Barkus Doolan acting against her due to Mr. F's presence in that firm. Barkus Doolan declined to withdraw, offering again that Mr. F give an undertaking to have no contact with the matter and not discuss any aspect of it with the team acting for Mr. Osferatu.

Mrs. Osferatu's application for restraint was successful at first instance, but overturned by the Family Court of Appeal.

Decision

The joint judgment is notable in a number of respects. It marks a clear departure from the "no theoretical risk" approach, and emphasises authorities in which the *McMillan* test was applied more conservatively. The test now applied is that the Court will act to restrain only where there is a real, if not substantial, risk of misuse.

Second, a blanket claim that confidentiality was at risk was not accepted. The party seeking the restraint must outline the classes of information they feel to be at risk, including why it is relevant to the current matter and how misuse would be detrimental to them.[14]

This insistence that the party seeking the restraint identify information and a tangible risk of disclosure has been an important feature of a number of subsequent cases.[15] Confidential information held is not the only basis for restraint, but continues to be the most salient. A longstanding association between the firm and former client is, and is likely to remain, grounds for restraint even where specific information directly relevant to the matrimonial proceeding cannot be shown.[16]

Another point of significance arising from Osferatu was the Court's acceptance of an information barrier as a reasonable tool to manage the risk to confidentiality. Previously, the "no theoretical risk" test meant that such a barrier would rarely be accepted by the Court. Cases decided since have adopted a more nuanced approach, analysing the nature of the information held, the role of the solicitor in the new firm and the measures being offered to protect the interests of the former client. For a good analysis of the principles applied, see *Wilmer & Golding* (No. 2).[17]

[14] See [27] and [28].
[15] *Gill v Wynn* [2016] FCWA 40; *Rollinson & Chase* [2017] FCCA 3119; *Dalton & Dalton* [2017] FamCAFC 78; *Huda & Huda* [2017] FamCAFC 2017; *Redden & Pennington* [2017] FCCA 194; *Thornton & Peach* [2016] FCCA 2432.
[16] See, for example *Gillam v Gillam* [2017] FCCA 64, where the solicitor acting against the husband had previously accepted appointment as his executor and attorney. (Restraint granted.)
[17] 2017 FamCAFC 213.

What should you do when hiring a "conflicted" solicitor?

Firstly, you will need to become familiar with the information barrier guidelines (available here). The barrier will need to be in place from the outset to be an effective protection, and may not be practical nor economic for a smaller firm.

Secondly, you should alert the opposing party and make them aware that a former staff member of is now in your employ. If there is an objection, you should offer a detailed undertaking and statement as to the arrangements in place to protect the "former client's" confidentiality. If the objection is maintained you are entitled to ask for particulars as to the information that they feel is at risk and why the proposed resolution is insufficient.

The opposing solicitor's position should be considered carefully, and your client fully appraised of the options and the complications arising from the situation. Even if you think you would win an application, this may be a distraction that is not in their interests.

Thirdly, having put the protection in place, it must be reviewed and all affected persons reminded of their obligations regularly.

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