Successively conflicted

Confidentiality has proven the focus for successive conflict disqualification

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In 2001 Brooking JA in *Spincode Pty Ltd v Look Software Pty Ltd*,[1] in dealing with former client ('successive') conflicts, opined that "the danger of misuse of confidential information is not the sole touchstone for intervention where a solicitor acts against a former client". His Honour, to this end, considered that "it may ... be a breach of duty for a solicitor to take up the cudgels against a former client in the same or a closely related matter",[2] which duty could be sourced from, inter alia, an equitable obligation of 'loyalty'.

Though not without supporters, the trajectory of subsequent case law has largely steered against a subsisting 'loyalty' obligation in this context. Given its close parallel (or even identity) with fiduciary principle, it was challenged by case law inconsistent with the proposition that fiduciary duties survive the termination of the (usually contractual) relationship that attracted those duties in the first place.[3] Moreover, locating the trigger for judicial intervention in (alleged) successive conflict cases as a real possibility of misuse of confidential information, as much of the case law has done, gives the inquiry a greater degree of precision than one grounded solely in an amorphous notion of 'loyalty'.

A second reason why the continuing 'loyalty' approach has received little judicial traction is that its main target — a scenario where, absent a misuse of confidential information, it nonetheless appears wrong to allow a lawyer to continue acting against a former client — has been addressed via the courts' long-standing inherent jurisdiction over its own officers. Directed at preserving the proper administration of justice, it affords the court power to determine which of its officers may represent parties to litigation.[4] The relevant inquiry is whether a fair-minded reasonably informed member of the public would find it subversive to the proper administration of justice to allow the representation to continue.[5]

Importantly, the inherent jurisdiction is not confined to cases involving successive representation; it has a much broader scope, including instances raising legitimate questions over the independence of a lawyer in the matter.[6] Just as importantly is the courts' repeated branding of the jurisdiction as very much exceptional or extraordinary.[7] And the reasonable observer, whose perspective the court must adopt, 'does not act on suspicion', nor 'make connections or draw inferences in the absence of evidence'.[8] It should not, as a result, be assumed that plaintiffs unable to establish a real possibility of misuse of confidential information in the successive representation context can routinely resort to the inherent jurisdiction to achieve disqualification.

It is an exceptional jurisdiction because its exercise is directly adverse to the important policies of (client) freedom to choose legal representation and (lawyer) freedom to practice a profession. It may also be exceptional because, not unlike the suggested equitable loyalty obligation, it invites a court to intervene on grounds that may be perceived to lack precision. In turn this explains the relatively few instances where courts have been convinced to apply it to restrain an alleged former client conflict.

Much more frequently courts have targeted their inquiry at confidential information, even in family law litigation, which has often elicited particular judicial sensitivity in this regard. So where in *Cuoco v Cuoco*[9] the wife sought to disqualify the husband's solicitor on the ground that he had acted for the parties in a conveyancing transaction and advised on a pre-nuptial agreement, Rees J refused the application because the wife could not point to any confidential information she had communicated in those dealings.

Just as a former client will likely find it difficult to substantiate a successive conflict independent of proof of a real possibility of misuse of confidential information, this is more difficult again for an applicant who was never a former client. In *Daher v Halabi*[10] the husband sought to disqualify the wife's law firm from acting in the family law proceedings, on the ground that his brother-in-law was a partner at the firm (as was the wife). The husband deposed that he had confided in his brother-in-law. That there was no suggestion that the relevant relationship was that of solicitor and client, even if some confidence existed, proved fatal to the application. Loughnan J saw the argument as one that "conflates the idea of private confidences with the important legal privilege that attaches to information that is imparted between solicitor and client".[11]

That Australian law appears to have ultimately focused on confidentiality as the relevant inquiry in successive conflicts applications bodes well for an area in need of clarity and certainty.

NOTES

1. (2001) 4 VR 501; [2001] VSCA 248 at [52].
2. *Ibid*.
3. See, for example, *Collard v State of Western Australia (No 4)* [2013] WASC 455 at [1513] per Pritchard J.
4. *Davies v Clough* (1837) 8 Sim 262 at 267; 42 RR 171 at 174 per Viscount Shadwell VC.
5. See *Rapid Metal Developments (Australia) Pty Ltd v Anderson Formrite Pty Ltd* [2005] WASC 255 at [181]–[189] per Johnson J.
6. See, for example, *R & P Gangemi Pty Ltd v Luppino Pty Ltd* (2012) V ConvR 54-815; [2012] VSC 168 (where the lawyer was propounding a cause on the client's behalf prompted by the lawyer's own error).
7. See, for example, *T J Board & Sons Pty Ltd v Castello* [2008] VSC 91 at [30] per Hollingworth J.
8. *Moore v Scenic Tours Pty Ltd* [2015] NSWSC 237 at [88] per Garling J.
9. [2014] FamCA 611.
10. [2014] FamCA 675.
11. *ibid.*, at [62].