The Law Society of Scotland Conflicts of Interest: Guidance Notes

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Overview

Conflicts of Interest for a law firm can arise where:

- There is a personal relationship (of friendship, blood relationship or a sexual relationship) with the client
- The law firm accepts instructions from a party where the firm is already acting for another party in the transaction/case
- The law firm accepts instructions from a party where the firm has information relevant to the case as a result of acting for/having in the past acted for another party in an unrelated transaction/case
- The law firm is instructed to act for two or more parties jointly (eg in respect of a Joint Venture Agreement)
- Fee-earners move firms, or firms merge
- A member of staff working on the matter has a personal interest (e.g. financial, role as a trustee/director, other outside interest etc) in the client company, other party to a transaction or some aspect of the transaction itself
- The firm has a business relationship (eg an affiliation or joint venture) with another company
- The firm has not made it clear that it is NOT representing a party, and that party relies on advice given for the benefit of the firm's actual client.

Confidentiality vs Disclosure

Protection of Confidential Information is a fundamental feature of the relationship with clients - and continues after the end of a retainer and after the death of a client. Every member of staff in the firm owes this duty to the client.

There is a also duty of disclosure to a client of information material to the particular matter on which you are instructed.

Where there is an irresolvable conflict of interest the duty of confidentiality takes precedence and you should cease to act for the client to whom you cannot disclose the confidential information. Information barriers MAY enable you to continue acting in limited circumstances.

There are a limited number of exceptions where disclosure is permitted notwithstanding a 'conflicting' obligation of client confidentiality:

- Where the client/former client authorises the disclosure
- Pursuant to a statutory duty, e.g. Proceeds of Crime Act 2002
- Where necessary to prevent the client or a third party committing a criminal act which is likely to result in serious bodily harm
- Under a court order, or police warrant
- If the information is already in the public domain

Creating an effective Conflict Check System

(i) Establishing an effective database

Your conflict database(s) should provide an easily cross-searchable, up-to-date, and comprehensive index that allows you to identify:

- Current and former clients (including former, maiden and alternative names)
- One-off consultations and potential clients who asked the firm to respond to a proposal request or tender (including those which did not lead to any engagement)
- People and entities for whom the firm has declined to act
- Clients previously represented by lawyers who have joined the firm from elsewhere

Ideally, your database should include the following fields:

- Date Opened
- Matter Name
- File Reference
- Client Name (including former, maiden and alternative names)
- Client Address (home, registered office) (this can also assist as an additional AML check safeguard, where any discrepancies are flagged)
- Other parties involved in the matter (including those who become involved at a later stage)
- Client Partner & Fee Earners
- Description of matter
- Conflict Names: (names of related and adverse parties and their relationship to the client – including family members)
- Date Closed: (date file was closed)
- Closed File Number: (number assigned to closed file)
- Date Destroyed: (the date when the file was destroyed)

For corporate and business entities, make sure to also include:

- Proper corporate and business names
- Any trade or alternative names under which the entity carries on business
- Names of the parent or controlling shareholder of a corporate client
- Proper and business names of other relevant affiliated companies
- Names of officers and directors of the corporate client, any subsidiaries and the parent company
- Partners' names (where the client is a partnership)

Specific matters will also require the addition of other information. For example, for an insurance matter, the names of the insured(s) as well as the insurer(s) should be recorded. A litigation file will require entering the names of expert witnesses, any guardian ad litem, insurers, spouses, and so on, depending on the type of file.

A register of employee/members interests either requires to be incorporated within the client conflict database or maintained separately. Ensure that you undertake sufficient due diligence on new employees, including maiden name, previous companies they have worked for, and personal interests. Get all members of staff to sign updated disclosure documents at least half yearly.

(ii) Implementing an effective Conflict Checking procedure

What makes a conflict-checking system effective?

1. The system is integrated with other office systems
2. The system provides for easy access to conflict data for everyone in the office
3. Checks are conducted at the three key junctures:
   - before the initial interview
   - before a new file is opened
   - when a new party enters the case

   In absence of other interim checks, it is good practice to renew conflict checks after 6 months from the initial conflict check, and annually thereafter, for continuing clients.
4. Searches should check for close matches in the spelling of names
5. Conflict entries show the details of any relationship between parties
6. All parties connected with a case are entered into the system
7. Conflict searches are documented in the file

Have a formal conflict checking procedure, which is part of all relevant staff's training.

Assign responsibility for conflict checking to specified staff. The person responsible should check the potential client's name and other conflict or adverse parties' names, including spelling variations, against the names in your firm's database. The names checked and the date should be recorded in a client intake sheet or separate "conflicts check" form.

Requiring the responsible individual to sign or initial the document will help ensure that the person is accountable.

Conduct Conflict Checks at Key Trigger Points

A conflicts check should be conducted at three key points in time in the client relationship:

- When a potential client first contacts your office for legal services
- After the first consultation and before opening a file
- After your firm has been retained, when a new party enters the matter or transaction

The first preliminary check will determine whether you should even meet with a potential client. Following your first meeting, you will have more information about other parties involved in the matter, so you can undertake a more thorough conflicts check. Subsequent checks are necessary as new information arises (e.g., the addition of new parties).

Monitoring for conflicts is less critical for transactional law firms where cases are typically straight forward and resolved within 60 days or so. For real estate, estate planning, immigration law, and similar short-term contracts, conducting a single conflict check at the beginning of the case is usually sufficient.

Diligence is far more crucial for litigators. If you are on the plaintiff side, your relationship with the client could go on for years. During this time, you will be dealing with multiple parties and as you're doing discovery and finding witnesses, you'll need to run conflict checks on every new contact.

For longer term matters, or for ongoing client relationships, new conflict checks should be undertaken at least annually, and ideally at 6 month intervals for live matters.

A conflict check also needs to be undertaken when the firm considers hiring a new lawyer, as that lawyer may have worked on files that present a conflict with your firm's clients. The new lawyer should review a list of the firm's clients and compare that with their list. Also make sure the new lawyer's list of clients is added to your firm's conflict system.

Circulate "New Client" Lists Around the Firm

As a back-up and an ancillary means of identifying potential conflicts, smaller firms can circulate a list of new clients and matters to all lawyers and staff on a regular basis, e.g., weekly or monthly. Each person should review this list for possible conflicts.

Regular "conflicts memos" will help to identify potential conflicts that aren't picked up by a regular conflict search.

Send Non-Engagement Letter When You Decline to Act

As conflicts can arise when a lawyer declines to act for a party, it's critical that you send a non-engagement or non-representation letter whenever you decide not to represent a potential client. Without this documentation, the potential client might later claim that they relied on you for legal representation, or that you received confidential information from them which could preclude you from acting against their interests in future.

Your letter should clearly advise the person:

- That you are not representing them
- That there are statutes of limitations that apply which must be met
- That the person should find another lawyer to act for them and protect their interests
- That you have not received any confidential information from them (if applicable)

After your letter has been sent, confirm with the person that they actually received it, and document this fact.

Recording decision when you CAN Act

Where the outcome of the conflict check identifies a potential conflict issue, but it is ultimately decided that the firm can act, there must be a fully documented note of the reasons for that decision.

A letter should be sent to both parties concerned, which they should sign and return, confirming that they believe there is no conflict in the firm acting for both parties, and confirming their wish that you continue to act in the circumstances.

(iii) Opening And Closing Files

A separate file should be opened for each new matter on which a client retains you. Avoid creating the "Client re: General" file. By keeping a general file open for someone who hasn't consulted your firm for some time, it may prevent you from accepting a retainer to act against that client.

When a matter is concluded, close the file as promptly as possible, and send a letter to the client confirming that your solicitor/client relationship on the particular matter has come to an end.

Managing A Conflict Of Interest

In many cases, you won't be able to act for a party. But some conflicts of interest can be managed.

(i) Waiving a Conflict With Informed Consent

The rules of professional conduct allow lawyers to act in the vast majority of cases, despite actual or likely conflicts of interest, if the firm has the informed consent of the affected client(s) or former client(s), i.e., there is a waiver of the conflict of interest.

Note, however, that the consent of a client is unlikely to be effective if you act against that client in a matter substantially related to your earlier representation of that client – even if the client is sophisticated or received independent legal advice concerning their consent.

On the other hand, you have less reason to be concerned about the validity of a waiver, if you seek it promptly after being approached by another client or potential client about a new mandate that's completely unrelated to any matter on which you've previously acted for the client whose informed consent you are seeking.

If you decide to act against a client or former client with their consent, make sure:

- That you fully disclose the relevant facts and implications of the client's waiver
- That the client seeks independent legal advice if the issue is complex or the client is unsophisticated
- That the client's consent is in writing

(ii) Erecting an Ethical Screen

In some instances, it may be possible to set up an ethical screen or wall when an imputed conflict of interest arises. The idea is to prevent the involved lawyer or lawyers (and staff) from being exposed to confidential information relating to a matter currently or previously handled by other lawyers or staff (e.g., a new lawyer who has left one firm to join your firm).

Whether or not this will provide protection against being disqualified from acting depends on how effective the screen is. The larger the firm, the less chance of contact between screened and non-screened lawyers. The physical layout of the office and proximity of the involved lawyer to the screened lawyer is another factor.

The most commonly followed standards for erecting an ethical screen are the guidelines developed by a Canadian Bar Association task force [see next page].

Guidelines for Establishing Ethical Screens

1. The screened lawyer should have no involvement in the law firm's representation of its client.

2. The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the law firm.

3. No lawyer in the law firm should discuss the current matter or the previous representation with the screened lawyer.

4. The current matter should be discussed only within the limited group that is working on the matter.

5. The files of the current client, including computer files, should be physically segregated from the law firm's regular filing system, specifically identified, and accessible only to those lawyers and support staff in the law firm who are working on the matter or who require access for other specifically identified and approved reasons.

6. No lawyer in the new law firm should show the screened lawyer any documents relating to the current representation.

7. The measures taken by the law firm to screen the transferring lawyer should be stated in a written policy explained to all lawyers and support staff within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.

8. Affidavits should be provided by the appropriate law firm lawyers setting out that they have adhered to and will continue to adhere to all elements of the screen.

9. The former client, or if the former client is represented in that matter by a lawyer, that lawyer, should be advised:

   (a) that the screened lawyer is now with the law firm, which represents the current client, and

   (b) of the measures adopted by the law firm to ensure that there will be no disclosure of confidential information.

10. The screened lawyer's office or work station and that of the lawyer's secretary should be located away from the offices or work stations of lawyers and support staff working on the matter.

11. The screened lawyer should use associates and support staff different from those working on the current matter.

** Adapted from the CBA Code of Professional Conduct (Chapter V)*

(iii) Limiting Your Firm's Retainer

A potential conflict of interest may also be managed by imposing limitations on your firm's retainer.

Some firms may turn down requests for legal services from smaller clients out of fear this will prevent them from acting for larger clients on more major matters in future. But you may be able to act for these smaller clients – with their agreement – if you make it clear up front that your acceptance of the retainer doesn't preclude you from acting against them on unrelated matters, either during the retainer or after.

Just make sure you send a carefully drafted retainer letter recording the client's agreement and the scope and duration of the retainer. You may also want to specifically include a clause that your firm is free to act for competitors of the client.

Case Studies

Would you act, refuse to act for one party, refuse to act for both parties (if applicable), or act subject to strict controls in the following scenarios?

1. **You are approached by a new corporate client to act in relation to a merger with Tyne Design Ltd, a former client that had previously instructed your litigation team on a number of matters.**

   Click to read case notes

2. **X Factory Ltd wish to instruct you in relation to the purchase of a storage depot in Doncaster. Your conflict search identifies that X Factory is on the other side of an employment tribunal claim by your client Anne Winters.**

   Would it make any difference to your answer if the employment claim was one that had settled two years ago?

   Click to read case notes

3. **You discover that the firm has been instructed by an existing client in the relation to obtaining planning permission for a development site. The site had previously been owned by another (continuing) client of the firm, who had failed to obtain planning permission for a very different planning use, prior to selling the site (your firm had also acted on the sale).**

   Click to read case notes

4. **You are approached by an existing client Allan Dextrose who wishes to instruct you jointly with his business partner Evan Pearce-Davis. They intend to set up a joint venture company, with the intention of obtaining start-up funding from the Princes Trust. [The wife of] a partner in the private client team is a trustee for the Princes Trust.**

   Click to read case notes

5. **The firm is approached separately by two existing clients in relation to:**

   (a) unfair dismissal claims against the same company
   (b) planning applications relating to neighbouring plots of land
   (c) funders and developers in a consortium bid for a public procurement project

   Click to read case notes

Does a conflict of interest arise for the instructed law firm in the following scenarios? If not, what is the issue, and in any event, how should it be addressed?

6

Ernest Soull was contacted by a client for whom he had acted in the purchase of a residential property. The client had sought to convert an outhouse attached to the property into a luxury conservatory-style kitchen, but her neighbour, John Crabbie had objected, and informed her that there were real burdens requiring his consent to any such alterations – restrictions that she had not been made aware of at the time of purchase. Ernest said he would investigate the matter, and confirmed with the client that he would contact Mr Crabbie to negotiate the required consents.

7

The firm had been instructed previously regarding a child maintenance dispute. There was a minor error alleged in the terms of the settlement agreement, which resulted in the client's child no longer receiving maintenance payments when she left school and went to university. The counsel instructed to represent the client at the settlement hearing appeared to be at fault. It transpired that the counsel instructed at the hearing was the husband of the fee-earner on the file. The fee-earner was no longer at the firm. The firm has agreed to act for the client in resolving the error in the settlement agreement.

Click to read case notes for both of the above

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The firm acts for the major shareholder in a limited company in a company re-structure. The minority shareholders intimate a claim against the firm for failing adequately to protect their interests.

Click to read case notes

9

The firm acts for a client in relation to his personal affairs, including property purchase, will-writing and tax advice. They also act for his wife and 30-year old son. The firm acts for both the son and the parents in relation to the transfer of a plot of land for a token consideration to their son. They subsequently are instructed in relation to business loan, where the matrimonial home is the security.

Click to read case notes

10

The firm was instructed by Reveley Gladders Inc. (RGI) regarding the negotiation and drafting of the executive directors new contracts, in conjunction with the Renumeration Committee. RJ, and SD (CEO and FD respectively) were the firm's usual contacts RGI, and the firm was instructed by them on RGI's behalf.

Click to read case notes

11

Proceedings have been threatened by Company B against your client, Company A. It transpires that one of Company A's directors serves as a director on the board of Company B.

Click to read case notes

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The firm acts for all the parties in relation to a variation of a trust deed.

Click to read case notes

Case Studies - with Facilitator Notes

You are approached by a new corporate client to act in relation to a merger with Tyne Design Ltd, a former client that had previously instructed your litigation team on a number of matters.

General Observations on the Questions

Firms require you to have effective systems and controls to identify and assess conflicts of interests. Using these systems and controls, you need to consider all the factors that might compromise your independence or your ability to act in the best interests of the buyer and the seller.

If you decide that there is no conflict of interest, then before you agree to act for both parties, you should:

- Check that acting will not be a risk to any of the Principles.
- Be sure that acting for both the parties will be of benefit to both those parties, rather than a benefit to your own commercial interests.
- Consider the impact of having to withdraw if circumstances change, for example, in a sale and purchase transaction, on the conveyancing chain.
- Consider whether you can act for the parties and still comply with other Outcomes, such as the Chapter 4 Outcomes (Confidentiality). For example, you may be asked by one party to keep information confidential, but to do so, would require you to stop acting for the other party.
- Ensure that appropriate safeguards are in place before you decide to act in the event of a potential client conflict.
- Keep a record of your decision in case you are asked to demonstrate compliance and justify your decision.

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See Prince Jeffri Bolkiah v KPMG & M&S v Freshfields

While Tyne Design is a former client, rather than a current one, there is still an obligation of confidentiality due by the firm to the former client. The fact that Tyne Design had instructed the firm in relation to an unrelated litigation matter may impact on the determination of whether there is a conflict – and in any event it would be for Tyne Design to show that there was a conflict, but, as per Bolkiah v KMPG, *'the burden of proof is not a heavy one'*.

It might be that there is no conflict in the particular circumstances , but if the firm decided to act, it would be advisable to ensure that there was an information barrier to prevent any information confidential to the former client being made available. A record of the rationale for any decision should be kept.

2

X Factory Ltd wish to instruct you in relation to the purchase of a storage depot in Doncaster. Your conflict search identifies that X Factory is on the other side of an employment tribunal claim by your client Anne Winters.

Would it make any difference to your answer if the employment claim was one that had settled two years ago?

The overriding consideration will be the best interests of each of the clients concerned and, in particular, whether the benefits to the clients of you acting for all or both of the clients outweigh the risks. Particularly where a contentious matter is in the past, and, as here, the transaction in question is a non-contentious and unrelated one -subject to any confidential information at issue, there is unlikely to be a material conflict.

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You discover that the firm has been instructed by an existing client in the relation to obtaining planning permission for a development site. The site had previously been owned by another (continuing) client of the firm, who had failed to obtain planning permission for a very different planning use, prior to selling the site (your firm had also acted on the sale).

Things to consider:

- is there a conflict of interest between your existing client and the new client (why did the original planning application fail? Is there any issue regarding the conduct of the firm in that respect?)
- does the firm have information relating to the site/previous planning application that is not in the public domain, and would be regarded as confidential information belonging to the existing client?

4

You are approached by an existing client Allan Dextrose who wishes to instruct you jointly with his business partner Evan Pearce-Davis. They intend to set up a joint venture company, with the intention of obtaining start-up funding from the Princes Trust. [The wife of] a partner in the private client team is a trustee for the Princes Trust.

Instructions from two parties in a venture (with a shared interest) are not uncommon. However, the fact that a conflict situation could well occur between the parties in the future (and be determined largely by the terms of the JV agreement that the firm has been responsible for drafting and advising on) means that the firm should only act for one party, and issue a non-engagement to the other party, advising them to obtain separate representation.

Query: Does the fact that a partner in another department in the firm have an interest in the Princes Trust prevent the firm from acting for either of the JV parties? If it had been a fee earner in the same department, would your answer have been different? If it was the wife of a partner not involved in the transaction, would that impact on your answer?

Could you act, but only subject to protections such as information barriers?

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5 **The firm is approached separately by two existing clients in relation to:**

(a) unfair dismissal claims against the same company
(b) planning applications relating to neighbouring plots of land
(c) funders and developers in a consortium bid for a public procurement project

It can be acceptable for a firm to act for more than one client in relation to the same/a related matter where the interests of the party are shared or where a potentially impacted client consents to the firm acting for the other party.

The Law Society of Scotland Professional Practice Committee has made the following observations on the topic.

'a consortium and a bank in relation to a PPP project were both existing clients. They had appointed one firm to act in implement of the transaction where the funders had had separate legal advice on the format of the loan agreement. The Committee agreed that if the parties had had separate advice on the formation of the loan agreement, and were now seeking implement of it, there would only be a conflict of interest if a dispute arose. The Committee declined to issue guidelines on the matter and felt that solicitors must exercise professional judgment in each individual transaction. If solicitors are concerned there is a significant potential for conflict of interest it would be sensible to decline to act'.

Many firms do act, subject to information barriers in advising consortium partners in such circumstances.

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Ernest Soull was contacted by a client for whom he had acted in the purchase of a residential property. The client had sought to convert an outhouse attached to the property into a luxury conservatory-style kitchen, but her neighbour, John Crabbie had objected, and informed her that there were real burdens requiring his consent to any such alterations – restrictions that she had not been made aware of at the time of purchase. Ernest said he would investigate the matter, and confirmed with the client that he would contact Mr Crabbie to negotiate the required consents.

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The firm had been instructed previously regarding a child maintenance dispute. There was a minor error alleged in the terms of the settlement agreement, which resulted in the client's child no longer receiving maintenance payments when she left school and went to university. The counsel instructed to represent the client at the settlement hearing appeared to be at fault. It transpired that the counsel instructed at the hearing was the husband of the fee-earner on the file. The fee-earner was no longer at the firm. The firm has agreed to act for the client in resolving the error in the settlement agreement.

In both of these scenarios, the firm should be intimating a potential claim to insurers as a result of their earlier engagement with the client – and as such the default position is that they should decline to act for the client when trying to resolve their earlier error. While at a certain stage it is normal practice for a firm to try to remedy an error, firms require to consider very carefully if there is a conflict of interest in continuing to act.

The relevant issues to consider include:

- You should inform current clients if you discover any act or omission which could give rise to a claim by them against you
- If you have to cease acting for a client, you should explain to the client their possible options for pursuing the matter;
- Where a client notifies you of their intention to make a claim or if you discover an act or omission which might give rise to a claim, you should consider whether a conflict of interest has arisen or whether they should be advised to obtain independant advice.

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Also relevant to Q 7:

It is important that you retain your independence when recommending third parties to your client and that you act in the client's best interests, and you should ensure that clients are fully informed of any financial or other interest which you have in referring the client to another person or business;

The firm acts for the major shareholder in a limited company in a company re-structure. The minority shareholders intimate a claim against the firm for failing adequately to protect their interests.

It is essential that you are clear who you are acting for, and who you are not acting for. Nor is it always clear (see Newcastle International Airport v Eversheds case). Where one shareholder or group of shareholders is being represented, it may appear to others that the advice is also addressed to them. Be especially careful where previously advice has been given to the company itself, or all shareholders – as there is an increased likelihood that parties may consider themselves as being advised when they are not, and also an increased risk of a conflict – including in terms of knowledge of information confidential to one party (which could result in the firm deciding to decline to act for either party in the particular matter).

Where there is any risk of doubt, the firm should issue a letter of non-engagement to the relevant parties, suggesting that they obtain independent legal advice

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The firm acts for a client in relation to his personal affairs, including property purchase, will-writing and tax advice. They also act for his wife and 30-year old son. The firm acts for both the son and the parents in relation to the transfer of a plot of land for a token consideration to their son. They subsequently are instructed in relation to business loan, where the matrimonial home is the security.

Law firms often act for more than one member of a family in relation to a number of matters.

'gift' to son

It will be a matter of professional judgment for the solicitor in each case as to whether there is an actual conflict of interest and if in doubt solicitors should exercise caution before proceeding. It may be for example that what is being gifted is more of a liability than an asset, or it may be that the sellers within a family may not fully appreciate that a conveyance is for less than full market value. If asked to act (say) for parents and children on either side of a transaction for less than full market value it will be necessary to see each side on their own to ensure that they fully appreciate the nature of the transaction and are capable of giving proper instructions.

Business loan

There is a clear conflict of interest between the husband and wife in respect of the loan over the matrimonial home. The firm should NOT act for both spouses. If one refuses to obtain separate independent legal advice, the firm must advise the party in writing that signature of any document will have legal consequences, and they should seek independent legal advice before signing it. A signed and returned letter of non-engagement on file would be advisable.

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The firm was instructed by Reveley Gladders Inc. (RGI) regarding the negotiation and drafting of the executive directors new contracts, in conjunction with the Renumeration Committee. RJ, and SD (CEO and FD respectively) were the firm's usual contacts RGI, and the firm was instructed by them on RGI's behalf.

The firm is entitled to accept instructions from RJ and SD. While normally there might not be any conflict of interest between the client company and the executive directors, and therefore the instructions of RJ and SD could be taken as the instructions of the company, and advice given to RJ and SD could be taken as advice to the company, in this instance there is a conflict of interest between the client company and the exec directors, and therefore the firm must ensure that the company receives advice –and that advice is in the best interests of the company, not the exec directors. (see Newcastle Intl Airport v Eversheds)

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Proceedings have been threatened by Company B against your client, Company A. It transpires that one of Company A's directors serves as a director on the board of Company B.

There does not immediately appear to be a conflict of interest for the instructed law firm here. There is no suggestion that your firm has any connection to Company B. There is an issue for the director however, and the firm would have to advise Company A regarding the complications that this may bring to the litigation (eg there may be difficulties with disclosure of materials relating to that director, and the director is likely to have conflicts in terms of what s/he can keep confidential/disclose to either company. The firm could not act for the director, and would have to act with great caution if it was being instructed on behalf of the company by that director to ensure that it was representing the interests of the company, not that director. The director may have to be advised to take separate independent legal advice regarding his/her position.

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The firm acts for all the parties in relation to a variation of a trust deed.

Rule B1.7 of the Law Society Rules, which deals with conflicts of interest, does allow a solicitor to act for clients with *potential* conflicts of interest in certain circumstances. Where you do act for both parties, you should ensure that certain systems and controls are in place. You should not act for both parties, where the potential for conflict is significant, without full knowledge and consent of both parties. One of the benefits in a variation of trusts case, where the parties are often in agreement, might be a cost saving.

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Related Case Law

Prince Jefri Bolkiah v KPMG [1999] 1 All ER 517

In *Prince Jefri Bolkiah v KPMG* the House of Lords considered the position where a firm having previously acted for a client who has since terminated the retainer are subsequently asked to act on behalf of a new client and the former client alleges that a conflict of interest arises.

It was held that the duty owed to the former client is a continuing duty to preserve the confidentiality of information received during the subsistence of that relationship. The former client has to establish that the firm:

1. Is in possession of information confidential to the former client
2. That the former client has not consented to its disclosure
3. That the firm is proposing to act for another client with an interest adverse to the former client in a matter to which the information is or may be relevant

Although the burden of proof is on the former client it has been held that it is not a heavy one.

In those circumstances the court may intervene to stop the firm acting for the new client unless the firm can satisfy the court that effective measures have been taken to ensure that no disclosure would occur and that there was no risk of the information coming into the possession of those acting for the new client. Although there is no rule of law that an information barrier (a Chinese wall) is insufficient to eliminate the risk, the presumption is that, unless special measures are taken, information moves within a firm and, to be effective, those measures have to be an established part of the organisational structure of the firm rather than ones created ad hoc. The evidential burden on the firm to show that there is no risk of confidential information being passed has been described as a heavy burden.

Re T and A (children) (risk of disclosure) [2000] 1 FCR 659

A solicitor whose firm had previously acted in unrelated matters for a party in family proceedings was not required to stand down as a solicitor to the children's guardian as it was not established that there was a real risk (as opposed to a fanciful one) of disclosure of confidential information obtained earlier from that party. The basis of the courts' jurisdiction to intervene is founded not on the avoidance of any perception of possible impropriety but on the protection of confidential information.

Marks and Spencers Plc –v- Freshfields Bruckhaus Derringer [2004] EWCA Civ. 741

Freshfields were Marks & Spencers (M&S) lawyers up to three years ago when the company switched its legal work to another city law firm (Slaughter & May). Whilst Freshfields continued to do some work for M&S, it no longer considered itself to be in a relationship with this company.

When Freshfields was approached by Philip Green on his bid to buy M&S, it felt in a position to accept instructions. However, Freshfields undoubtedly had inside information on M&S which would have been very useful to Philip Davis. Freshfields insisted that disclosure of any such information would never happen and that anything to do with M&S would be put behind a Chinese wall.

The Court did not agree and it felt that M&S was at risk under the arrangement. The Court believed that there was a substantial risk of breach of confidence on the basis that some confidential information essential to the transaction could be accessed by Freshfields. The Court felt that Freshfield's obligation went beyond not using that information- its obligation was not to do anything that would increase the risk of accidental disclosure. Freshfields had advised M&S on a contractual deal four years earlier in relation to a clothes line which now one of M&S' most profitable lines. The attempt by Freshfields to mitigate this risk by setting up an ad hoc Chinese wall was not viable as the law firm had too much confidential information held by too many people for the Court to be satisfied that a Chinese wall would be entirely effective.

The decision underlines the need to put Chinese walls in place throughout a law firm where there are potential conflicts of interest *prior to accepting instructions.*

Georgian American Alloys & Others v White & Case [2014] EWHC 94 (Comm)

Although White & Case had withdrawn from a related arbitration in December, 2013, it had sought to continue in the formal litigation between Victor Pinchuk and rivals Gennady Bogoliubov and Igor Kolomoisky. Upon a finding that an unavoidable conflict of interest existed, the court issued a permanent injunction debarring the international law firm from acting on Pinchuk's behalf.

The Court's determination that White & Case was conflicted was based on the revelation that the firm had previously advised a number of companies in the United States in which Bogoliubov and Kolomoisky has ownership interests.

The disqualification centred on White & Case's internal conflicts checking procedures, which were highlighted after it emerged that the firm had been advising Bogoliubov and Kolomoisky in the US on a corporate restructuring and potential IOPO and Pinchuk in London on the dispute involing the former pair.

In April 2011, a team led by White & Case partner Colin Diamond in New York accepted instructions to act for a number of companies in which Kolomoisky and Gennadiy had ownership interests on the restructuring and IPO. White & Case acted for the claimants until May 2013. During that time it became privy to and obtained substantial confidential information about Kolomoisky and Gennadiy's ferroalloy businesses' assets and the structure of various corporate vehicles.

Unknown to the Ukranian pair, White & Case lawyers in London and Moscow led by partner David Goldberg had been advising Pinchuk since September 2010 on claims against Kolomoisky and Bogolyubov.

The court heard that White & Case decided internally there was no conflict of interest between its acting for the claimants and also acting for Pinchuk and did not establish any information barriers separating the teams for two years.

White & Case was instructed to act for Pinchuk in the London court in March 2013 and related London arbitration proceedings in August 2013. The claimants sought an injunction to prevent White & Case acting for Pinchuk in both the commercial court and the London arbitration. In both cases White & Case has now ceased acting for Pinchuk.

In his ruling today Mr Justice Field found that White & Case was in possession of confidential information that was or might be relevant to the litigation, and that Pinchuk's interests were or might be adverse to the interests of the claimants.

He further held that White & Case could not show that there was no real risk of the disclosure of the claimants' confidential information to Pinchuk.

Newcastle International Airport Ltd v Eversheds LLP [2013] EWCA Civ 1514

The Court of Appeal held that where solicitors acting for a company had taken instructions from executive directors of the company in relation to the directors' own service contracts, on the understanding that the drafts would be reviewed by the company's remuneration committee and signed off by someone with appropriate authority, the proper discharge of the solicitors' duty of care to the company required it to take reasonable steps to ensure that the reviewers properly understood the effect of the drafts. Advice to the directors in the course of the drafting exercise could not, in the particular circumstances, be regarded as equivalent to advice to the company itself, and the solicitors' duty was to ensure that the company itself was properly advised.

The detail

On 6 January 2006 Eversheds received instructions from their client, a company that owned Newcastle Int'l Airport, through their one of their regular contacts, JP (CEO of the company) to draft amendments to the service contracts.

On 10 January 2006 RR (Chair of the Remuneration Committee) had a meeting with JP and LF (FD) to discuss the amendments. There was some discussion about the restrictive covenants.

On 13 January 2006 JP and LF told E LLP that they had been authorised by RR to instruct E LLP to draft new contracts, that the note reflected agreement that had been reached at the meeting of 10 January 2006.

The Court of Appeal found that the first instance judge had been correct to find that the executives had apparent authority to give instructions to Eversheds in relation to the revised contracts. However it appeared that the only advice given in relation to the drafting of the service agreement would be that given to the executive who had provided the instructions for it. The practice, however, also recognised that the draft would be separately reviewed by the company's remuneration committee. But no advice was separately provided by the solicitors to that reviewing body.

In the circumstances, where there was a clear potential conflict of interest between the company and the directors, the firm was obliged to ensure that it advised the company (its client) and represented its interests above those of the directors.

Two cases relating to joint instructions in relation to insured and insurer

Brown v Guardian Royal Exchange

A solicitor was appointed by the insurer to act for the insured and the insurer in the usual way (ie pursuant to a joint retainer), and the insured was expressly informed that insurers' rights were reserved while the solicitor was investigating the claim.

An express term in the policy entitled insurers to disclosure of any communications which the solicitors received from the insured or from third parties concerning the subject matter of the claim. At this stage, the insured was invited to a meeting with the solicitor and asked questions about the claim, including questions the answers to which could, potentially, have resulted in insurers declining to indemnify the insured.

This was deemed acceptable:

(a) Hoffmann LJ described the situation in this way

'Such disclosure is of course necessary to enable the insurers to make an informed decision about whether tomake an offer of settlement or payment into Court or to defend the claim. It causes no difficulty in cases in which the insurers have accepted liability to indemnify the insured or cannot reasonably dispute it. But problems may arise when the investigation of the claim also touches upon questions relevant to whether the insurers are liable.
So in this case, the claim for negligence against Mr Brown required an investigation of exactly what he knew or did not know at the time when he agreed to exchange contracts. The insurers could not decide whether or not to defend the claim without full information on these matters. But lurking within them was an issue on which Mr Brown and the insurers had conflicting interests, namely the possibility that the investigation might reveal that Mr Brown had been dishonest.

...There is no suggestion that RPC should have advised Mr. Brown to seek separate representation at an earlier stage. The purpose of the conference with Mr Dagnall was simply to enable him to advise on the claim and settle the defence.'

(b) Similarly, Neill LJ said this (at 329):

'...while the representation under the policy subsisted RPC were under a duty to make a full and not merely a partial report of how matters had progressed. Suppose the possibility of a conflict had come to light because of a statement obtained from another witness who was not only able to give evidence about a number of important matters of fact but who could also testify to Mr Brown's state of knowledge at a relevant time. it seems to me to be clear that the duty to report about matters which happened while the joint representation still subsisted continued thereafter.'

TSB v Robert Irving & Burns

A solicitor was appointed by the insurer to act for the insured and the insurer in the usual way (ie pursuant to a joint retainer), and the insured was expressly informed that insurers' rights were reserved while the solicitor was investigating the claim. At this stage, the insured was invited to a meeting with the solicitor and asked questions about the claim, including questions the answers to which could, potentially, have resulted in insurers declining to indemnify the insured.

This conduct was deemed acceptable, and information provided by the insured to the solicitor at this stage were covered by the implied waiver of privilege, and therefore could be communicated by the solicitor to the insurer for the purpose of deciding whether to confirm cover.

The solicitor advised the insurer that cover should be confirmed, and the insurer agreed. In the event, cover was never expressly confirmed, but the judge at first instance found that the solicitor had unequivocally conveyed the impression that liability had been accepted, which came to the same thing.

Several months later, after disclosure and consideration of a draft expert report, the solicitor instructed counsel to advise in conference on behalf of the insured *'who may have the benefit of cover from professional indemnity underwriters',* to advise on the draft expert report and the insured's factual evidence, and, following the conference with the insured, *'to consider again on behalf of Underwriters their liability to indemnify the [insured] under the terms of the policy'*.

This conduct was not acceptable, and information provided by the insured to the solicitor at this stage was not covered by the implied waiver of privilege, and therefore could not be communicated by the solicitor to the insurer for the purpose of deciding whether to confirm cover.

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