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Abstract
When speaking of the ethics of giving tax advice, whether by a lawyer or an accountant, what often comes to mind concerns the ethics of advising clients as to ways of reducing their tax liability. This necessarily triggers a variety of views, often impacted by individual so-called 'ethical tolerance', rather than a concrete principle. This article instead focuses on an ethical domain for tax advisers with an ostensibly more concrete application, namely the application of conflicts of interest rules in tax practice.

Keywords
ethical conflicts, tax advice, conflicts of interest, Chinese walls, professional obligations of tax practitioners

ETHICAL CONFLICTS AND THE TAX PRACTITIONER

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When speaking of the ethics of giving tax advice, whether by a lawyer or an accountant, what often comes to mind concerns the ethics of advising clients as to ways of reducing their tax liability. This necessarily triggers a variety of views, often impacted by individual so-called 'ethical tolerance', rather than a concrete principle. This article instead focuses on an ethical domain for tax advisers with an ostensibly more concrete application, namely the application of conflicts of interest rules in tax practice.

'ETHICS'

This article is devoted to ethics and the tax practitioner. Though all may accept that 'ethics' are important — whether to tax practitioners, other professional advisors, and for the conduct of broader human interaction —the concept of 'ethics' is not always easy to define or delimit. Most in society see 'ethics' as representative of a course of behaviour that, although not legally mandated, is nonetheless the 'right' way to act.

Conceptualising ethics in this fashion reveals the chief hurdles facing its practical utility. What is 'right' in any given circumstance is unlikely to be the province of unanimous agreement. Accordingly, what amounts to ethical behaviour may likely vary according to the perspective of the individual. It is not unusual to speak of 'individualised ethics' which is fed by the absence of a legal mandate or legally enforceable consequences. While not all may agree with the law, compliance with the law is not a matter of individual whim. The law transcends individual belief and desire, not just because it is 'the law' — a descriptor that sounds both authoritative and unyielding — but because that status carries with it the power of enforcement.[1]

Of course, 'the law' cannot help but be informed by considerations of 'rightness', and accordingly by notions underscoring what is 'ethical'. After all, litigating parties each appeal to the 'rightness' of their cause (or defence) but at the adjudicative stage both cannot, by definition, prove wholly successful. The ethical underpinnings of the law, as declared by an adjudicative tribunal, are therefore not amenable to 'rightness' at large, but operate by reference to an external, ostensibly objective, reference point.

Moreover, so far as ethics are concerned, what is 'right' may, beyond involving a subjective (individualised) inquiry, rest on the particular circumstances in which the inquiry is made. Hence the phrase 'situational ethics', implicitly suggesting that what is 'right' may vary according to the

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1 For instance, 'law' has been defined, inter alia, as 'an obligatory rule of conduct', '[t]he commands of him or them who have coercive power' and 'a rule of conduct imposed and enforced by the Sovereign': Woodley M (ed), *Osborn's Concise Law Dictionary* (10th ed, Sweet & Maxwell, 2005), 238.

situation facing the individual in question. It follows that what is 'right' in one instance may, because of countervailing considerations, not necessarily be 'right' in another.

In view of the foregoing, for many persons 'ethics', being both individualised and situational, remain the domain of individual conscience and/or broader public reputation. A person chooses to behave 'ethically', it is reasoned, not because of any legal sanction operating on 'unethical' behaviour but because it appeals to his or her own peace of mind, whether or not informed by religious motivations, and/or a desire to avoid slights on his or her reputation. But for those whose conscience is not pricked by 'ethics', or who are less concerned with matters of reputation (or otherwise believe in their ability to shield their reputation from adverse inference), only the law may set the parameters of behaviour.

This distinction between 'law' and 'ethics' has dovetailed into discussions of the ethics of tax practitioners most prominently in targeting the 'ethics' — or 'rightness' — of advising clients of ways of reducing their tax liability.[2] Even members of the judiciary have ventured views in this regard. For instance, in 1943 Viscount Simon LC, commenting on what today would likely be viewed as legitimate tax planning, said the following:[3]

> There is, of course, no doubt that they are within their legal rights, but that is no reason why their efforts, or those of the professional gentlemen who assist them in the matter, should be regarded as a commendable exercise of ingenuity or as a discharge of the duties of good citizenship. On the contrary, one result of such methods, if they succeed, is, of course, to increase pro tanto the load of tax on the shoulders of the great body of good citizens who do not desire, or do not know how, to adopt these manoeuvres.

Conversely, there is the classic statement of Lord Macnaghten that 'no one is bound to leave his property at the mercy of the revenue authorities if he can legally escape their grasp'.[4] Tax practitioners generally adhere to this view. The issues raised by Viscount Simon are generally rationalised, including by judges of high authority,[5] by directing the responsibility to the legislature. Tax law is, ultimately, a creature of statute. And as a tax is, by definition, 'a compulsory exaction of money by a public authority for public purposes [which does not] … constitute payment for services rendered',[6] its inherent infringement on personal autonomy and property riles against any suggestion that a person should pay more than is statutorily required.

Tax practitioners can assuage any tugging at their consciences by resting on their role in fostering a core value, namely taxpayers' personal autonomy. They can also seek to locate the 'ethics' of their advice squarely in the domain of the taxpayer client. If a client wishes to avail itself of a tax

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2 See the discussion in Regan M C, 'Tax Advisors and Conflicted Citizens' (2013) 16 *Legal Ethics* 322 (describing the tension between the tax advisor as both advocate and trustee, as reflective of the potentially conflicting roles of the taxpayer as a private and a public citizen).

3 *Latilla v Inland Revenue Commissioners* [1943] AC 377, 381. See also *Countess Fitzwilliam v Inland Revenue Commissioners* [1993] BTC 8003, 8035 (Lord Templeman, dissenting).

4 *Commissioner of Stamp Duties v Byrnes* [1911] AC 386, 392.

5 See, for example, *Federal Commissioner of Taxation v Westraders Pty Ltd* (1980) 144 CLR 55, 59, 60 (Barwick CJ). See further Myers A, 'Tax Advice: The Lawyer's Ethical Responsibility' (1990) 19 *Aust Tax Rev* 80.

6 *Matthews v Chicory Marketing Board* (1938) 60 CLR 263, 276 (Latham CJ).

minimisation route that is legal — whether or not it is 'ethical' or 'right' — the tax practitioner is duty-bound to assist.[7] A former Chief Justice of the High Court of Australia, speaking extra-judicially, has opined that 'the morality of tax avoidance (as distinct from tax evasion) is very much a matter for the individual taxpayer'.[8]

At the same time, another former High Court judge, again extra-judicially, encouraged tax practitioners to assess 'whether the objective or the means of achieving it, although not prohibited by law, may nevertheless be regarded as dishonest by the standards of the community'.[9] There is, it seems, a risk that a purely mechanical approach to tax advice could, in time, function to desensitise the practitioner to the 'ethics' of their advice. This appears to have been the fate of two tax lawyers in *R v Pearce*.[10] In ordering a term of imprisonment, in what was admittedly a clear case of fraud, the judge's sentencing remarks nonetheless deserve to be pondered:

> I can only think that in the hothouse of the taxation industry you lost your moral compass and direction causing you to play this part in this conspiracy … I suspect that you have been playing the taxation game for so long that your vision as to what is right in the complexities of taxation law and accounts practice has become blurred.

There is clearly room for divergent views in this context, stemming not only from notions of individualised and situational ethics, but also from a perceived ability to shift the ethical judgment to a third party, whether it be the legislature or the client. Propounding one view ahead of another may ultimately come down to value judgments as to the 'rightness' of any particular course. As noted above, many questions of 'rightness', at least when not bolstered by law, remain within the province of individual conscience. And to impose fetters on individual conscience arguably undermines what many view as a fundamental human right.[11]

For this reason, this article does not traverse this path any further. It was mentioned because it forms the classic target when speaking of the 'ethics' of tax practitioners. But it was also mentioned as a backdrop, and counterpoint, to other uses of the concept of 'ethics', at least in a professional sphere, with an apparently more concrete (and less individualised) application.

One such use of the term 'ethics' is as a vehicle to highlight that professionals may be subject to obligations more onerous than those imposed by law. The privilege that comes with professional

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7 *Bayer v Balkin* (1995) 31 ATR 295, 305 (Cohen J) (affd without reference to this specific point: *Balkin v Peck* (1998) 43 NSWLR 706) ('there is a duty on persons such as accountants and solicitors to advise their client how they can avoid, as far as possible, making what the government regards as a proper contribution'). Indeed, a failure to advise clients as to how to legally minimise their tax liability may, where that advice comes within the scope of the engagement, constitute negligence: see, for example, *Hurlingham Estates Ltd v Wilde & Partners* (1996) 37 ATR 261.

8 Mason A F, 'Where Now?, cited without reference by Hampel J in *R v Forsyth* (1990) 20 ATR 1818, 1822–3.

9 McHugh M, 'Jeopardy of Lawyers and Accountants in Acting on Commercial Transactions' (1988) 22 *TIA* 542, 553.

10 (SC(WA), McKechnie J, 13 July 2004, unreported).

11 For instance, Art 18.1 of the International Covenant on Civil and Political Rights ([1980] ATS 23) prescribes 'the right to freedom of thought, conscience and religion'.

status — chiefly a monopoly entitlement to provide a particular service — must, it is reasoned, be counterbalanced by the acceptance of greater responsibility. It has accordingly been suggested that critical to professionalism is that the standards the profession (voluntarily) sets for itself exceed those that can be externally imposed.[12] As those standards represent the judgment of the profession on how its own members should conduct themselves, they should, another commentator has said, 'exceed both in breadth and particularly the requirements of the ordinary law of the land and the dictates of moral philosophy or science'.[13]

Yet a perusal of rules and pronouncements of professional bodies governing tax practitioners (and especially lawyers) reveals relatively little that can accurately meet this description. Instead, they largely reflect what are otherwise legal obligations of the relevant professional.[14] It is in this latter sense though that a further, and ostensibly more practical and realistic, use of the term 'ethics' surfaces. There are 'rules', ordinarily emanating from the law and mirrored in pronouncements by professional bodies, directed to what can be described as 'professional ethics'. Given their predominantly legal foundation, the 'ethics' in question are less subjected to the vagaries of individual conscience.

Some may even query whether the term 'ethics' is apt in this context, in view of the legal force attaching to the relevant 'rules'. If 'ethical obligation' is indeed mutually exclusive from legal obligation, this concern is a valid one. But to use the term 'ethics' as a cover for what can be legally compelled is not necessarily inapt. As noted earlier, legal rules are ordinarily designed to reflect or foster 'ethical' or 'right' behaviour. Moreover, there are 'rules' that apply in the professional arena — most pointedly as between professional and client — that have limited or no substantive application to the provision of services outside that arena. In this sense, albeit that the 'rules' have legal force, they nonetheless have a discrete application to fostering ethical behaviour by (certain) professionals. As a consequence, they merit the descriptor 'professional ethics'.

It should be understood at the outset, however, that *in this context* there are no 'rules' or 'ethics' specific to tax practitioners, whether lawyers, accountants or otherwise. The parameters set by the relevant 'rules' apply to lawyers and accountants generally, whether or not they perform a taxation service. It is nonetheless instructive, after identifying the 'rules' in question (immediately below), to consider their application in the tax practitioner and client environment. This forms the substance of this article.

'ETHICS' TRANSLATING INTO LAW

While it may not be exhaustive of 'professional ethics', a common target is one that can be described as 'conflicts of interest'. As this arises both in the legal and accounting context, and is

12 Benson H, 'The Profession of the Future' (1979) 53 *ALJ* 497, 500.

13 Potter J, quoted in Harley J, 'Ethics, Professionalism and Success' (1993) 15 (Oct) *LSB* (SA) 14.

14 For instance, breach of few, if any, of the rules found in the Australian Solicitors Conduct Rules are incapable of creating some legal (as opposed to professional disciplinary) consequence, for the (errant) solicitor.

most prominently represented in the case law and professional rules, it has been chosen as the focus of 'professional ethics' for the purposes of this article.

As elaborated below, two areas of the general law — fiduciary law and confidentiality law — emanating from equity jurisdiction heavily inform 'professional ethics' under the 'conflicts of interest' banner. Equity jurisdiction, by its historical and substantive nature, fixates upon the conscience of an individual,[15] and the tenets of fiduciary law and confidentiality law present no exception. The fixation upon conscience invites an inherently ethical dimension, which in this instance is translated to legal obligation.

The core legal and ethical principles proscribe the relevant professional from engaging in a dealing involving a conflict between his or her own interests and those of a client (sometimes termed a 'duty-interest conflict'). They also proscribe the professional from acting for two or more clients concurrently whose interests conflict vis-à-vis the relevant engagement(s), and can proscribe a professional from acting for a client against the interests of a former client (collectively, a 'duty-duty conflict'). In each instance, the relevant conflict can be overcome by informed client consent.

Informing the 'duty-interest conflict' rule is, as foreshadowed above, fiduciary law. The latter functions to superimpose upon persons in certain relationships obligations, beyond those agreed by contract or recognised by tort, directed at fostering *loyalty* by one person to another.[16] The proscriptive 'duty-interest conflict' rule accordingly aims to promote loyalty by the professional to a client by ensuring that the professional is not even tempted to sacrifice client duty to his or her own interests. In tandem with the fixation on conscience, fiduciary law, via the 'duty-interest conflict' rule, reflects a quintessentially ethical ideal — namely unselfishness — that is given legal force.

Aspects of the 'duty-duty conflict' rules also exhibit fiduciary overtones. Acting for two or more clients with conflicting interests potentially places the professional in a position whereby he or she cannot fulfil obligations to one client without sacrificing obligations to another. In this instance, it can hardly be said that the professional displays loyalty to the latter client. Disloyalty may, for example, surface in the professional shielding information confidential to one client that may be relevant to the interests of another client.[17]

But not all 'duty-duty conflicts' are necessarily or exclusively proscribed under the fiduciary umbrella. The trend of case authority charts the temporal parameters of fiduciary obligations, in the professional-client context, to the commencement and end of the (contractual) relationship between the parties. It makes little sense, it is reasoned, to recognise obligations of loyalty, attracted by a professional-client relationship, beyond the duration of that relationship. Otherwise, professionals would be subjected to life-long loyalty obligations to each of their

15 See *Earl of Oxford's Case* (1615) 1 Ch Rep 1, 7; 21 ER 485, 486 (where it was said that the Office of the Chancellor, from which equity jurisdiction was originally dispensed, 'is to correct men's consciences for frauds, breach of trust, wrongs and oppressions of what nature so ever they be').

16 See *Breen v Williams* (1996) 186 CLR 71.

17 See, for example, *Hilton v Barker Booth and Eastwood (a firm)* [2005] 1 All ER 651; [2005] UKHL 8.

former clients. This does not mean, however, that professionals can unthinkingly accept engagements that are detrimental to the interests of former clients. The relevant 'interests' the law seeks to protect are those pertaining to information confidential to former clients, which the professional has received or secured in the course of previous engagements. Information does not lose its confidentiality merely because the relationship within which it was communicated has come to an end; the legal concept of confidentiality (in line with its dictionary meaning) envisages that entry of information into the public domain is what forfeits confidentiality.[18]

The relevant principles find expression in the speech of Lord Millett in *Prince Jefri Bolkiah v KPMG (a firm)*,[19] whose remarks to this end not only received the concurrence of the other four Law Lords in the case, but have also seen endorsement by multiple Australian judges.[20] His Lordship said:[21]

> … where the court's intervention is sought by an existing client … a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation Where the court's intervention is sought by a former client, however, the position is entirely different. The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.

It is interesting to note that his Lordship's remarks in the first paragraph above — directed to the 'duty-duty conflict' between existing ('concurrent') clients — were phrased by reference to a 'fiduciary', whereas those in the second paragraph — directed to a former client ('successive') 'duty-duty conflict' — were couched by reference to the relationship between 'solicitor' and client. It is interesting because the *Prince Jefri* case involved an ultimately successful attempt to disqualify *an accounting firm* from acting against a *former* client, and so was grounded in identifying information confidential to that former client. It therefore cast no doubt on the accepted notion that the accountant-client relationship can trigger (legal) obligations of confidentiality. Their Lordships did not, however, need to address whether, as between *existing* clients or for other

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18 *Johns v Australian Securities Commission* (1993) 178 CLR 408, 438 (Dawson J), 460–1 (Gaudron J), 475 (McHugh J).

19 [1999] 2 AC 222.

20 See, for example, *Photocure ASA v Queen's University at Kingston* (2002) 56 IPR 86; [2002] FCA 905, [56] (Goldberg J); *AG Australia Holdings Ltd v Burton* (2002) 58 NSWLR 464; [2002] NSWSC 170, [139] (Campbell J); *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2005] NSWSC 550, [54] (Bergin J); *Nasr v Vihervaara* (2005) 91 SASR 222; [2005] SASC 83, [33] (Doyle CJ, with whom Vanstone and White JJ concurred); *Ismail-Zai v State of Western Australia* [2007] WASCA 150, [23] (Steytler P). Cf *Spincode Pty Ltd v Look Software Pty Ltd* (2001) 4 VR 501; [2001] VSCA 248, [52]–[55] (Brooking JA).

21 *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222, 234–5.

reasons, that relationship may attract fiduciary obligations. The point, so far as 'duty-interest conflicts' and concurrent 'duty-duty conflicts' for non-lawyer tax practitioners are concerned, therefore merits some investigation.

TRANSLATION TO NON-LAWYER TAX PRACTITIONERS

Where the tax practitioner is a lawyer, courts are more likely to identify the relationship between practitioner and client as a fiduciary one.[22] While not every duty owed by lawyer to client is fiduciary in character, those directed to fostering loyalty by lawyer to client — by proscribing 'duty-interest conflicts' and concurrent 'duty-duty conflicts' — are accurately branded as fiduciary. The position may not be so clear where the tax practitioner is not a lawyer, typically an accountant. For the relevant 'professional ethics' to have a breadth of application to tax practitioners, therefore, it is necessary to investigate those circumstances where accountants too can be subjected to fiduciary obligations.

First and foremost, it should be understood that Australian law espouses no defining indicium of relationships that give rise to fiduciary duties. Instead it resorts to several open-ended indicia. These typically involve trust and confidence, an undertaking or a reasonable expectation to act in the interests of another, and the presence of inequality or vulnerability — to conceptualise occasions where fiduciary duties should be superimposed, as distinct from those where an abuse of position, if any, is adequately addressed by existing legal avenues (usually in contract or tort).[23]

Instead it resorts to several open-ended indicia to conceptualise occasions where fiduciary duties should be superimposed, as distinct from those where an abuse of position, if any, is adequately addressed by existing legal avenues (usually in contract or tort). These indicia typically involve trust and confidence, an undertaking or a reasonable expectation to act in the interests of another, and the presence of inequality or vulnerability.

In fostering a higher level of trust and confidence in relationships where it could otherwise be abused, fiduciary law serves to protect the integrity of socially useful relationships and, via the relevant remedial avenues, functions to *deter* abuses of this kind.

Second, it should be understood that, if fiduciary duties are to surface in the accountant-client relationship, they must exhibit the *proscriptive* 'no conflict' character. As in the lawyer-client relationship, fiduciary law has no role in replicating duties agreed in contract or recognised by tort.[24]

A third pertinent observation is that the accountant-client relationship has not been presumed by the law to attract fiduciary obligations, unlike that between lawyer and client.[25] The point is illustrated, in the tax practitioner context, by the New South Wales Court of Appeal's decision in

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22 See generally Dal Pont G E, *Lawyers' Professional Responsibility* (5th ed, Lawbook Co, 2013), 114–17.

23 See Dal Pont G E, *Equity and Trusts in Australia* (6th ed, Lawbook Co, 2015), 109–15.

24 See, for example, in the accountant and client context, *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165; [2001] HCA 31.

25 For instance, it was not found in Mason J's list of accepted fiduciary relationships in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96–7.

Pavan v Ratnam.[26] The respondent was the appellant's tax accountant, having prepared the appellant's tax returns for a few years. The evidence revealed that, in the course of and as part of that relationship, the respondent from time to time advised the appellant on appropriate financial structures and investment options. The respondent, separate from his accountancy practice, decided to pursue a particular investment opportunity, namely the development of land upon which he proposed to build industrial units. The respondent invited the appellant to participate in this investment, by purchasing units in the development as a means of reducing his expected high taxable income in the relevant year. The development encountered difficulties, which ultimately caused the appellant to lose the moneys invested.

The appellant brought proceedings against the respondent for, inter alia, breach of fiduciary duty. He argued that, even if the respondent did not act in the capacity of 'financial adviser' as such, the respondent was a tax advisor concerned with investment related to tax, had extensive business experience relating to property transactions of the kind, prepared a contract that reasonably related to the transaction, and encouraged the investment by the appellant. Accordingly, it was argued that the respondent:[27]

> … had a duty of a fiduciary character either springing from the circumstances in which the moneys were paid or provided and/or from his particular relationship with [the appellant] as his tax advisor and accountant, to take steps to secure the funds either by securing them himself or by appropriate advice to [the appellant]. [The appellant] was entitled to rely on him to take those steps.

The problem for the appellant, which seems implicit in the formulation of the above argument, was his struggle to identify with precision, even if there had been some fiduciary obligation, how the respondent had breached that obligation. The practical upshot of accepting the appellant's argument was that any client engaging in a business dealing with his or her tax accountant should effectively secure some (higher) level of 'insurance' against loss. But, assuming fiduciary obligations exist, unless there is evidence that the accountant has yielded to a conflict between interest and duty, it is difficult to see how fiduciary law could provide an avenue for relief.

In any case, the court unanimously rejected the existence of any fiduciary obligation in the circumstances. Beazley JA, with whom Meagher JA concurred, reasoned that:[28]

> Although the appellant undoubtedly had confidence that the project would be successful and it may well have been that that confidence was engendered by the fact the respondent was involved with it, there are none of the indicia of vulnerability, reliance or confidence in the sense which those matters bear in the context of a fiduciary relationship.

Mahoney ACJ elaborated the point, noting that the trial judge had found that the appellant had not placed trust and confidence in the respondent in the conventional sense, but entered the transaction acting upon his own judgment, as part of his endeavour to invest in property with a

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[26] (1996) 23 ACSR 214.

[27] As recounted in the judgment of Beazley JA: see *Pavan v Ratnam* (1996) 23 ACSR 214, 223.

[28] *Pavan v Ratnam* (1996) 23 ACSR 214, 225.

view to reducing his tax liability. The dealing was a 'commercial transaction', said his Honour, 'negotiated between the parties', and therefore one in which fiduciary law is reticent to interfere.[29]

More importantly, the Chief Justice premised his conclusion on a finding made by the trial judge that the respondent was not the appellant's financial adviser. There is a difference, it seems, between a tax accountant who does little more than compliance work for a client, and a tax accountant who performs an advisory role. Accepting this to be so, the general trend by the accounting profession to move beyond mere book-keeping to providing a broader advisory service that cannot be seen as independent of tax considerations — and with this the increasing 'professionalisation' of accounting practice — must necessarily attract greater scope for the fiduciary indicia to surface. Beazley JA's acceptance that the respondent acted in an advisory capacity *in a limited sense* suggests that the relevant inquiry rests on questions of degree.

Of course, had the respondent been a (tax) lawyer, there would have been no automatic conclusion that fiduciary duties would have enveloped the dealing in issue. After all, as observed by an American court, '[t]he fact that a person is a lawyer, or a physician, or a plumber, or a lion-tamer, does not mean that every relationship he undertakes is, or can reasonably be perceived as being, in his professional capacity'.[30] At the same time, though, the case law reveals that lawyers who deal with an existing client undertake a heavy burden.[31] The concern is that, by becoming personally interested in the dealing, lawyers put it out of their power to give disinterested advice.[32] This feeds into the judicial admonition that '[a] conflict of interest which is avoidable, and ought to be avoided, is that which arises from a deliberate proposal of the solicitor that his client deal with him'.[33]

Tax lawyers (and possibly even tax accountants) should not perceive themselves as immune from these admonitions. In *Leary v Federal Commissioner of Taxation*,[34] Brennan J remarked that the appearance of solicitors performing the twin roles of professional adviser and entrepreneur invites attention to 'significant differences between the two functions'. The case involved a tax avoidance scheme, perpetrated by members of the legal and accounting professions. His Honour elaborated on the dangers arising in such a situation in the following terms:[35]

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29 *Pavan v Ratnam* (1996) 23 ACSR 214, 219.

30 *Sheinkoph v Stone* (1991) 927 F 2d 1259, 1265 (USCA, First Circuit). See, for example, *Marcolongo v Mattiussi* [2000] NSWSC 834 (where Young J found no fiduciary breach in a property development in which solicitors were involved with a former client, as each party met on equal bases, and the business person appeared the more shrewd of the two, having given the solicitors the opportunity to participate in the project: [137]).

31 *Law Society of New South Wales v Harvey* [1976] 2 NSWLR 154, 171 (Street CJ); *Re Fabricius* (1989) 91 ACTR 1, 7–8 (FC).

32 *Ex parte Clowes* (1968) 87 WN (Pt 1) (NSW) 364, 368 (the Prothonotary); *Farrington v Rowe McBride & Partners* [1985] 1 NZLR 83, 96 (McMullin J); *Sims v Craig Bell and Bond* [1991] 3 NZLR 535, 546 (Hardie Boys J).

33 *Law Society of New South Wales v Harvey* [1976] 2 NSWLR 154, 171 (Street CJ).

34 (1980) 11 ATR 145, 161.

35 *Leary v Federal Commissioner of Taxation* (1980) 11 ATR 145, 161–2.

> These differences do not arise out of any judicial view as to the lawfulness or morality of tax avoidance … They arise because the field of professional activity is co-extensive with a lawyer's professional duty. That duty is to give advice as to the meaning and operation of the law and to render proper professional assistance in furtherance of a client's interests within the terms of the client's retainer. It is a duty which is cast upon a lawyer, as a member of an independent profession, whether his services are sought with respect to the operation of taxing statutes, the provisions of a contract, charges under the criminal law or any other of the varied fields of professional concern. It is a duty which arises out of the relationship of lawyer and client. But activities of an entrepreneur in the promotion of a scheme in which taxpayers will be encouraged to participate falls outside the field of professional activity; those activities are not pursued in discharge of some antecedent professional duty. Entrepreneurial activity does not attract the same privilege nor the same protection as professional activity; and the promotion of a scheme in which particular clients may be advised to participate is pregnant with the possibility of conflict of entrepreneurial interest with professional duty.

The point has potential practical significance even outside the fiduciary arena. For instance, in *Solicitors' Liability Committee v Gray*[36] solicitors who engaged in a scheme, in which they purchased properties without instructions and then promoted and sold the properties to clients in order to provide investment and tax advantages, were found to be acting 'as entrepreneurs rather than as legal professionals'. Costs and expenses reasonably and necessarily incurred in defending proceedings arising out of claims made against the solicitors accordingly fell outside the coverage of their professional indemnity insurance policy, which was confined to 'any civil liability in connection with the … private practice of a solicitor'.

APPLICATION OF 'DUTY-INTEREST CONFLICT' RULE TO TAX PRACTITIONERS

The remarks of Brennan J above, targeting tax lawyers as they do, may point to a distinction between the tax lawyer and the tax accountant for this purpose. While lawyers, it seems, are to foster independence ahead of entrepreneurial spirit in dealings with clients, a characteristic of the accounting profession is its close association with entrepreneurial promotion to clients. It is something also reflected in restrictions on the manner in which tax lawyers can charge, which have no application to charging by tax accountants.[37] The foregoing may explain, at least in part, the divergence in curial attitudes to recognising fiduciary obligations in each environment.

The Duty

But in circumstances where the tax practitioner performs an advisory role, and the client reasonably expects independent advice, there seems little reason to distinguish tax accountants and tax lawyers for fiduciary purposes. The decision of the Supreme Court of Canada in

36 (1997) 147 ALR 154, 196 (Beaumont and Burchett JJ).

37 For example, lawyers are, under the legal profession legislation, proscribed from charging by way of a percentage fee: see G E Dal Pont, *Law of Costs* (3rd ed, LexisNexis Butterworths, 2013), 64. No equivalent statutory (or other) restriction applies to charging by accountants.

Hodgkinson v Simms[38] is illustrative for this purpose. Albeit against the backdrop of a greater judicial willingness to recognise prescriptive fiduciary obligations in Canada (at the time) than in Australia,[39] the facts in *Hodgkinson* invited an orthodox application of proscriptive fiduciary principle. They also generated a result, it is suggested, aligning with the direction of Australian law.[40] Indeed, an Australian judge has, adopting the double-negative, found no presumption that the accountant-client relationship, where it displays an advisory capacity, is *not* a fiduciary one. To the contrary, his Honour remarked that the relationship 'is likely to involve elements of trust, confidence and vulnerability requiring undivided loyalty'.[41]

In *Hodgkinson* the appellant, a stockbroker inexperienced in tax planning, sought independent professional advice to this effect. He accordingly hired the respondent, an accountant, who specialised in providing tax shelter advice, and specifically advice pertaining to real estate tax shelter investments. In accordance with the respondent's advice, upon which the appellant relied without question,[42] the appellant invested in a particular form of real estate investment project. The appellant lost heavily when the value of the investment plummeted during a decline in the real estate market.

There was no suggestion that the bottoming out of the real estate market was reasonably foreseeable, or that the respondent had necessarily given the appellant poor advice. The original claim in tort was accordingly dismissed at trial. But what ultimately succeeded before a majority of the Supreme Court was the appellant's claim for breach of fiduciary duty. This claim was grounded in the fact that the respondent, at the time of advising the appellant as to tax-effective investment options, acted for the developers in structuring the relevant projects and secured a monetary kick-back for each client he directed to the developers. This placed the respondent in a position where his own financial interest conflicted with his obligation to the appellant client to provide independent tax-effective investment advice.

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38 [1994] 3 SCR 376.

39 See, for example, *McInerney v MacDonald* [1992] 2 SCR 138; *M(K) v M(H)* [1992] 3 SCR 6.

40 See, for example, the following non-tax cases, in this context: *L T King Pty Ltd v Besser* (2002) 172 FLR 140; [2002] VSC 354 (where a financial adviser was found to have committed a fiduciary breach by omitting to make full disclosure of their personal interest in the relevant transaction with a client); *Cameron v McMahon* [2009] VSC 277 (where the client was relying not only on the accountant's skill and experience as an accountant, but trusted him absolutely to protect her interests and investment); *Calvo v Sweeney* [2009] NSWSC 719 (where the defendant accountant was retained as the plaintiffs' adviser to find purchasers for the plaintiffs' shares or to raise capital for a company to repay the plaintiffs' loan, but the defendant obtained control of company and procured the issue of a substantial shareholding to himself for no consideration); *Thomas v SMP (International) Pty Ltd (No 4)* [2010] NSWSC 984 (where the accountant in question was found to have voluntarily assumed the function of advising and assisting his clients — who trusted him and depended on his superior knowledge, expertise and experience — in relation to the advancement of their financial interests, through a company which he established and in which he became a shareholder).

41 *Calvo v Sweeney* [2009] NSWSC 719 at [219] per White J.

42 Indeed, the majority found that the respondent 'actively cultivated [a] high degree of reliance': *Hodgkinson v Simms* [1994] 3 SCR 376, 433 (La Forest J).

La Forest J delivered the judgment of the majority.[43] His Honour accepted that not all advisory relationships are necessarily fiduciary (a finding equally supported in Australian law),[44] calling for 'something more than a simple undertaking by one party to provide information and execute orders for the other for a relationship to be enforced as fiduciary'.[45] Rather, for the advisory relationship to attract fiduciary obligations, it must exhibit 'the presence of elements such as trust, confidentiality, and the complexity and importance of the subject matter', such that 'it may be reasonable for the advisee to expect that the advisor is in fact exercising his or her special skills in that other party's best interests, unless the contrary is disclosed'.[46]

La Forest J, in this vein, distinguished arm's length commercial relationships from professional advisory relationships, or at least those where, as on the facts, independence of the advisor had been fostered and accordingly expected.[47] The appellant had, to this end, adduced unchallenged evidence that the respondent went out of his way to represent himself as independent, leading his Honour to surmise that the respondent made a conscious decision to shield his fee arrangement with the developers for fear its disclosure would interfere with his lucrative practice.[48] In these circumstances, La Forest J declared, 'the essence of professional advisory relationships is precisely trust, confidence, and independence',[49] wherein clients 'have a right to expect that their professional advisors will act in their best interests, to the exclusion of all other interests, unless the contrary is disclosed'.[50] His Honour added that 'particularly in specialized areas such as law, *taxation* and investments', the very existence of many professional advisory relationships is premised upon full disclosure by the client of vital personal and financial (and therefore confidential) information that itself may go to substantiating the relevant indicia of fiduciary principle.[51]

There were accordingly, in the majority's view, compelling reasons to conclude that the respondent came under fiduciary obligations to the appellant. These in turn required the respondent, in order to avoid a fiduciary breach and its consequences, to make full disclosure of the nature and extent of his financial interest in the investment avenue proposed.

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43 Per La Forest, L'Heureux-Dubé and Gonthier JJ, Iacobucci J concurring.

44 See, for example, *Beeck v Kohlen* [2013] WASC 166, [92]–[101] (Allanson J) (no fiduciary relationship arising between architectural designer and client).

45 *Hodgkinson v Simms* [1994] 3 SCR 376, 410.

46 *Hodgkinson v Simms* [1994] 3 SCR 376, 410.

47 *Hodgkinson v Simms* [1994] 3 SCR 376, 414–15. Cf Sopinka, McLachlin and Major JJ dissenting, whose reasons were delivered by Sopinka and McLachlin JJ, who were unwilling to accept that the appellant had placed a sufficient degree of trust and confidence in the respondent in the circumstances to justify attracting fiduciary duties (465), and were further unwilling to draw a bright line between professional advisors and commercial interactions for this purpose (469). On the facts, their Honours refused to view the appellant as having unreflectively accepted the respondent's advice. At the same time, they were at pains to observe (472) that this did not mean that advisors, financial or otherwise, could never be subject to fiduciary obligations, envisaging that '[a] relationship where one party unreflectively and automatically accepts the advice of the other might raise different considerations'.

48 *Hodgkinson v Simms* [1994] 3 SCR 376, 417.

49 *Hodgkinson v Simms* [1994] 3 SCR 376, 415.

50 *Hodgkinson v Simms* [1994] 3 SCR 376, 417.

51 *Hodgkinson v Simms* [1994] 3 SCR 376, 429 (emphasis supplied).

The remedial response

Identifying a breach of fiduciary obligations in a tax advisory context is not simply about branding behaviour as 'unethical' — as an abuse of trust, and also as capable of generating professional disciplinary sanction[52] — but is a vehicle to secure relief, often where none is otherwise available (typically in contract or tort). As to the latter, La Forest J[53] cited the Australian case of *Re Dawson (deceased)*,[54] where Street J remarked that in the context of equitable compensation for breaches of fiduciary duty, as opposed to common law damages for breach of contract or in tort, '[c]onsiderations of causation, foreseeability and remoteness do not readily enter into the matter'. As to causation, this obviates the need to prove that the fiduciary breach caused the loss, and instead places the onus on the defendant (here the respondent) to prove that the innocent victim (here the appellant) would have suffered the same loss regardless of the breach.[55]

In *Hodgkinson v Simms*, La Forest J noted the trial judge's finding that the appellant paid a fair market price for the investments, but that had the appellant known of the true relationship between the respondent and the developers, he would not have so invested.[56] That there may have been multiple other causes of the appellant's loss, including primarily the general economic recession that afflicted property values, did not preclude the majority from ordering the respondent to compensate the appellant for *his entire losses* in the investment. La Forest J reasoned that the appellant 'would not have been exposed to *any* of the risks associated with these investments had it not been for [the respondent] fiduciary's desire to secure an improper personal gain', characterising the particular fiduciary breach as initiating the chain of events leading to the loss.[57] Any other outcome, his Honour remarked, would undermine the element of deterrence that underscores fiduciary obligations, reasoning as follows:[58]

> Like-minded fiduciaries in the position of the respondent would not be deterred from abusing their power by a remedy that simply requires them, if discovered, to disgorge their secret profit, with the beneficiary bearing all the market risk. If anything, this would encourage people in his position to in effect gamble with other people's money, knowing that if they are discovered they will be no worse off than when they started. As a result, the social benefits of fiduciary relationships, particularly in the field of independent professional advisors, would be greatly diminished.

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52 See Dal Pont, above n 22, 810–11.

53 *Hodgkinson v Simms* [1994] 3 SCR 376, 453.

54 [1966] 2 NSWR 211, 215.

55 *Hodgkinson v Simms* [1994] 3 SCR 376, 441 (La Forest J), citing *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465, 469 (Lord Thankerton). The latter statement has been cited and applied on numerous occasions by Australian courts: see, for example, *Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453, 479 (FC(FCA)); *Wan v McDonald* (1992) 105 ALR 473, 502 (Burchett J); *Gemstone Corporation v Grasso* (1994) 62 SASR 239, 243 (Matheson J), 252 (Olsson J); *Australian Securities and Investments Commission v Adler (No 3)* (2002) 168 FLR 253; [2002] NSWSC 171, [747], [748] (Santow J).

56 *Hodgkinson v Simms* [1994] 3 SCR 376, 440.

57 *Hodgkinson v Simms* [1994] 3 SCR 376, 443 (emphasis in original).

58 *Hodgkinson v Simms* [1994] 3 SCR 376, 453–4.

Accordingly, when acting in an ostensibly independent advisory capacity there may be little scope, without full disclosure, for tax practitioners to shield themselves from fiduciary obligations, and attempts to rely (typically in the case of accountants) on some notion of entrepreneurship in this context are likely to fall upon deaf judicial ears. Instead, there is an expectation, for both (tax) lawyers and accountants, that either any personal interest potentially in conflict with their duty to clients is eschewed or otherwise that it is fully disclosed with a view to seeking informed client consent.

The relevant code of ethics for accountants leaves little doubt as to the applicability of fiduciary notions — in the 'duty-interest conflict' scenario — to the non-lawyer tax practitioner.[59] It acknowledges that an accountant may be faced with a conflict of interest in performing a 'professional service', defined to include a taxation service, and that a conflict of interest creates a threat to objectivity.[60] That may ensue, for example, where the interests of the practitioner with respect to a particular matter, and the interests of the client for whom the practitioner provides a professional service related to that matter, are in conflict.[61] Similarly, the Code of Professional Conduct for tax agents, which is prescribed by statute,[62] targets 'independence' as a core value, and in so doing requires tax agents to 'have in place adequate arrangements for management of conflicts of interest' that may arise in relation to activities undertaken as a registered tax agent.[63]

Professional pronouncements are not the law and may, as noted earlier in the article, exceed the applicable legal standard. Professional rules are, moreover, the standard for professional discipline rather than any private cause of action against the practitioner.[64] But they are hardly irrelevant as an influence on the behaviour expected, at law, of the relevant practitioner. In this context the following remarks of La Forest J in *Hodgkinson v Simms* are compelling:[65]

> With respect to the accounting profession, the relevant rules and standards evinced a clear instruction that all real and apparent conflicts of interest be fully disclosed to clients, particularly in the area of tax-related investment advice. The basis of this requirement is the maintenance of the independence and honesty which is the linchpin of the profession's credibility with the public. *It would be surprising indeed if the courts held the professional advisor to a lower standard of responsibility than that deemed necessary by the self-regulating body of the profession itself.* [(author's emphasis)].

It should be noted, for the purposes of completeness, that the trend to acknowledge the importance of independence and the fiduciary notions that underscore it has witnessed statutory

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59 APES 110 *Code of Ethics for Professional Accountants* (including amendments to November 2013), s 220.1. See also s 100.17. In the (tax) lawyer-client scenario see *Australian Solicitors Conduct Rules* r 12.

60 'Objectivity' is identified by the Code as a 'fundamental principle': APES 110 *Code of Ethics for Professional Accountants* (including amendments to November 2013), ss 100.5(b), 120.

61 Various examples of conflict scenarios are provided in the last four dot points in APES 110 *Code of Ethics for Professional Accountants* (including amendments to November 2013), s 220.2.

62 See *Tax Agent Services Act 2009* (Cth) s 30.10.

63 *Tax Agent Services Act 2009* (Cth) s 30.10(5).

64 Dal Pont, above n 22, 27–9.

65 *Hodgkinson v Simms* [1994] 3 SCR 376, 425 (emphasis supplied). See also *Russell McVeigh McKenzie Bartleet & Co v Tower Corporation* [1998] 3 NZLR 641, 677 (Blanchard J).

translation to those dealing with financial products, who must hold a relevant financial services licence.[66]

APPLICATION OF 'DUTY-DUTY CONFLICT' RULE TO TAX PRACTITIONERS

As foreshadowed earlier, in the context of a tax practitioner acting concurrently for clients whose interests may conflict (a 'duty-duty conflict'), it is fiduciary law that impedes the continuing engagement absent informed client consent. Alternatively, as elaborated later in the article, in the larger firm environment there may be scope — nowadays even for (tax) lawyers, and not just (tax) accountants — to 'manage' such a conflict via the erection of Chinese walls. Concurrent 'duty-duty conflicts'.

Professional rules governing lawyers clearly proscribe concurrent conflicts, whether in contentious or non-contentious scenarios,[67] which reflect the widespread enunciation of legal principle to this effect by the courts.[68] Consistent with the recognition, by the relevant accountants' code of ethics, of fiduciary notions in cases of 'duty-interest conflict', the code targets 'duty-duty conflicts' as threats to the core principle of objectivity. It does so by identifying such a threat where a (tax) accountant provides a (tax) service 'related to a particular matter for two or more clients whose interests with respect to that matter are in conflict'.[69]

In the tax environment, the most obvious concurrent conflict, whether for the lawyer or the accountant, is in representing, in an advisory or litigation capacity, both the taxpayer and the relevant taxing body (whether at a Federal, State or local government level) in relation to the same or related issue or matter. Another concurrent conflict scenario may potentially arise where a (law or accounting) firm is engaged to provide (tax) advice to two or more parties to a (proposed) transaction. It cannot be assumed, in this instance, that the interests of each party necessarily

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66 See, for example, Corporations Act 2001 (Cth) ss 923A (which proscribes the use of words such as 'independent', 'impartial' and 'unbiased' by financial services licensees where, by reason of the receipt of a benefit from a third party, some restriction imposed by a third party, or some other potential conflict of interest, do not exhibit the required independence), 947B(2)(d), 947B(2)(e) (duty to disclose, upon recommending a financial product, any remuneration or other benefit that the licensee or an associate will or may receive as a result of, or any interest of the licensee or an associate that may reasonably be expected to be capable of influencing, that recommendation), 963E(1) (prohibition on a licensee accepting 'conflicted remuneration', namely any benefit that, because of its nature or the circumstances in which it is given, could reasonably be expected to influence the choice of financial product recommended or the financial product advice given: s 963A).

67 See *Australian Solicitors Conduct Rules* r 11.1 ('A solicitor and a law practice must avoid conflicts between the duties owed to two or more current clients, except where permitted by this Rule').

68 See, for example, *Alexander (trading as Minter Ellison) v Perpetual Trustees WA Ltd* [2001] NSWCA 240, [125] (Davies JA) ('A conflict of interest is an insidious thing. Aspects of a duty of care, which ought to be seen clearly and distinctly, are seen in a hazy light when a [practitioner] seeks to reconcile the interests of two clients who each have interests which differ from those of the other').

69 APES 110 *Code of Ethics for Professional Accountants* (including amendments to November 2013), s 220.1 (and see the various examples in dot points 2–6 in s 220.2). See also s 100.17.

align in every respect, and tax implications pertaining to the structure of the transaction may hardly be a consideration irrelevant to the prospects and terms of any deal.

But these principles do not generally preclude a (tax) practitioner from acting concurrently for different clients involved in the same line of business, or competing with each other for business. For instance, there is no reason in principle why a tax practitioner cannot accept different clients that syndicate tax schemes to the same investor community. For example, A's concurrent conflict can, however, surface where the practitioner is disinclined from making available information relevant to client B because of a conflicting duty to client A or, worse still, the practitioner's personal interest in client A.

The latter scenario arose before the Supreme Court of Canada in *Strother v 3464920 Canada Inc.*[70] There the lawyer appellant whose firm had an ongoing retainer with the respondent company had over time provided tax advice relating to the tax shelter investment schemes marketed by the respondent. When the viability of these schemes was undermined by a statutory change in 1997, the tax shelter part of the respondent's business was wound down. (The firm continued to act for the respondent on other matters.) An employee of the respondent (D), who had been laid off as a result, approached the appellant, with a proposal to circumvent the statutory change. In early 1998, the appellant submitted the proposal to Revenue Canada without fee, on the understanding that he was to receive one-half of the profits of any new venture structured through a newly established company (S), should a favourable tax ruling ensue. The latter in fact came to fruition. Yet at no stage did the appellant make this known to the respondent, but took on S as a client. In March 1999, the appellant resigned from the law firm and joined D full time in the new venture which generated some $64m in profits.

When the respondent subsequently learned of the above tax ruling, it promptly severed its connections with the firm. On advice from another law firm, it sought to take advantage of the ruling This was ultimately frustrated by further legislative amendments in 2001, denying any further scope for the particular tax shelter investment schemes. It then commenced proceedings against the appellant for, inter alia, breach of fiduciary duty. The claim succeeded, with a majority of the court[71] finding that the appellant had breached his fiduciary duty to the respondent in failing to inform the respondent of the favourable tax ruling and, subject to preserving any confidentiality owed to S,[72] there may have been an alternative means to achieve the relevant tax benefit(s).

That the failure to make this disclosure was hardly inadvertent,[73] but actively favoured the interests of one client in which the appellant had a financial interest ahead of another marked it as a fiduciary breach. It became *both* a 'duty-duty conflict' and a 'duty-interest conflict'. Binnie J, in

70 [2007] 2 SCR 177; [2007] SCC 24.

71 Per Binnie J, Deschamps, Fish, Charron and Rothstein JJ concurring.

72 Binnie J suggested that the appellant could have disclosed to the respondent that because his change of view was based at least in part on information confidential to another client on a transaction unrelated to the respondent, he could not advise further except to suggest that the respondent consult another law firm: *Strother v 3464920 Canada Inc* [2007] 2 SCR 177; [2007] SCC 24, [47].

73 Even had it been inadvertent, there may have been a claim in tort for negligence.

delivering the majority judgment, identified the problem for the appellant as arising not out of S and the respondent being potential competitors, but in the appellant aligning his personal financial interest with S's success.[74] The appellant could not with equal loyalty serve the respondent and pursue his own financial interest, which stood in obvious conflict with the respondent making a quick re-entry into marketing the tax schemes in question.[75] In reaching this conclusion, his Honour made the following incisive remarks that apply to all tax practitioners:[76]

> [The respondent's] tax business was in a jam. [The appellant] was still its tax lawyer. There was a continuing 'relationship of trust and confidence'. [The respondent] was dealing with professional advisors, not used car salesmen or pawnbrokers whom the public may expect to operate on the basis of 'didn't ask, didn't tell', and who collectively suffer a corresponding deficit in trust and confidence. Therein lies one of the differences between a profession and some businesses.

The court ordered that the appellant compensate the respondent for the personal profit he derived through S, and his earnings as S's lawyer up until the date of his resignation from the firm.

In other contexts, the subject matters of the concurrent engagements, though one or both may be tax-focused, are ostensibly unrelated. In this instance the existence of a disqualifying conflict may not be evident. A similar scenario was heard in the New Zealand Court of Appeal in *Russell McVeigh McKenzie Bartleet & Co v Tower Corporation*.[77] As the majority decided the case by reference to any conflict between concurrent clients having been spent, it is of limited precedent value for the law surrounding *concurrent* conflicts. At the same time, though, the facts highlight a scenario arguably close to the line (and, in the view of the dissenter, over the line) concerning concurrent conflicts in the tax sector and advice to each client that could have been the domain of either lawyers or accountants. It therefore requires closer consideration.

The Auckland office of the appellant law firm, which at the time had 64 partners and some 190 fee earning personnel, acted for a company (GPG) that planned a takeover of the respondent (T). At the time of the engagement, a partner in the appellant's Wellington office was advising the respondent in a tax dispute with the Inland Revenue Department (the 'tax retainer'). The relevant partner in the Auckland office, following inquiry of the Wellington partner, was informed that there was no reason why the appellant should not act for GPG given that the tax retainer was specialised and narrow. For the appellant to consult the respondent on the matter would have conflicted with the interests of GPG, which at that stage wished to shield its plan from the respondent as the proposed takeover target. The tax retainer ended some five months before GPG presented its takeover proposal to the respondent, at which time the respondent discovered that the appellant had been advising GPG on the takeover. It then sought to disqualify the appellant from continuing to act for GPG.

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74 *Strother v 3464920 Canada Inc* [2007] 2 SCR 177; [2007] SCC 24, [67].
75 *Strother v 3464920 Canada Inc* [2007] 2 SCR 177; [2007] SCC 24, [70].
76 *Strother v 3464920 Canada Inc* [2007] 2 SCR 177; [2007] SCC 24, [42].
77 [1998] 3 NZLR 641.

What proved an 'insurmountable hurdle'[78] in grounding disqualification on a breach of fiduciary duty arising out of concurrent representation was that, as the tax retainer had ended, the 'alleged fiduciary duty of loyalty while acting for one client not to act for another client whose interests under that instruction are or may be adverse to the first client is no longer in danger of being breached'.[79] The reasoning of the majority, however, suggests that the same outcome would have been reached even had the tax retainer continued. The reason for this was that, in the words of Henry J (who also delivered the judgment of Richardson P and Gault J), the retainers in question covered 'quite distinct and unrelated issues'.[80] In his Honour's opinion, there was 'nothing incompatible between the interests of [the respondent] which were concerned with the taxation dispute, and the interests of GPG which were or are concerned with the takeover procedure'.[81]

As the retainers were unrelated, it was difficult to conceive of a concurrent conflict, unless there was nonetheless evidence of a risk that the concurrent engagements could prejudice the confidentiality of one or both of the clients.[82] In a similar vein, Blanchard J concurred, stating that:[83]

> … a duty of loyalty depends upon the scope of the retainer and can arise only from the lawyer's knowledge of the client and the client's affairs. If that knowledge is and will be limited there may be no reasonable possibility of detrimental disclosure or misuse by the lawyer. If there is in fact no such possibility the client will have no good reason to raise objection. The client's trust and confidence are not being abused.

In this sense, the court discussed the principles underscoring the law on successive conflicts, where the law's intervention is grounded chiefly in the protection of the client's surviving interests, namely confidentiality. What the majority's reasons reveal in this context is that, *at least in the commercial arena*,[84] attempts to bring within the umbrella of confidentiality 'generalised' information — relating to a client's negotiating style, corporate culture and structure, and personalities of members of its management team — are likely to face significant challenges. On the facts, Henry J found that the nature of insights of this kind obtained in the course of the tax retainer was 'so general as to be of little real significance to the GPG position'.[85] There are

78 The phrase used in the reasons of Henry J, who also delivered the judgment of Richardson P and Gault J: *Russell McVeigh McKenzie Bartleet & Co v Tower Corporation* [1998] 3 NZLR 641, 647.

79 *Russell McVeigh McKenzie Bartleet & Co v Tower Corporation* [1998] 3 NZLR 641, 647 (Henry J).

80 *Russell McVeigh McKenzie Bartleet & Co v Tower Corporation* [1998] 3 NZLR 641, 648. Cf 663–5 (Thomas J, dissenting) (who, rather than focus on the unrelated nature of the respective retainers, conceived the (fiduciary) duty of loyalty in a more encompassing fashion, reasoning that the acceptance of the GPG retainer was a matter that, without the respondent's consent, served to undermine the 'trust and confidence' that the respondent reposed in its legal representatives as a consequence of the relevant fiduciary relationship).

81 *Russell McVeigh McKenzie Bartleet & Co v Tower Corporation* [1998] 3 NZLR 641, 648.

82 *Russell McVeigh McKenzie Bartleet & Co v Tower Corporation* [1998] 3 NZLR 641, 648.

83 *Russell McVeigh McKenzie Bartleet & Co v Tower Corporation* [1998] 3 NZLR 641, 677.

84 The position may be otherwise in the family law arena: see, for example, *Marriage of Magro* (1989) 12 Fam LR 770.

85 *Russell McVeigh McKenzie Bartleet & Co v Tower Corporation* [1998] 3 NZLR 641, 653. See also 677–8 (Blanchard J). Contra 671–2 (Thomas J, dissenting).

various statements by Australian judges, in the commercial environment albeit outside the tax scene, likewise revealing a reticence to identify a duty-duty conflict from generalised information about a client.[86]

In the *Russell McVeigh* case, there was no need to inquire into Chinese walls, although by passing reference the majority signalled a (limited) recognition of their potential utility.[87] The case should not, however, be read as suggesting that a tax retainer with client A, albeit unrelated in subject matter to an engagement for client B, can never involve the communication or receipt of confidential information potentially relevant to the client B engagement. Information communicated or secured by reason of a retainer to provide tax-related advice may, after all, not infrequently reveal the client's structure and financial position. Information of this kind, when not necessarily in the public domain, may conceivably assume relevance to an engagement, even if prima facie unrelated to the tax retainer, by client B with an interest in the affairs of client A.[88] The potential ability to access knowledge pertaining to the financial position of a person or entity with which a client proposes to deal is hardly to be downplayed in its significance to the relevant dealing.[89] In circumstances of this kind, there is an ostensible duty-duty conflict, which can only be cured by informed client consent or the existence of an effective Chinese wall.

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[86] See, for example, *Mintel International Group Ltd v Mintel (Australia) Pty Ltd* (2000) 181 ALR 78; [2000] FCA 1410, [44] (Heerey J); *Nasr v Vihervaara* (2005) 91 SASR 222; [2005] SASC 83, [42] (Doyle CJ, with whom Vanstone and White JJ concurred); *Ismail-Zai v State of Western Australia* [2007] WASCA 150, [29] (Steytler P, with whom Wheeler JA concurred); *Fonterra Brands (Australia) Pty Ltd v Viropoulos* [2013] FCA 657, [31] (Robertson J). Cf *Yunghanns v Elfic Ltd* (SC(Vic), Gillard J, 3 July 1998, unreported) 10–11; *Village Roadshow Ltd v Blake Dawson Waldron* (2004) Aust Torts Reports 81-726; [2003] VSC 505, [37] (Byrne J). See further Dal Pont, above n 22, 287–92.

[87] See *Russell McVeigh McKenzie Bartleet & Co v Tower Corporation* [1998] 3 NZLR 641, 654–5 (Henry J) (noting that '[a]lthough the concepts of Chinese walls and cones of silence leave much to be desired, and cannot be allowed to obscure the realities of life and the ordinary behaviour and incidents of relationships where individuals practice together in a firm, internal control measures may nevertheless in some circumstances be both appropriate and sufficient to ensure protection'), 678 (Blanchard J) ('Proof by the law firm that disclosure has not occurred and is not likely to occur may be assisted by the existence of an operating system like a Chinese Wall but its existence will by no means be determinative'). Cf 670 (Thomas J, dissenting) (opining that the concept of Chinese walls 'should only be used in exceptional circumstances where there is an overriding and compelling need', and warning that their effectiveness 'should not be overstated').

[88] See the remarks of Thomas J (dissenting) in *Russell McVeigh McKenzie Bartleet & Co v Tower Corporation* [1998] 3 NZLR 641, 658–9 (agreeing with the trial Judge's view that 'taxation questions can rarely be resolved in isolation and must be considered against details of the financial operation of the entity concerned', as '[t]his information may be sensitive and confidential'), 665 (on the facts surmising that the respondent's senior executives would have been disinclined to divulge its financial, commercial and managerial affairs to lawyers acting in a hostile or potentially hostile take-over of the corporation).

[89] See the remarks of Thomas J (dissenting) in *Russell McVeigh McKenzie Bartleet & Co v Tower Corporation* [1998] 3 NZLR 641, 665 ('Experience in commercial litigation confirms the exceptional sensitivity commercial bodies attach to their financial and commercial material').

Successive 'duty-duty conflicts'

As foreshadowed earlier, 'duty-duty conflicts' facing (tax) practitioners can involve a duty owed to a *former* client. The bulk of the case law in 'duty-duty conflicts' maintains that the core duty owed to a former client is not one specifically directed to loyalty (and thus not a fiduciary duty) but one grounded in preserving the integrity of information communicated or derived in confidence.

To the substantial extent that confidentiality informs curial intervention, and with this the parameters of ethical obligation, the relevant principles should not differ according to whether a tax practitioner is a lawyer or an accountant. The leading successive conflicts case of *Prince Jefri Bolkiah v KPMG (a firm)*[90] involved not a law practice but an international accounting firm. It is true that their Lordships' remarks were couched against the backdrop of the accounting firm providing litigation support services paralleling legal services.[91] Yet a corresponding paralleling, in the tax field, as between accounting and legal services suggests a convergence of principle in this context. Moreover, the case law recognises that an engagement of an accountant by a client, as in the case of a lawyer-client retainer, attracts an obligation of confidentiality - usually by way of an implied contractual term, but in any case in equity.[92] The same is recognised in the Code of Ethics for Professional Accountants[93] and the Code of Professional Conduct for tax agents.[94]

The core inquiry, to this end, is whether there is a real, as opposed to a theoretical, possibility that confidential information secured through an engagement by a former client might be used by the practitioner to advance the interests of a new client to the detriment of the former client.[95] The issue has arisen predominantly in the context of lawyers who, more so than accountants, may be retained to act against the interests of a former client – particularly in the context of litigation. But as *Prince Jefri* reveals, lawyers have no monopoly in this regard. Information secured by the practitioner in providing tax advice to a (now former) client is likely to reveal non-public aspects of their finances. There may well be occasions in the course of the practitioner's business, as in *Prince Jefri* (there involving information pertaining to the former client's assets), where that information could be used in a new engagement against the interests of the former client.

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90 [1999] 2 AC 222.

91 See *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222, 226–7 (Lord Hope), 234–5 (Lord Millett).

92 See, for example, *Weld-Blundell v Stephens* [1920] AC 956; *Nam Tai Electronics Inc v PriceWaterhouse Coopers* [2008] 1 HKLRD 666; [2008] HKCU 170.

93 APES 110 *Code of Ethics for Professional Accountants* (including amendments to November 2013), s 140. Also, confidentiality is identified in the Code as a 'fundamental principle': see s 100.5(d). The Code provides an illustration of an ostensibly successive 'duty-duty conflict' by reference to the scenario where a firm is requested to provide a transaction advisory service to a client seeking to acquire an audit client of the firm, where the firm has obtained confidential information during the course of the audit that may be relevant to the transaction: s 220.2 (first dot point).

94 Tax Agent Services Act 2009 (Cth) s 30.10(6).

95 Deriving chiefly from the language adopted by Drummond J in *Carindale Country Club Estate Pty Ltd v Astill* (1993) 42 FCR 307, 312, which has been cited and approved on various occasions, both in Australia and elsewhere: see, for example, *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222, 237 (Lord Millett); *Newman v Phillips Fox* (1999) 21 WAR 309; [1999] WASC 171, [63] (Steytler J); *Sent v John Fairfax Publication Pty Ltd* [2002] VSC 429, [66] (Nettle J); *Nasr v Vihervaara* (2005) 91 SASR 222; [2005] SASC 83, [17], [18] (Doyle CJ, with whom Vanstone and White JJ concurred).

Special mention should be made of the curial willingness to disqualify a practitioner, in a family law matter, from acting against a former client to whom tax advice had been supplied, where the practitioner is apprised of confidential financial information capable of being utilised against the former client's interest in the proceedings. Theoretically, there is nothing specific to tax practitioners in this scenario; it reflects a judicial tendency towards greater sensitivity to perceived 'duty-duty conflicts' in the family law sector.[96] But to the extent that a divorce (not infrequently) brings with it a dispute over money or property, 'inside knowledge' of a (former) client's finances and asset pool derived from an earlier tax-related engagement is likely to heighten any perceived conflict.

Marriage of Griffis[97] presents a clear case of this kind. There the husband sought to disqualify the wife's solicitor from acting in property proceedings on the ground that two years earlier the husband and wife had consulted the solicitor regarding the structure of business and personal arrangements for income tax purposes. At the time the husband handed the solicitor various documents and records relating to his business and earnings. In acceding to the husband's application, Mullane J stated that:[98]

> It is easy to contemplate types of information which are likely to be contained in such documents. Examples are profit figures, expense figures, wages paid, expenditures for purchase of items of property, details of suppliers and details of cash receipts recorded. It is easy to recognise ways in which such information could, even without disclosure to the wife, be used by the solicitor to the prejudice of the husband. It could give rise to the issue of subpoena to the husband or others for production of records, or to recruitment of particular witnesses. It could be the basis of some cross-examination of the husband. It could be used to attack his case or his credit.

The above scenarios presuppose litigation between (former) parties to a marriage and therefore target lawyers involved in representing those parties. But a parallel issue *outside of disqualification in court proceedings* can also arise for accountants independent of (the prospect of) litigation between the parties. An accountant may, for instance, have been advising a married couple over time preparing tax returns for the parties and for associated entities. While the marriage remains on foot, there may be no apparent conflict in acting for multiple associated clients in this fashion.

But once the marriage relationship sours, continuing to advise each party may result in conflict between the interests of each client, and in the use and disclosure of confidential client information. To the extent that the parties have business (and therefore taxation) interests in common, the dissolution of their marriage may pit those interests against one another. Tax advice relating to the division of property interests may not necessarily support the wishes, or even best interests, of each party in this instance. If so, continuing to act for each party is pregnant with the prospect of conflict, and continuing to act for only one of the parties, independent of any fiduciary notion of conflict, may threaten the confidentiality owed to the now former client.

96 See Dal Pont, above n 22, 286–8.
97 (1991) 14 Fam LR 782.
98 *Marriage of Griffis* (1991) 14 Fam LR 782, 792.

Similarly, an accountant who has prepared tax returns for a married couple over some years will face a duty–duty conflict upon their divorce if the claiming of a rebate or offset by the (former) husband would preclude that same rebate or offset being claimed by the (former) wife.[99] Again, the accountant cannot provide advice in the interests of one client without at the same time providing advice potentially contrary to the interests of the other. In the absence of informed client consent to the conflict, the accountant cannot continue to act for each client and may find it difficult to the extent that he or she is possessed of relevant confidential information pertaining to each client, to ethically continue to act for only one of them.

As foreshadowed above, a duty–duty conflict, and associated threat to confidentiality, can be assuaged by informed client consent. There may be occasions where each party develops a close relationship with the accountant and wishes him or her to continue to advise them. If the client so desires, it behoves the accountant to set out clearly in writing the 'ground rules' for the continuing engagement, so that there is no expectation gap in the client's mind regarding the nature and scope of the advice to be supplied.

CHINESE WALLS AND THE TAX PRACTITIONER

Where a case such as *Griffis* involves the same practitioner who acted for a client then acting against that client, it provides no scope to countenance the 'duty-duty conflict' being addressed via a Chinese wall. Both in the legal and accounting context there is recognition that in cases of 'duty-duty conflicts', whether concurrent or successive, there may be a limited avenue to quarantine the conflict by establishing barriers ('Chinese walls') within the professional firm to segregate the practitioners acting for one client from those who act (or have acted) for another client with a contrary interest.

The Australian Solicitors Conduct Rules, intended to form the foundation for uniform rules of professional conduct for solicitors,[100] represent the first rule-based recognition in this country that Chinese walls (termed 'information barriers' in the rules) can, in some circumstances, function to avoid the relevant conflict. This extends to the concurrent conflict scenario, albeit couched by reference to confidential information: the rules state that 'a law practice (and the solicitors concerned) may act where there is a conflict of duties arising from the possession of confidential information where an effective information barrier has been established'.[101]

The applicable accountants' code of ethics states, in different language but capable of encompassing the same concept, that '[i]f the threat created by a conflict of interest is not at an Acceptable Level, the [practitioner] shall apply safeguards to eliminate the threat or reduce it to an Acceptable Level'.[102] The code defines 'Acceptable Level' as 'a level at which a reasonable and informed third party would be likely to conclude, weighing all the specific facts and circumstances

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99 This example derives from an Information Sheet issued by the Tax Practitioners Board, 19/2014, cl 32 (available at <www.tpb.gov.au>).

100 To date the *Australian Solicitors Conduct Rules* have been implemented in Queensland and South Australia and, as from 1 January 2014, to a significant degree in New South Wales.

101 Australian Solicitors Conduct Rules r 11.4.

102 APES 110 *Code of Ethics for Professional Accountants* (including amendments to November 2013), s 220.5.

available to the [practitioner] at that time, that compliance with the fundamental principles is not compromised'. The 'fundamental principles' include 'objectivity' and 'confidentiality',[103] both of which inform the law's approach to conceptualising 'duty-duty conflicts', as well as 'duty-interest conflicts'.

These professional pronouncements reflect statements found in the case law. Perhaps the leading curial analysis in Anglo-Australian law is in the speech of Lord Millett in *Prince Jefri Bolkiah v KPMG (a firm)*,[104] a case that involved a successive 'duty-duty conflict' where the respondent accounting firm (KPMG) provided forensic accounting and litigation support services to the appellant stemming out of the appellant's role as chairman of a government agency. In the course of its engagement, KPMG was given access to confidential information concerning the nature and extent of the appellant's assets. The dispute was settled, around which time the appellant was removed from that office. Shortly thereafter, the agency engaged KPMG to investigate the whereabouts of certain of its assets that, it was suspected, had been misappropriated by the appellant. KPMG sought to 'manage' the evident 'duty-duty conflict' by allocating personnel and premises to the engagement discrete from those who had earlier worked on the appellant's matter, and by seeking to create a Chinese wall within its forensic accounting department to stem the flow of information between the respective teams of practitioners.

Lord Millett, with whom the other Law Lords concurred, found 'no rule of law that Chinese walls or other arrangements of a similar kind are insufficient to eliminate the risk' of the relevant conflict.[105] After all, his Lordship noted, Chinese walls were in widespread use by financial institutions as the favoured technique for managing conflicts of interest arising when a conglomerate carries on financial business.[106] Accordingly, it seemed odd to ban their potential use in the instant scenario or, by parallel reasoning, where law firms are involved. KPMG pointed to various aspects of its practices directed to managing the conflict, which Lord Millett catalogued as follows:[107]

> KPMG insist that, like other large firms of accountants, they are accustomed to maintaining client confidentiality not just within the firm but also within a particular team. They stress that it is common for a large firm of accountants to provide a comprehensive range of professional services including audit, corporate finance advice, corporate tax advice and management consultancy to clients with competing commercial interests. Such firms are very experienced in the erection and operation of information barriers to protect the confidential information of each client, and staff are constantly instructed in the importance of respecting client confidentiality. This is, KPMG assert, part of the professional culture in which staff work and becomes second nature to them. Forensic projects are treated as exceptionally confidential and are usually given code names.

The same arguments could not necessarily have been presented at the time, at least not in fullness, had KPMG been an (Australian) law practice. Not only do law practices not offer the

[103] APES 110 *Code of Ethics for Professional Accountants* (including amendments to November 2013), s 100.5.
[104] [1999] 2 AC 222.
[105] *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222, 237.
[106] *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222, 238.
[107] *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222, 238.

breadth of services that are 'bread and butter' for accountants, in the 1990s scope for effective information barriers within Australian law firms had been largely scuttled by a heavy judicial emphasis on fiduciary law and a belief that (confidential) information was attributable within a law partnership.[108] It should be noted that Australian courts have since mollified their resistance to the potential efficacy of Chinese walls within law firms.[109] Notwithstanding KPMG's experience and measures taken to manage the conflict, his Lordship concluded that as the Chinese Walls had been 'established ad hoc' and 'within a single department', this rendered them wanting, reasoning as follows:[110]

> It is one thing, for example, to separate the insolvency, audit, taxation and forensic departments from one another and erect Chinese walls between them. Such departments often work from different offices and there may be relatively little movement of personnel between them. But it is quite another to attempt to place an information barrier between members all of whom are drawn from the same department and have been accustomed to work with each other.

Yet implicit in this reasoning is a recognition that barriers that effectively segregate the affected departments – for instance the taxation practice of a (law or accounting) firm from other potentially discrete areas of professional practice – may, if 'an established part of the organisational structure of the firm',[111] overcome a 'duty-duty conflict'. However, it should be understood that an effective information barrier involves more than mere physical separation of persons and facilities, but strict and carefully defined procedures, recurring education and regular monitoring.

There are nonetheless challenges in erecting and maintaining an effective information barrier where the practice services clients by way of general engagements or retainers. It is not unusual for a client to engage the one firm to provide a variety of services, including taxation advice. And in this instance, given that taxation advice is rarely divorced from the broader business environment within which the client operates — after all, competent tax advice cannot be given in a vacuum — there is likely to be some informational confluence between divisions of the practice. This in turn may undermine the available scope for effective information barriers — not just concerning the client in question but even other clients, whose advice requirements are more discrete[112] — to the extent that this informational confluence is symptomatic of the firm's operational structure.

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108 Interestingly, perhaps the most influential case to this end, *Mallesons Stephen Jaques v KPMG Peat Marwick* (1990) 4 WAR 357, also involved KPMG.

109 See Dal Pont, above n 22, 303–8.

110 *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222, 239.

111 *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222, 239.

112 Cf *Russell McVeigh McKenzie Bartleet & Co v Tower Corporation* [1998] 3 NZLR 641, discussed earlier in the article, where the main reason why the court refused to disqualify the appellant law firm from acting was that its (previous) retainer with the respondent involved a discrete tax matter unrelated to the subject matter of the current (non-tax) retainer. There was accordingly no real need to resort to a Chinese wall, as there was no relevant confidential information capable of being used to the detriment of the respondent.

The foregoing assumes that, in line with Lord Millett's reasons in *Prince Jefri*, the creation of ad hoc information barriers for a particular engagement will invariably be ineffective to manage the 'duty-duty conflict'. Yet neither the Australian Solicitors Conduct Rules nor the Code of Ethics for Professional Accountants, by their terms, outright deny the potential efficacy of ad hoc measures. Although professional pronouncements of this kind cannot govern the law, there is Australian case law to the same effect.[113] An Australian court has remarked to this end that 'one should take a hard-nosed and realistic approach', and opined that 'judges in some of the cases in this area have shown considerable imagination in devising ways in which confidential information could conceivably pass from one lawyer to another'.[114] That these remarks were made in a family law context, in which courts have traditionally exhibited particular sensitivity to 'duty-duty conflicts', may if accurate be suggestive of a shift away from the apparent absolutism of *Prince Jefri* in this regard.

Even if so, it should not be taken as heralding any overly welcoming attitude to the efficacy of Chinese walls as an elixir for 'duty-duty conflicts'. The onus on the professional practice that seeks to 'manage' the relevant conflict remains weighty. Walls established solely for the purpose of a particular engagement are unlikely to generate an immediate change in the communication patterns of information or firm attitude/culture. For this reason, attempts to erect a Chinese wall after the event and on an ad hoc basis, without any educational programme, monitoring, record keeping, or any proposal for disciplinary sanctions, have almost invariably been held ineffective.[115] In the context of successive representation, the more extensive the previous engagement, the closer its subject matter to the current engagement, and the more attention that the former and present litigation has attracted both in legal circles and in the public arena are particularly relevant to avoiding conflict. Where this is the case it becomes less likely a court will be to uphold any Chinese wall, irrespective of the undertakings and procedures attendant to it.

CONCLUSION

At the outset it was noted that concepts of 'ethics' regarding tax practitioners have often centred on the 'rightness' or otherwise of advising clients of means of reducing their exposure to paying

[113] See, for example, *Photocure ASA v Queen's University at Kingston* (2002) 56 IPR 86; [2002] FCA 905. There the law firm Freehills acted for a pharmaceutical company that was seeking leave to become a party to proceedings brought by the applicant, which proceedings involved a claim for the invalidity of a patent. Freehills' client was the sub-licensee of that patent. The applicant sought to disqualify Freehills on the basis that a patent attorney firm that had integrated with Freehills had previously advised the applicant in relation to the matter the subject of the proceedings. Goldberg J held that the Chinese wall, though an ad hoc arrangement, when taken in conjunction with the undertakings given was effective to ensure that there was no real risk of disclosure of any of the applicant's confidential information to the team at Freehills working on the matter. More recently, see *Zani v Lawfirst Pty Ltd* [2014] WASC 75 (information barrier successfully established for the specific purpose of screening a single migratory lawyer).

[114] *Lakey v Lakey* [2008] FMCAfam 827, [26] (Brewster FM).

[115] See, for example, *Re a Firm of Solicitors* [1992] QB 959; *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222; *Newman v Phillips Fox* (1999) 21 WAR 309; [1999] WASC 171, [77]–[81] (Steytler J); *Zalfen v Gates* [2006] WASC 296, [92]–[103] (Newnes M).

tax. Differing views have been proffered to that end, which have to a significant extent been informed by notions of individualised or situational ethics.

This article has sought to refocus on aspects of 'ethics' that are of a potentially more concrete and determinable nature. What gives them these characteristics is that they are largely supported by the force of law. These aspects, however, remain 'ethical' in nature not just because they form part of the professional obligations of tax practitioners — to the exclusion of most service providers — but because, in being grounded in the notions of conscience underscoring fiduciary and confidentiality law, they exhibit a distinct 'ethical' flavour. Although many tax practitioners are prone to view legal rules in a formalistic fashion, and are trained to find (and rewarded for finding) ways around those rules, it stands to reason that the inherent ethical dimension of rules governing conflicts arguably merit no such legalistic approach.