Matthew Bunting

Conflicts of Interest and Chinese Walls: Prince Jefri Bolkiah and New Zealand

Submitted for the LLB (Honours) Degree

Victoria University of Wellington

15 September 1999

CONTENTS

I INTRODUCTION

In the realm of geography, the Chinese wall has associations of solidity, longevity and impermeability. These attributes of the masonic Chinese wall do not extend to its legal namesake. Uncertainty is the defining feature of the legal Chinese wall. The concept may "have little to offer"[1] or it may be capable of significantly modifying law firm operations.[2] The law relating to Chinese walls is, at best, unsettled.

The 1998 decision of the New Zealand Court of Appeal in *Russell McVeagh v Tower Corporation*[3] appeared to clarify the standards expected of firms of solicitors when dealing with conflicting retainers. It held that where firms acted for clients whose interests conflicted with former clients the Court would undertake a balancing exercise to ensure the reasonable protection of confidential information. Chinese walls were accepted as potentially effective in avoiding disqualification. The subsequent judgment of the House of Lords in *Prince Jefri Bolkiah v KPMG (a firm)*[4] has rejected the Court of Appeal's analysis, preferring a rule which requires that justice not only be done but that it be seen to be done, and doubting the legal effect of Chinese walls. In light of this, the law in New Zealand is again unsettled.

II THE CONCEPT OF CHINESE WALLS

A The Chinese Wall

A Chinese wall is an institutional mechanism within a firm created to prevent disclosure of confidential information from one part of the firm to another. The

---

[1] *Equiticorp Holdings v Hawkins* [1993] 2 NZLR 737, 741.
[2] *Canada Southern Petroleum v Amoco Canada Petroleum* (1997) 144 DLR (4th) 30.
[3] [1998] 3 NZLR 641.
[4] [1999] 2 WLR 215.

concept is taken from the banking and securities industries,[5] but has received increasing attention in the legal profession with the rise of the mega-firm.[6] Firms instituting Chinese walls do so to avoid disqualification where they act for clients with conflicting interests. Confidential information received from one client is withheld from solicitors dealing with the conflicting client. It is the efficacy of these institutional mechanisms in preventing the disclosure of confidential information and subsequent law firm disqualification, which is at issue.

B The Scope of Chinese Wall Protection

Law firm disqualification in conflict of interest cases may arise under two heads. There may be a risk of disclosure ofconfidential information, received from one client, to another client, breaching a duty of confidence owed to the first client. There may be a breach of the fiduciary duty of undivided loyalty owed to a client occasioned by the acceptance of a retainer from a client whose interests conflict with the existing client. Both situations may warrant disqualification of the firm from acting for the second client.

Chinese walls are information barriers. They do not create two organisations under the umbrella of a single firm. They isolate information within one part of the firm, preventing solicitors in another part of the firm from using that information. Chinese walls may avoid a breach of a duty of confidence owed to a client, but do not prevent a breach of a fiduciary duty of loyalty owed to that client. While the client may be assured that their confidential information will not be disclosed, they are not assured of the undivided loyalty of the firm to which they are entitled.[7]

---

[5]R Tomasic "Chinese Walls, Legal Principle and Commercial Reality in Multi-Service Professional Firms" (1991) 14 UNSWLR 46, 47.
[6]D Coull "Conflicts of Interest and Chinese Walls" [1998] NZLJ 347.
[7]*Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, 90.

Given the inability of Chinese walls to prevent breaches of fiduciary duty, it follows that they will not prevent disqualification where a firm owes two clients concurrent and competing duties of loyalty. The efficacy of Chinese walls in avoiding disqualification is in situations of successive conflicts. Successive conflicts arise where the interests of a new client conflict with the interests of a former client of the firm, or a former client of a lawyer now employed by the firm. In these situations the fiduciary duty owed to the former client no longer provides grounds for disqualification. The grounds for disqualification are restricted to the breach of confidentiality head. Here the potential ability of Chinese walls to prevent information disclosure creates the possibility that they may allow a firm to avoid disqualification.

C Types of Chinese Wall

There is a judicial tendency to dismiss Chinese walls as a concept without examining their factual elements.[8] This denies the variety of forms of institutional arrangement which may constitute a Chinese wall. In assessing the utility of Chinese walls, it is important to consider the precise nature of the arrangements instituted. The Law Commission has identified Chinese walls as consisting of a combination of five organisational arrangements[9]: (i) physical separation of departments; (ii) an educational programme to emphasise the importance of non-disclosure; (iii) strict procedures for dealing with the situation where it is felt that the wall should be crossed; (iv) monitoring of the wall by compliance officers; (v) disciplinary sanctions for improper breach. In addition to these elements, solicitors may make undertakings not to disclose, electronic separation may be imposed, and document security may be increased.[10] A Chinese wall may be erected as an *ex ante* or *ex post* measure.[11] The

---

[8] *Equiticorp*, above n 1, 741; *McNaughton v Tauranga City Council (No 2)* (1987) 12 NZTPA 429, 431.

[9] Law Commission *Consultation Paper on Fiduciary Duties and Regulatory Rules* (1992, Law Commission no 124).

[10] *Young v Robson Rhodes (a firm)* (unreported, English High Court, 30 March 1999, No. 01297).

[11] *Canada Southern Petroleum*, above n 2, 43.

combination of elements will have a significant impact on the factual efficacy of the wall.

D Chinese Wall Jurisprudence

Judicial consideration of Chinese walls assesses their effectiveness as a defence to a former client's application for an order of disqualification on the basis of a breach of an equitable duty of confidentiality. The decisions in *Russell McVeagh* and *Bolkiah* lie parallel to professional rules. The New Zealand Law Society's Rules of Professional Conduct potentially provide a remedy by way of professional sanction. They do not impact on the power of the Courts to order equitable disqualification.

In the courts, two considerations are necessary in discussing the efficacy of Chinese walls. The legal threshold for disqualification where there is a risk of disclosure is uncertain, as is the significance of Chinese walls in determining whether a firm crosses that threshold.

The established position for much of this century was disqualification where there was a "probability of mischief".[12] However this test has been the subject of much criticism, and has been widely replaced with an approach which disqualifies a firm where there is a "reasonable apprehension"[13] or "real and sensible possibility"[14] that information will be disclosed. This view relies on the premise that it is crucial to ensure "not only that justice is done but also that it is apparent that it is done".[15] This approach may be modified by the introduction of presumptions. In *MacDonald Estate v Martin*[16] the Canadian Supreme Court established rebuttable presumptions that relevant

---

[12] *Rakusen v Ellis Munday & Clarke* [1912] 1 Ch 831, 841.
[13] *Equiticorp*, above n 1, 739.
[14] *Mallesons Stephen Jaques v KPMG Peat Marwick* (1990) 4 WAR 357, 363; *Farrow Mortgage v Mendall Properties* [1995] 1 VR 1, 5.
[15] *Mallesons*, above n 14, 362. See also *Black v Taylor* [1993] 3 NZLR 403, 411-412.
[16] (1990) 77 DLR (4th) 249, 268-269.

confidential information will have been communicated to the firm by the former client, and that this information will have been imparted to the solicitors working with the subsequent client. In the same case, the minority prefers irrebutable presumptions. In the United States, Courts have adopted a rebuttable presumption of disclosure[17]. Prior to *Russell McVeagh*, the New Zealand Court of Appeal indicated that they would disqualify where there was an appearance of injustice.[18]

Chinese walls have received similarly varied judicial support. Prior to the *Russell McVeagh v Tower*[19] decision, they have received little support in New Zealand.[20] Courts have also been disinclined to accept Chinese walls in Australia[21] and in England,[22] although such acceptance has not been completely absent.[23] Canadian acceptance of the concept has been encouraged by the development of guidelines by the Canadian Bar Association in response to the *MacDonald Estates* judgment.[24] Acceptance of Chinese walls is well established in the United States.[25]

These two considerations are linked. The greater the risk of disclosure that is required as a condition for disqualification, the more likely a Chinese wall is to enable a law firm to conduct successively conflicting retainers without that level of risk existing. Thus a determination of the efficacy of Chinese walls must first establish the threshold risk of disclosure which will result in disqualification, and then assess whether a Chinese wall will allow a firm to avoid that risk.

---

[17] *In re American Airlines* (1992) 972 F 2d 605 (Fifth Circuit Court of Appeals). *Cromley v Board of Education of Lockport Township High School District* (1994) 17 F 3d 1059 (Seventh Circuit Court of Appeals). American conflicts jurisprudence is prone to inter-state disparities following the Supreme Court's judgment that the outcomes of disqualification applications in litigation situations could not be appealed to the Federal appellate courts: *Richardson-Merrell v Koller* (1985) 472 US 424.

[18] *Black*, above n 15, 408.

[19] Above n 3.

[20] *Equiticorp*, above n 1, 741; *McNaughton*, above n 8, 431.

[21] *D & J Constructions v Head* (1987) NSWLR 118; *Mallesons*, above n 14.

[22] *David Lee v Coward Chance* [1991] 1 All ER 668; *Re a firm of solicitors* [1992] 1 All ER 353.

[23] *Fruehauf Finance Corporation v Feez Ruthning (a firm)* [1991] 1 Qd R 558, 571.

[24] *Canada Southern Petroleum*, above n 2.

[25] *Kesselhaut v United States* (1977) 555 F 2d 791.

III *RUSSELL MCVEAGH V TOWER CORPORATION*[26]

Russell McVeagh's Wellington office provided specialist taxation advice to Tower during 1995, with Tower retaining Phillips Fox as their principal solicitors. In 1997 Russell McVeagh were retained through their Auckland office to act for Guinness Peat Group in relation to the acquisition and demutualisation of Tower. Having discussed the matter with the relevant Wellington partner, the Auckland partner accepted the retainer without consulting Tower. In the High Court, Gallen J held that there was a conflict of interest and that the information barrier erected was insufficient to prevent disqualification. Russell McVeagh appealed.

A The Standard of the Duty of Confidentiality

Delivering the majority judgment of the Court of Appeal, Henry J held that there were three questions to be considered.[27] First, whether confidential information is held which would be prejudicial to the former client's interests if disclosed. This must be specifically relevant to the second retainer. General information is insufficient. Secondly, whether there is a real or appreciable risk, viewed objectively, that the confidential information will be disclosed. Thirdly, if there is a risk of disclosure of such information, whether the Court's discretionary power to disqualify should be exercised, recognising the importance of the special fiduciary relationship which gives rise to the duty of protection. An answer to this third question involves a balancing exercise considering factors such as a client's right to the solicitor of their choice, the right of a solicitor to offer their services to the public generally, the relevance of mobility within the profession, the need for access to specialist services, and the need for market competition. Henry J indicates that this is a question of fact in each case.

---

[26]See also Coull, above n 6.

[27]*Russell McVeagh v Tower Corporation* [1998] 3 NZLR 641, 651.

B Chinese Walls

On Chinese walls, Henry J while accepting that the concept "left much to be desired"[28] and should not obscure the realities of behaviour in firms, held that they would be appropriate and sufficient to ensure protection in some circumstances. New Zealand's small size and the limited availability of expert advice are identified as relevant considerations. Coupled with the increased tolerance of a risk of disclosure, this affirmation appears to signal the general efficacy of Chinese walls in New Zealand.

C Justification of the Majority Decision

The *Russell McVeagh* decision not only removes the requirement of the appearance of justice,[29] but also rejects both the possibility and probability of mischief approaches,[30] and the use of presumptions favoured in *MacDonald Estate*. Henry J approaches a *reductio ad absurdum* analysis in dealing with the appearance of justice point, stating that "possible difficulties perceived by the public"[31] do not provide an appropriate standard. The possibility and probability approaches are rejected because "such a clearcut distinction . . . is not always readily discernible from the cases"[32] and because "rigid rules imposed by the Court"[33] are less likely to meet the overall ends of justice than a balancing approach. Presumptions are rejected in favour of a "common sense practical approach of assessing the evidence".[34] These direct criticisms are weak, and the justification for the decision lies more fully with the positive arguments for the

---

[28] *Russell McVeagh*, above n 27, 654-55.
[29] *Russell McVeagh*, above n 27, 649.
[30] *Russell McVeagh*, above n 27, 651.
[31] *Russell McVeagh*, above n 27, 654.
[32] *Russell McVeagh*, above n 27, 649.
[33] *Russell McVeagh*, above n 27, 649.
[34] *Russell McVeagh*, above n 27, 651-652.

balancing approach. Further, Henry J avoids the 1993 Court of Appeal decision in *Black v Taylor*[35] by distinguishing it as a factually and legally dissimilar situation.[36] The validity of this distinction is questionable.

The considerations against disqualification identified as applicable in the balancing exercise[37] also appear to be justifications of the overall approach taken by Henry J. As noted above, a client's right to the solicitor of their choice, the right of a solicitor to offer their services to the public generally, the relevance of mobility within the profession, the need for access to specialist services, and the need for market competition, are all advanced as important considerations. Implicit in Henry J's reasoning is the contention that these factors would be disregarded under the other tests considered.

D Individual Judgments

Thomas J's dissenting judgment accepts that generally relevant information may give rise to a conflict, and requires that the appearance of justice be maintained. Disqualification is appropriate unless there is no risk that disclosure will occur.[38] Thomas J considers the structure of the legal profession in New Zealand, and while conceding that the size of the New Zealand market created conflict problems, concludes that "if the existing structure of the profession cannot cope with the responsibilities and standards required of a fiduciary, it is the structure of the profession which must adjust".[39]

---

[35] Above n 15.
[36] *Russell McVeagh*, above n 27, 649.
[37] *Russell McVeagh*, above n 27, 651.
[38] *Russell McVeagh*, above n 27, 673-675.
[39] *Russell McVeagh*, above n 27, 661.

Blanchard J's judgment is written in support of the majority. He accepts the test laid down by Henry J, but the basis of his decision is a belief that the information received by Russell McVeagh from Tower was not relevant to Guinness Peat Group's takeover.[40]

IV *PRINCE JEFRI BOLKIAH V KPMG (A FIRM)*[41]

A The Facts

Prince Jefri Bolkiah is the youngest brother of the Sultan of Brunei. For many years he had held the post of Chairman of the Brunei Investment Agency (the 'BIA'), an organisation formed to hold and manage the General Reserve Fund of the Government of Brunei and its external assets, and to provide the Government with money management services. Since the inception of the BIA in 1983, KPMG have undertaken its annual audit, examining records relating to many billions of dollars and charging over 6000 hours of time each year. In addition to this, over 4000 hours of time was charged on advisory and consultancy work for the BIA.

Between 1996 and 1998 Prince Jefri also retained KPMG through one his companies to provide investigative support for litigation in which the Prince was personally involved. This investigation was given the codename Project Lucy. During the course of this project, KPMG received extensive confidential information concerning Prince Jefri's financial affairs. Project Lucy was subject to document security provisions, and reiterations of confidentiality, and physical separation from January 1997. 168 KPMG personnel worked on the project, billing over £4.6 million.

---

[40] *Russell McVeagh*, above n 27, 678.
[41] Above n 4.

Prince Jefri's flamboyant lifestyle brought about a fall from favour with the Sultan in 1998[42], resulting in his dismissal from the BIA Chairmanship. Following his departure, many large transfers of capital were made from BIA funds, the destination of which fell outside the scope of the KPMG audits. KPMG was approached by the BIA with a request for assistance in determining the location of these transfers, a retainer to which Project Lucy information was relevant, and which was also adverse to Prince Jefri's interests. KPMG determined that it could properly accept these instructions, provided that special arrangements were instituted to prevent disclosure of information gained during Project Lucy. The retainer was given the codename Project Gemma.

Project Gemma involved 50 staff, of whom 11 had previously worked for Prince Bolkiah, and billed over 7,500 hours. To protect the confidentiality of Project Lucy information, all prospective Project Gemma staff were interviewed to ensure that no-one with knowledge of the Prince's affairs was selected. Physical separation from general KPMG operations was effected by carrying out work in Brunei and in a separate project room in a separate building to the team which had worked on Project Lucy. Electronic separation was effected through use of a separate file server and deletion of Project Lucy files from the main KPMG server. All staff confirmed on affidavit that they had no knowledge of any confidential information obtained from Prince Jefri.

B Lower Court Judgments

Prince Jefri applied to the High Court to have KPMG disqualified from performing further work on Project Gemma, on the basis of a conflict of interest. Pumfrey J, in making the injunction, accepted that KPMG had done all that was possible to avoid

---

[42]"Privy Council storms professionals' Chinese Walls" *Independent* (27 January 1999) 36.

disclosure. However, he found himself bound to assess the adequacy of any protective measures. He held that Chinese walls, while potentially capable of preventing deliberate disclosure, were insufficient to prevent accidental disclosure. In this situation a former client should not be exposed to the risk of disclosure in the absence of powerful reasons to the contrary, which did not exist in this case.

In the Court of Appeal, the majority adopted the three stage test established by Henry J in *Russell McVeagh*. Lord Woolf MR noted Prince Jefri's knowledge of KPMG's relationship with the BIA when he retained them for personal work, the inconvenience and expense of allowing an injunction, and KPMG's undertakings of non-disclosure. He held that KPMG's duty was limited to taking reasonable steps to prevent disclosure, and that continuation of the injunction would set an unrealistic standard for firms.

C House of Lords - Confidential Information

In the House of Lords, Lord Millett delivered the Lords' opinion that the disqualification should be maintained, with Lord Hope of Craighead making some additional remarks. Lord Millett framed the solicitor's duty as one to keep information confidential, not just to take reasonable steps to do so.

In considering the standard of risk which will attract an injunction, Lord Millett rejected the *Rakusen's* case test of reasonable probability of mischief, concluding that it imposed an unfair burden on the former client while creating significant risk exposure. He also noted that the *Rakusen* approach could create uncertainty for a solicitor where the source of information is unclear. The rebuttable presumptions used in *MacDonald Estate* were also rejected in favour of a common sense approach.

Lord Millett favoured a strict approach as giving effect to the concept of legal professional privilege. The importance of ensuring that information communicated to a solicitor in confidence remained confidential was a matter "of perception as well as substance".[43] He held that the court should intervene where there was a real risk of disclosure. This risk must be more than fanciful or theoretical, but need not be substantial. While the requisite degree of relevance is not considered, Lord Millett's approach suggests that either specifically or generally relevant information will be sufficient.

Lord Millett rejected the approach of the New Zealand Court of Appeal in *Russell McVeagh*, stating that the balancing exercise was "inappropriate".[44] The considerations made by the Court of Appeal could not affect the duty of confidentiality or convert it into a duty to take reasonable precautions, as this would "run counter to the fundamental principle of equity that a fiduciary should not put his own interests or those of another client before those of his principal".[45] New instructions should not be accepted without former client consent unless they do not increase the risk that the former client's confidential information will be disclosed to a party with a conflicting interest.

D House of Lords - Chinese Walls

Lord Millett accepts that there is "no rule of law"[46] that Chinese walls are ineffective in overcoming a risk of disclosure but states that in the absence of special measures, the Court will assume that information moves within a firm. Unless satisfied on the basis of clear and convincing evidence that effective measures have been taken to ensure non-disclosure, the Court will disqualify a firm.

---

[43] *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 WLR 215, 226.
[44] *Bolkiah*, above n 43, 227.
[45] *Bolkiah*, above n 43, 227.
[46] *Bolkiah*, above n 43, 227.

Lord Millett dismissed the KPMG measures as ad hoc and erected within a single department. He noted the difficulties created by a large and rotating staff. An information barrier within a single department is likely to be ineffective in that it attempts to divide people who are accustomed to working together. This was especially so in this case where staff were said to commonly share information and expertise to overcome new and unusual problems.

An effective Chinese wall "needs to be an established part of the organisational structure of the firm, not created ad hoc and dependent on the acceptance of evidence sworn for the purpose by members of staff engaged on the relevant work".[47]

V THE APPLICATION OF *BOLKIAH* IN NEW ZEALAND

A The Rule in Hamlin

The effect of the judgments in *Russell McVeagh* and *Bolkiah* is that the New Zealand law on conflicts of interest is out of step from the English law. As Tower did not appeal to the Privy Council in *Russell McVeagh*, a conclusive determination of the New Zealand position is yet to be made. Should a future conflict of interest case be appealed to the Privy Council, it is possible that the Judicial Committee may elect to allow the New Zealand law on this issue to develop separately to the English law.

In *Invercargill City Council v Hamlin*[48], a case not dealing with conflicts of interest, Lord Lloyd of Berwick, in delivering the unanimous judgment of the Privy Council, held that "the Court of Appeal in New Zealand should not be deflected from developing the common law of New Zealand (nor the Board from affirming their

[47] *Bolkiah*, above n 43, 229.
[48] [1996] 1 NZLR 513.

decisions) by consideration that the House of Lords . . . have not regarded an identical development as appropriate".[49] Departure from the English common law is permissible on the ground "that conditions in New Zealand are different".[50] While *Hamlin* is a negligence case, the broad approach can be taken in other areas of law.[51]

A decision of the House of Lords will have persuasive, rather than binding, precedent effect on New Zealand courts. In a situation where a New Zealand court is faced with conflicting English and New Zealand rules, the New Zealand rule may be more readily sustained if the departure from the English law is justified on the basis of disparities between English and New Zealand society.

For *Hamlin* to provide a justification for a New Zealand departure from English law, two requirements should be satisfied. First, material differences must exist between England and New Zealand such that a different approach is justifiable. Secondly, the New Zealand approach must be effective in resolving the New Zealand problem.

B New Zealand's Legal Profession

New Zealand's legal profession is manifestly smaller than that in England. New Zealand has fewer large law firms than England, with these few firms maintaining significant market dominance[52]. New Zealand is internationally notable for its high degree of concentration of corporate law expertise in a few firms.[53] Few firms are equipped to undertake major projects in specialist areas. The *New Zealand Law Who's Who*[54] suggests that there are eight national practices specialising in banking work, thirteen in commercial law, eleven in commercial property, seven in consumer law,

---

[49] *Invercargill City Council v Hamlin* [1996] 1 NZLR 513, 521.
[50] *Hamlin*, above n 49, 520.
[51] *Koopu v Hannah Grant* (unreported, 18 June 1996, High Court, Rotorua Registry, CP 25/92) 3.
[52] *Russell McVeagh*, above n 27, 659.
[53] *Russell McVeagh*, above n 27, 659.
[54] (New Zealand Lawyer Ltd, 1995) 8-13.

ten in employment law, nine in insolvency, twelve in intellectual property, eight in international trade, and seven in taxation. The extent to which commercial clients would be willing to retain law firms other than these large practices is questionable.

The legal services market in New Zealand is tiny. Concentration of expertise into a small number of firms means that there is little real choice available to large clients.

C Relevant Practical Considerations

1 Knowledge transfer within firms and within the profession

Bolkiah rejects the presumed imputation or attribution of knowledge from one partner to his fellow partners. The question of whether an individual is in possession of confidential information is "a question of fact which must be proved or inferred from the circumstances of the case".[55] However, in analysing the efficacy of Chinese walls, Lord Millett states that "the starting point must be that, unless special measures are taken, information moves within a firm",[56] citing behavioural tendencies to share information. In *Russell McVeagh*, Henry J holds that "where there is possession of relevant information, in the absence of negating evidence of protection the court will readily infer that there is a risk of disclosure".[57] Crucial to the efficacy of Chinese walls is the manner and degree of knowledge movement within a firm. There is acceptance in both *Bolkiah* and *Russell McVeagh* of the proposition that Chinese walls are capable of preventing knowledge from being disclosed through formal or deliberate means. The difference between the two approaches is Henry J's greater willingness to accept that internal controls may be effective despite "the realities of

---

[55] *Bolkiah*, above n 43, 225.
[56] *Bolkiah*, above n 43, 227.
[57] *Russell McVeagh*, above n 27, 652.

life and the ordinary behaviour and incidents of relationships where individuals practice together in a firm".[58]

The question of informal knowledge transfer has been canvassed in a number of cases addressing Chinese walls. It has been suggested that no matter how large a firm, there will be innumerable occasions when lawyers having confidential information relating to a former client will be in contact with a lawyer representing a client with conflicting interests. Cory J in *MacDonald Estate* identifies partners' meetings, committee meetings, lunches, office golf tournaments, boardrooms and washrooms as potential contact points.[59] In *D & J Constructions v Head* Bryson J notes that "wordless communication can take place inadvertently and without explicit expression, by attitudes, facial expression or even by avoiding people one is accustomed to see, even by people who sincerely intend to conform to control".[60] The risk of informal transfer is exacerbated by the presence of support staff in the form of legal executives, secretaries and summer clerks who may have less appreciation of the importance of confidentiality.[61]

If it is accepted that informal disclosures occur to a significant degree within a firm, it may appear to follow that Chinese walls have no place in the legal profession. However, the informal information seepage occuring within a firm may also occur between staff of different law firms with conflicting clients. In the small commercial legal community in New Zealand it is not uncommon for staff of one firm to socialise with, live with, or even marry the staff of other firms. One flat of junior staff may contain employees of many firms. While it may be hoped that contractual confidentiality requirements act to prevent deliberate or formal disclosure, the wordless communication identified in *D & J Construction* will still occur. The risk of

---

[58] *Russell McVeagh*, above n 27, 655.
[59] *MacDonald Estate v Martin* (1990) 77 DLR (4th) 249, 273.
[60] Above n 21, 123.
[61] I Schein "Legal Secretaries and the Conflict of Interest Rule" (1992) 14 Advocates Quarterly 81.

accidental disclosure between firms is similar to the risk of accidental disclosure across a Chinese wall within a firm.

No situation where clients with conflicting interests are represented by firms from the same small city can be wholly free of a risk of informal disclosure. *Bolkiah*'s statement that the Court will intervene unless there is no risk of disclosure,[62] applied strictly, would result in disqualification wherever firms in the same city represented clients with conflicting interests. This outcome would be absurd. It follows that disqualification of a single firm from accepting successively conflicting retainers on the basis of a similar level of risk of informal disclosure is almost as absurd.

The *Russell McVeagh* approach, while not pursuing an ideal world, acknowledges the reality of legal practice in New Zealand.

2 *Chinese wall effectiveness*

It is acknowledged that there is little evidence evaluating Chinese wall effectiveness.[63] The US Seventh Circuit Court of Appeals has identified factors appropriate for consideration in determining Chinese wall effectiveness.[64] These include, but are not limited to, the size and structural divisions of the law firm involved, the likelihood of contact between solicitors acting for the former and current clients, the existence of rules which prevent solicitors for the current client from accessing files related to the former client, and rules which prevent the solicitor for the former client from sharing fees derived from the new client. The Court affirmed that such determination must be made on a case by case basis.

---

[62] *Bolkiah*, above n 43, 226.

[63] FW Hamermesch "In Defence of a Double Standard in the Rules of Ethics: A Critical Reevaluation of the Chinese Wall and Vicarious Disqualification" (1986) 20 Journal of Law Reform 245, 270.

[64] *Schiessle v Stephens* (1983) 717 F 2d 417. *La Salle National Bank v County of Lake* (1982) 703 F 2d 252.

Authority now seems to accept that Chinese walls are effective in overcoming formal disclosure.[65] Whether a Chinese wall is effective therefore turns on three questions. Does the barrier design stop formal disclosure? How much informal disclosure is permissible if the Chinese wall is to be regarded as effective? How much informal disclosure does the Chinese wall allow? The first question is answered by reference to the facts, and is clearly capable of an affirmative answer. The second question raises a policy consideration. *Bolkiah* requires an absence of informal disclosure, while *Russell McVeagh* appears to require informal disclosure to be reduced to a level which is reasonable in light of competing policy interests. If the *Bolkiah* approach is taken, the nature of human interaction is such that the third question is almost never likely to be answered in the affirmative.[66] If the *Russell McVeagh* approach is taken, it becomes necessary to consider the restraint of informal disclosure more closely.

Chinese walls are more likely to be effective in so-called mega-firms. An increase in firm size will diminish the level of informal contact between staff from different areas in the firm. Offices in different cities mean that many staff may be wholly unacquainted with staff in another area of the firm. Thomas J, in his *Russell McVeagh* dissent, holds that the physical separation possible in mega-firms does not eliminate the risk of informal disclosure. He cites electronic communication and ease of travel as factors nullifying the protections afforded by a large organisation. These factors contribute more to a risk of formal disclosure, rather than the informal, even non-verbal disclosure envisaged in *D & J Constructions*. The assumption that law firm staff are unavoidably in contact with all other staff has decreasing validity in the age of the mega-firm.[67]

---

[65] *Bolkiah*, above n 43. *Russell McVeagh*, above n 27.

[66] NS Poser "Chinese Wall or Emperor's New Clothes? Regulating Conflicts of Interest of Securities Firms in the US and the UK" (1988) 9 Michigan Yearbook of International Legal Studies 91, 128.

[67] M Steinberg and T Sharpe "Attorney Conflicts of Interest: The Need for a Coherent Framework" (1990) 66 Notre Dame Law Review 1, 3.

This is reinforced by specialisation within mega-firms. While lawyers in small practice may be called upon to work in a variety of fields, the number of lawyers in a mega-firm affords the luxury of specialising in a certain area of law. This establishes internal departmental divisions which may result in little contact between staff in certain departments. A commercial property lawyer may have little incidental contact with an intellectual property lawyer or a public lawyer. As a result, the risk of informal disclosure within mega-firms is reduced.

Chinese walls are capable of preventing formal disclosure. They will never completely prevent informal disclosure, but in a mega-firm the risk of such disclosure can be reduced to a level where disqualification is inappropriate.

D Relevant Value Considerations

1 Appearance of justice

A lawyer is both a private agent and an officer of the court. As an officer of the court, lawyers have traditionally been expected to act so as to maintain public confidence in the law.[68] As such, courts have looked to disqualify firms from acting where this is necessary to maintain the appearance of justice, even if it is not necessary to maintain the fact of justice.[69] On this basis Chinese walls are commonly rejected as incapable of creating the appearance of justice, despite their potential to create the fact of justice.[70] This approach was rejected in *Russell McVeagh*, where Henry J held that the possibility of public perception could not provide an adequate standard for

---

[68]See *MacDonald Estate*, above n 59, 270.
[69]*D & J Constructions*, above n 21, 124.
[70]See *D & J Constructions*, above n 21, 123.

disqualification.[71] Rather it appears that public perceptions may be a permissible consideration as part of the balancing exercise required by the Court.

Disqualification for apparent conflicts of interest is not a necessity for the protection of a client's interests. The benefit achieved by such a rule is a purported maintenance of public confidence in the legal system. This cost for this benefit is significant, impacting negatively on both firms and clients. By considering the public interest benefits of maintaining the appearance of justice as part of a balancing exercise, it becomes possible to assess whether the benefits of maintaining appearances outweigh the costs in a given case. A strict appearance of conflict rule may frequently result in disqualification where the injury to public perceptions of justice are minimal when compared to the disadvantages imposed on legal practice and client interests.

While disqualification will be appropriate where the fact of disclosure is clear, the appearance of justice is best regarded as a value to be considered in a balancing exercise. The potential appearance of injustice should not be used as a strict rule to reject Chinese walls.

2 Professional mobility

There is judicial recognition of the value of maintaining the mobility of lawyers within the legal profession.[72] Where a lawyer shifts firms, the confidential information they may have received at the first firm may create a conflict of interest when the new firm acts against the interests of a client of the previous firm. The potential exists for numerous disqualifications as lawyers shift between firms. The problem is even

---

[71] *Russell McVeagh*, above n 27, 654.
[72] *Equiticorp*, above n 1, 739. *MacDonald Estate* above n 59, 255.

greater where a lawyer specialises in a certain area of law, due to the circumscribed pool of clients demanding that speciality.[73]

In *Bolkiah*, the House of Lords held that where a firm was shown to hold information relating to a former client, it would be disqualified from acting for a new client with conflicting interest unless there was no risk of disclosure. This approach would seem to apply equally to a transferring lawyer. Where the firm was in possession of confidential information about the client of another firm obtained from a transferring lawyer, it would be disqualified from acting for a client with conflicting interests unless there was no risk of disclosure. Given the Lords' unwillingness to accept measures reducing the risk of disclosure, this would effectively prevent lawyers from shifting firms. This effect would be exacerbated in New Zealand by the small size of the legal profession.

Professional mobility is expressly accepted as a valid value in the *Russell McVeagh* balancing exercise.[74] It is notable that the case by case consideration of the importance of professional mobility had been accepted in New Zealand law alongside the stricter pre-*Russell McVeagh* disqualification rule, albeit subordinated to the pursuit of an appearance of justice.[75] The smallness of the New Zealand legal profession, accentuated by the concentration of corporate law expertise in a few large firms, means that New Zealand cannot afford the luxury of virtually automatic firm disqualification through lawyer transfer. A balancing exercise allows consideration of the need for mobility alongside the values militating in favour of disqualification.

The *Russell McVeagh* acceptance of Chinese wall effectiveness also provides a partial solution to the problems of transferring lawyers. Institutional arrangements have been

---

[73] *Analytica v NPD Research* (1983) 708 F 2d 1263.
[74] *Russell McVeagh*, above n 27, 651.
[75] *Equiticorp Holdings v Hawkins*, above n 1, 739.

accepted by United States courts to prevent firm disqualification as a result of lawyer transfer.[76] The use of Chinese walls provides a means for professional mobility without significant negative impacts on the profession.

3 Professional competition

Modern commercial legal practice has replaced the idea of client loyalty to a single firm with market driven, cost and ability based client mobility.[77] Commercial clients, mindful of the need for cost-effective legal solutions, may shift firms to obtain the best outcomes, or may retain different firms to undertake different work. Such competition is capable of stimulating firms to deliver quality services to clients, and of enabling clients to reduce their legal bills. The movement of clients between firms results in a number of firms being in possession of confidential information relating to a client. Disqualification of each of these firms from acting for a client whose interests compete with the mobile client would be destructive of the legal profession.

Russell McVeagh offers three solutions to this problem. First, disqualification will not occur unless the information received from the former client is specifically related to the retainer of the new client. General information is an insufficient ground for disqualification.[78] Secondly, market competition is expressly valid as a consideration in the balancing exercise.[79] Thirdly, Chinese walls may be effective in allowing client mobility without infecting an entire firm with each transfer.

Bolkiah does not explicitly canvass the issue of client mobility, but it is apparent from Lord Millett's judgment that the point would have been dismissed as subordinate to

---

[76] *Kesselhaut v United States*, above n 25. *Nemours Foundation v Gilbane, Aetna, Federal Insurance* (1986) 632 F Supp 418.
[77] D Dawson "New View of Law Puts Money First" (1995) 11 Australian Lawyer 10.
[78] *Russell McVeagh*, above n 27, 653.
[79] *Russell McVeagh*, above n 27, 651.

the need for an appearance of justice and the absence of risk. While this dismissal may be sustainable in England, where the number of large and skilled firms may make competition possible despite a strict disqualification rule, New Zealand would be unable to maintain a competitive environment with such a rule. Where eight major law firms are available to provide specialist services to five major banks,[80] the maintenance of professional competition is tenuous and should not be eroded by a disqualification rule which disregards the value of client mobility.

4 Choice of quality counsel

The right of a client to select their legal representative is an important, if fettered, right.[81] Where a client has established a relationship with a firm, it will be disadvantageous to the client to be forced by disqualification to seek new counsel. The client will lose the benefit of the disqualified firm's familiarity with their business, and may be deprived of the work done by the disqualified firm. The new firm may have to duplicate work at the client's expense. These problems are accentuated in time governed situations such as litigation and takeovers. The new firm may be unable to provide quality legal services within the time constraints imposed by the transaction.

This negative impact arose in the *Bolkiah* situation. KPMG were plainly the best placed advisers to conduct the investigation required by the BIA. In retaining Arthur Anderson to replace KPMG, BIA would be subject to increased costs. This fact is not addressed in Lord Millett's judgment, nor is there room for consideration of the factor in the approach promulgated in *Bolkiah*.

---

[80] *New Zealand Law Who's Who* (New Zealand Lawyer Ltd, 1995) 9.

[81] *Black*, above n 15, 409. *Wells v Wellington District Law Society* [1997] 1 NZLR 660. See also *Gazley v Lord Cooke of Thorndon* [1999] 2 NZLR 668.

The *Russell McVeagh* balancing approach allows a court to consider the burdens which would be imposed by a disqualification order, and potentially decline to make such an order where these were significantly in excess of the public interest benefits which would accrue. Further, *Russell McVeagh* enables the operation of Chinese walls to avoid the negative consequences of disqualification. Protection of the interests of the current client can be effected with little or no real injury to the interests of the former client.

5 *Vexatious litigation*

Where organisations are in competition with one another, whether in the commercial world or through litigation, there is a strategic advantage to one organisation in depriving the competing organisation of legal counsel. This was arguably a factor in the *Russell McVeagh* disqualification application, with Tower seeking to disadvantage Guinness Peat Group's involvement in Tower's demutualisation by requiring them to find new lawyers. Companies may behave so as to create the possibility for future disqualification actions against competitors. In *Australian Commercial Research and Development v Hampson*[82] the plaintiff briefed fourteen Queens Counsels prior to the commencement of proceedings. While the judge declined to make a ruling on the point, this behaviour hints at the risk of vexatious abuse of disqualification rules. There has been suggestion that New Zealand companies have sought to retain firms for relatively minor projects so as to effectively disqualify them from acting for a competing interest in the future.[83] While the use of unjustified disqualification applications as a delaying tactic may be an abuse of process,[84] the risk that clients may deliberately behave to create grounds for disqualification remains.These strategies are

[82](1989) 1 Qd R 508.
[83]"Privy Council storms professionals' Chinese walls", above n 42.
[84]*Black*, above n 15, 420.

neither conducive to public confidence in the law,[85] nor to the effective operation of the legal profession.

The *Bolkiah* approach to disqualification makes such strategies more likely to succeed. Courts are required to disqualify where there is a risk of disclosure, and have no way of considering the potential motivation of the former client. The issue was not relevant to the facts of *Bolkiah*, and was not addressed by Lord Millett. In disregarding this consequence of the decision, *Bolkiah* has potentially created a disqualification environment which is conducive to abuse. There is little to commend this.

Despite the potential relevance of the issue, Henry J does not address vexatious disqualification applications in *Russell McVeagh*. However, the majority approach is capable of resisting ill-motivated applications. Motivation could be included in the balancing exercise to decline an application, or Chinese walls could be accepted as a means of avoiding disclosure. Where evidence of vexatious behaviour existed, the standard required of Chinese walls could be lowered.

6 Evidential implications

Successive conflict of interest situations, resting on the potential disclosure of confidential information, create significant evidential problems. To obtain a disqualification order, applicants must show that the firm has confidential information relevant to the new retainer. Mindful of the need to sustain confidentiality, parties may be unwilling to adduce the relevant information as evidence. This point was considered in *MacDonald Estate*, where the self-defeating nature of adducing confidential information in support of a disqualification application resulted in the use

---

[85] *Panduit Corp v All States Manufacturing* (1984) 744 F 2d 1564, 1576.

of a rebuttable presumption that such information existed where there was a substantial relationship between the two retainers.[86]

Both *Bolkiah* and *Russell McVeagh* reject the use of presumptions.[87] The first stage of the *Russell McVeagh* approach requires an inquiry into the existence of specifically relevant confidential information. This requirement is not modified by any inferences, and the onus of proof appears to lie with the applicant. In *Bolkiah*, Lord Millett states that the existence of relevant confidential information may be readily inferred, and notes that the evidential burden is not a heavy one.[88] The tenor of the judgment suggests that the information need only be generally relevant.

A court applying *Bolkiah* will be readier to accept that confidential information is relevant, because the plaintiff need only prove the appearance of injustice. It need only be shown that confidential information may be relevant or that it would appear to be relevant. This burden may be discharged without reference to the detail of the information, as it was in *Bolkiah*. A court applying *Russell McVeagh* would need proof that confidential information was actually specifically relevant, a burden which would be difficult to discharge without use of the information in question. This may affect the willingness of a former client to seek a disqualification order.[89]

This creates a potential procedural problem in the application of *Russell McVeagh*. The practical effectiveness of the approach may be dependent on a reduction in the standard of proof for the first stage of the test. A greater willingness to infer relevance, using either a *MacDonald Estate* rebuttable presumption or the *Bolkiah* low threshold burden on the plaintiff with the possibility of inference, would achieve this without being destructive of the overall approach. The second and third elements of the test,

---

[86] *MacDonald Estate* above n 59, 267.
[87] *Russell McVeagh*, above n 27, 651. *Bolkiah*, above n 43, 225.
[88] *Bolkiah*, above n 43, 225.
[89] Coull, above n 6, 349.

considering the likelihood of disclosure and the balancing exercise, would still operate to avoid the negative outcomes of *Bolkiah*. The problem of proof does not create a fundamental problem in the application of *Russell McVeagh*.

E The Russell McVeagh Approach and the Privy Council

Henry J's judgment in *Russell McVeagh* is not written in anticipation of surviving Privy Council scrutiny. In *Hamlin*, the Court of Appeal judgment allowed by the Privy Council as a variation from the English law was explicit in identifying the material differences between the two jurisdictions. Justice Richardson cited at length the findings of a Commission of Inquiry chaired by Robin Cooke QC, as he then was, providing detailed factual evidence of social difference.[90] This evidence provided a clear basis for the Privy Council to accept a departure from the English law.

Russell McVeagh is not so explicit. Only in the conclusion to his judgment does Henry J note that "New Zealand is still comparatively small, and in some professional areas the availability of expert advice is limited".[91] Henry J does not provide the factual analysis presented by Richardson J in *Hamlin*. It is Thomas J, in his dissenting judgment, who provides a more detailed analysis of the New Zealand legal profession.[92] Nor does Henry J provide a direct and substantive attack on the stricter approaches. However, he is explicit in adopting a different approach to that in England, thus avoiding Lord Lloyd of Berwick's restriction that where the Court of Appeal purports to apply English law, the Privy Council will intervene to ensure that it does so correctly.[93]

---

[90] *Hamlin*, above n 49.
[91] *Russell McVeagh*, above n 27, 655.
[92] *Russell McVeagh*, above n 27, 659.
[93] *Hamlin*, above n 49, 519.

The weaknesses in Henry J's argumentation do not mean that the *Russell McVeagh* approach is unsustainable. Rather when the *Russell McVeagh* approach is tested against the *Bolkiah* approach, the Court of Appeal, should it wish *Russell McVeagh* to be accepted by the Privy Council, ought to provide information of the character presented by Richardson J in *Hamlin*.

The issue of successive conflicts of interest does address materially different societal scenarios in New Zealand to those relevant in England. These differences are both quantitative and qualitative. The *Russell McVeagh* approach provides an effective resolution to these specifically New Zealand problems. *Hamlin* provides an approach for justifying the New Zealand Court of Appeal's approach against modification or rejection by the Privy Council.

VI LAW FIRM CONDUCT

Until the New Zealand law is clarified by the Privy Council, law firms will remain uncertain as to how to proceed in conflict of interest situations. Two approaches are possible.

A Conduct under Russell McVeagh

Regardless of the direction taken by the law, the safest conduct available to a law firm is to pursue the consent of the former client to the new retainer. Informed consent would provide effective rebuttal to an application for disqualification, provided the law firm acted within the scope of the former client's consent.

If consent cannot be sought, or is not forthcoming, then the firm must consider the quality of its actions. *Russell McVeagh* does not provide a basis for concurrent representation of conflicting clients. Such representation would breach the firm's

fiduciary duty to the first client, as well as creating a risk of disclosure of confidential information. *Russell McVeagh* is not authority for a reduction in the fiduciary duty owed to current clients. Thus, in the absence of consent, conflicting retainers should only be accepted following the termination of the first retainer.

Where a successive conflict exists, *Russell McVeagh* provides a firm with three defences to a disqualification action. The confidential information held by the firm may be irrelevant, there may be no real risk of disclosure, or disqualification may not be in the public interest. Evidential problems make the first argument difficult to present. Henry J notes that the three stages of his disqualification test overlap.[94] Disqualification may be disputed with an argument that, given the existence of an effective Chinese wall, the benefits of disqualification are outweighed by the practical difficulties such disqualification would cause.

The efficacy of this argument turns on the ability of the firm to show the existence of an effective Chinese wall. In the absence of New Zealand guidelines as to the components of an effective Chinese wall, it is useful to consider the Canadian guidelines cited in *Canada Southern Petroleum v Amoco Canada Petroleum*.[95] The Federation of Law Societies promulgated twelve guidelines for the avoidance of conflicts in transferring lawyer cases in response to *MacDonald Estate*. These are largely applicable to all successive conflicts. The guidelines require that there be no concurrent or successive involvement of professional or support staff in both matters, and that physical separation is required. Those in possession of former client information should not discuss either the former or the current representation with anyone in the firm. The current representation should only be discussed within the group working on the matter. Electronic and physical material relating to the current representation should only be available to those working on the matter. The

---

[94] *Russell McVeagh*, above n 27, 651.
[95] Above n 2, 45.

arrangements should be in writing, and publicised with the warning that breaches will result in sanctions potentially including dismissal. Relevant staff members should sign affidavits stating their continued adherence to the policy. Those staff holding former client confidential information should not participate in the fees generated by the new representation.

The guidelines also require that notice of the representation be given to the former client. This requirement seems to add little, as it does not carry a commensurate requirement of former client consent. Where the other guidelines are complied with, an effective Chinese wall will almost always be created. Giving notice to the former client does not affect the effectiveness of the wall. Further, where the wall is effective, the former client's interests will not be materially affected.

Where a wall of the type envisaged by the Canadian Federation of Law Societies is established, formal disclosure will be prevented. Informal disclosure will be reduced to a level similar to that which occurs daily between separate law firms. This degree of disclosure should not provide grounds for disqualification.

Compliance with the Canadian requirements of physical separation, restricted file access, non-discussion, education, and enforcement, should enable a firm to avoid disqualification under *Russell McVeagh*. Development of indigenous guidelines on Chinese walls would aid firms in ensuring safe conduct.

B Conduct under Bolkiah

Under *Bolkiah* a firm wanting to maintain successively conflicting retainers must show that there is no risk of disclosure, and that there is an appearance of justice. The court will readily infer that confidential information received under the first retainer is relevant to the second retainer. The only defence to a disqualification action is that the

barriers within the firm are effective in overcoming the risk of disclosure. Lord Millett requires that an internal barrier be an established part of the firm, not established ad hoc, and that it is not dependent on the acceptance of affidavits from the relevant staff.

Opinion following the *Bolkiah* decision was that Lord Millett's conditions were unachievable in New Zealand firms, meaning that adoption of the approach would result in widespread disqualification.[96] Notably, large English legal firms also indicated that Lord Millett's Chinese wall was unfeasible.[97]

Despite this, the English High Court subsequently accepted the efficacy of a Chinese wall, understanding Lord Millett's comments on ad hoc walls to mean that they were less likely to be effective, rather than being ineffective.[98] The accepted barrier did not proscribe social contact. Notwithstanding the attractions of this interpretation, it is likely that the judgment would not have survived appeal.

Instead, it has been suggested that large English firms will simply disregard *Bolkiah*, as they admit to disregarding previous judicial direction in the area.[99] The comparative smallness of New Zealand firms may result in more risk averse behaviour. Successively conflicting retainers could only survive a disqualification application where distinct departments, physically divided between two cities, with total information separation, represented the respective clients. It appears that any work related contact will result in disqualification. The group representing the new client would have to come close to resembling a distinct firm. Such separation would rarely be cost-effective in New Zealand firms where staff commonly work concurrently on a number of different tasks. Staff working on the new retainer would be unable to have

---

[96]"Privy Council storms professionals' Chinese walls", above n 42.
[97]J Griffiths-Baker "Further cracks in Chinese walls" (1999) 149 NLJ 162, 175.
[98]*Young*, above n 10, para 42.
[99]J Griffiths-Baker "Further cracks in Chinese walls" (1999) 149 NLJ 162, 175.

sufficient contact with the rest of the firm to work on these other matters. Only the very largest clients could warrant this dedicated staff.

Adoption of *Bolkiah* would result in widespread disqualifications, with very few coincidences of firm and client which allowed erection of a Chinese wall to have a palliative effect.

VII CONCLUSION

The *Russell McVeagh* approach to conflicts of interest is unlikely to be overturned by the New Zealand Court of Appeal in light of the *Bolkiah* decision. The negative outcomes of such a move would be apparent to the Court. Further, in the short term, the personality of the Court of Appeal is unchanged. Richardson P, and Gault, Henry and Blanchard JJ are unlikely to change their 1998 positions, regardless of an intervening House of Lords decision.

Any future Court of Appeal decision on successive conflicts or Chinese walls is likely to be appealed to the Privy Council. The view exists that the Privy Council would willingly replace the *Russell McVeagh* approach with the *Bolkiah* approach.[100] This argument is ill-founded. Neither *Russell McVeagh* nor *Bolkiah* provide a perfect solution to the problem of successive conflict.

In advocating an analogous approach to that later taken in *Bolkiah*, Thomas J accepts that such an approach does not suit the New Zealand profession, but states that "it is the structure of the profession which must adjust".[101] However, it is questionable whether adjustment is possible, given the continuing needs of large clients.[102] The

---

[100] "Privy Council storms professionals' Chinese wall", above n 42.
[101] *Russell McVeagh*, above 27, 661.
[102] *MacDonald Estate*, above 59, 255.

Russell McVeagh majority approach, while not without fault, will avoid significantly negative outcomes of successive conflicts. Further, the acceptance of this realistic rule will prevent the emergence of the disregard for the law now evident in England.[103]

The solution advanced in *Russell McVeagh* is preferable for New Zealand conditions. If presented with an analysis of the New Zealand legal profession in *Hamlin* terms, the Privy Council may be willing to accept the validity of New Zealand's departure from the English law.

---

[103]Griffiths-Baker, above 97, 175.