Supreme Court of New South Wales

Kallinicos and anor v Hunt and ors [2005] NSWSC 1181 (22 November 2005)

Last Updated: 25 November 2005

NEW SOUTH WALES SUPREME COURT

CITATION: Kallinicos & anor v Hunt & ors [2005] NSWSC 1181

CURRENT JURISDICTION:

FILE NUMBER(S): 1033/03

HEARING DATE{S): 5 September 2005

JUDGMENT DATE: 22/11/2005

PARTIES:

Peter Kallinicos (first plaintiff/applicant)

Chepan Pty Limited (second plaintiff)

Peter Anthony Hunt (first defendant/respondent)

Dibsenta Pty Ltd (second defendant/respondent)

Randall Pty Ltd (third defendant/respondent)

P & K Corporation Pty Ltd (fourth defendant/respondent)

Rowntree Properties (fifth defendant)

JUDGMENT OF: Brereton J

LOWER COURT JURISDICTION: Not Applicable

LOWER COURT FILE NUMBER(S): Not Applicable

LOWER COURT JUDICIAL OFFICER: Not Applicable

COUNSEL:

G Burton SC & G Segal (plaintiffs/applicants)

J Ireland QC & B DeBuse (first, second, third & fourth defendants/respondents)

SOLICITORS:

Konstan Lawyers (plaintiffs)

Moloney Lawyers (defendants)

CATCHWORDS:

LEGAL PRACTITIONERS – Solicitors – former client seeking to restrain from acting – when solicitor can be restrained – whether breach of confidence sole basis for intervention – whether inherent supervisory jurisdiction available after Prince Jefri – held, it is still available – test for intervention – objective perception of want of independence and impartiality necessitating removal – discretionary considerations

ACTS CITED:

Corporations Act 2001 (Cth), ss 236, 237

DECISION:

Order that respondent solicitor cease to act for defendants.

JUDGMENT:

IN THE SUPREME COURT

OF NEW SOUTH WALES

EQUITY DIVISION

BRERETON J

Tuesday 22 November 2005

1033/03 Peter Kallinicos and Anor v Peter Anthony Hunt and ors

JUDGMENT

1 **HIS HONOUR**: The first plaintiff Peter Kallinicos, by notice of motion filed on 21 April 2005, applies for an order restraining Patrick Moloney, solicitor, from acting on behalf of any of the defendants Peter Anthony Hunt, Dibsenta Pty Limited, Randall Pty Limited, P&K Corporation Limited and Rowntree Properties Pty Limited. He does so, not on the basis that Mr Moloney is in possession of confidential information of the plaintiffs which is at risk of disclosure, but on the basis that, in its supervisory jurisdiction, the Court should prevent Mr Moloney from acting in this particular case, due to the likelihood of his being a material witness and having a perceived interest in the outcome. Mr

Hunt, Dibsenta and Randall, and Mr Moloney, oppose the application.

Dramatis Personae

2 The second plaintiff Chepan Pty Limited is a company of which Mr Kallinicos is and was at all material times a director; it does not feature in the present application.

3 Mr Hunt is the only director of Dibsenta. Dibsenta's shareholders are Mr Hunt and his domestic partner Kay Susanne La Forest as to ten each of the twenty ordinary issued shares.

4 Mr Hunt and Ms La Forest are the sole directors of Randall, and each hold one of the two issued ordinary shares in it.

5 Mr Kallinicos, his wife Mrs Kallinicos (nee Vatalis), Mr Hunt and Ms La Forest are the directors of P&K, and each of Mr Kallinicos and Mr Hunt hold one of the two ordinary issued shares in P&K.

6 Rowntree's directors are Mr Kallinicos and Mr Hunt, and although its shareholders are recorded as Mr and Mrs Kallinicos, it is conceded by Mr Kallinicos that they should be himself and Mr Hunt, not Mrs Kallinicos. Ms La Forest has never been an officer of Rowntree.

Mr Kallinicos' Case

7 The present application arises in the context of the breakdown of a commercial relationship between Mr Kallinicos and Mr Hunt, and consequent litigation between them.

In the substantive proceedings, Mr Kallinicos and Chepan claim, in substance, a declaration that a partnership between Mr Kallinicos and Mr Hunt was determined on or about 9 November 2001, the appointment of a receiver to the assets of that partnership, and the taking of accounts between the parties. To understand the circumstances which are said to raise objection to Mr Moloney acting for the defendants, it is necessary to appreciate some aspects of how Mr Kallinicos puts his case for final relief.

8 Mr Kallinicos asserts that, in about June 1994, he and Mr Hunt agreed that they or corporations in which they, or members of their family, were interested would acquire various properties from time to time and resell them, with or without development, for profit, and share the profits and losses equally. It is this business that Mr Kallinicos contends constituted "the partnership business".

9 Various properties were acquired for the purpose of the business, including, relevantly, land at 1/11 Marshall Street, Surry Hills (being lots 1 and 2 in DP 1012198), known as the Abbco site. Mr Kallinicos alleges that, in or about June 1996, Chepan (controlled by Mr Kallinicos) and Dibsenta (controlled by Mr Hunt) agreed that Mr Kallinicos and Mr Hunt would acquire a company to purchase and develop the Abbco site; that Mr Kallinicos and Mr Hunt themselves, or their nominees, would equally own all the shares in that company; and that the nett proceeds to which each of Chepan and Dibsenta were entitled from the development and sale of a property at Frances Street, Leichhardt would be applied to assist the proposed new company to fund the project. Mr Kallinicos alleges that Rowntree was acquired as the corporate vehicle and that, as the balance proceeds from the Frances Street property ought to have been applied towards the purchase and development of the Abbco site, Rowntree hold so much of those proceeds to which Chepan was entitled, or their product in the form of a 50% interest in the Abbco site, upon trust for Chepan, or alternatively as a debt due to Chepan.

10 Rowntree acquired the Abbco site for a price of $1,750,000 pursuant to a contract made on 29 May 1997, by transfer dated 22 August 1997, and registered 17 September 1997. The purchase of the Abbco site was financed by a mortgage loan from Esanda Finance Corporation, and from the proceeds of the Frances Street property. Subsequently, the development of the site was funded in part from the proceeds of the Frances Street development, and in part by a further mortgage loan, from Perpetual Trustee Company Limited. Additional finance was obtained from Advance Investments Finance (No 2) Pty Limited, and from Bendigo Bank Limited. Lot 1/DP1012198 was in due course subdivided into lots 1-14/SP62568; lot 2/DP1012198 was not further subdivided. The strata lots were sold, and the sale of several - but not of lots 3, 11, 12, and 13 - were completed before November 2001. Mr Moloney acted for Rowntree as vendor on the sales, through his then firm, Eddy & Moloney.

11 Mr Kallinicos contends that the partnership was terminated on 9 November 2001. On that day, his solicitors, Konstan Lawyers, sent to Mr Hunt a letter, in the following terms:-

We act for Peter Kallinicos.

We are instructed as follows:-

1. We are instructed that our client entered into a partnership and/or joint venture arrangement whereby our client with his wife Angela Kallinicos entered into various real estate projects with yourself and your partner/spouse Kay La Forest.

2. The purpose of the joint venture was to speculate in property development and property investment.

3. The partnership/joint venture arrangement involved the use of various vehicles including various “shelf companies” as well as the involvement of client’s wife Angela Kallinicos nee Vatalis and your spouse Ms Kay La Forest.

4. We are instructed that our client has given you Notice that he has terminated all past agreements and is desirous in taking accounts of the partnership/business with a view to distributing contributions and retained earnings to our client. We are further instructed that you hold all the books and records of the partnership and have refused to provide our client’s accountant access.

5. We note that you have advised our client of numerous dates upon which accounts will be presented and have failed to meet those promised dates.

6. Further, we note that you have failed to pay numerous creditors of the various ventures. Our client’s wife has recently been served with a Statement of Liquidated Claim upon BHL Holdings Limited claiming monies for unpaid Liquor purchasers with respect to the business “The Balmain Monkey Bar”. This is unacceptable to our client.

We are instructed therefore to demand the following:-

1. You pay our client within seven (7) days from the date of this letter the sum of $2 million being part payment of our client's share in the partnership assets.

2. Provide an account within seven (7) days of all financial dealings including records of all projects undertaken by the partnership; books of accounts; cheque books; Bank statements; records of all loans; capital contribution; payments receipts; an audited record of all expenses paid by the partnership to builders, contractors, employees, agents together with a copy of all files including settlement sheets, trust account statements etc.

We are instructed that unless our client receives the above information as referred to above, he will approach the Supreme Court of New South Wales and have a Receiver appointed to the partnership previously conducted by you and our client.

12 Eddy & Moloney responded on behalf of Mr Hunt, by letter dated 15 November 2001, reference "PM" (Mr Moloney), as follows:-

We refer to the above and confirm that we are the solicitors for Mr Peter Hunt.

Mr Hunt has provided to us a copy of your letter dated 9 November 2001. With respect to that correspondence we are instructed to reply as follows:-

1. Our respective clients have undertaken a number of joint venture arrangements which were conducted through development companies. A number of those joint ventures involved the development of real estate.

2. None of those joint venture arrangements have to date been terminated by either party. In addition no demand has been made on our client by Mr Kallinicos or any other party for production of books of account or associated documentation.

3. Our client denies that he failed to pay any creditors other than creditors whose claim is disputed. With respect to the claim made by BHL Holdings Limited we confirm that we have received instructions to defend those proceedings on behalf of the first and second defendants.

4. In order that we might obtain meaningful instructions from our client we would be grateful if you could provide us with specific details of the alleged partnership in question and the various development projects which were undertaken by that partnership. It is unclear form your correspondence what projects you refer to or whether the relationship between our respective clients was that of a partnership or joint venturers. In circumstances where your client seeks to rely upon written documentation, we would be grateful if you could provide us with a copy of same.

5. Our clients recently retained new accountants to investigate the books and records of various developments in which your client may have had an involvement.

6. Your letter dated 9 November 2001 provides no detail whatsoever with respect to any entitlement of your client to the sum of $2,000,000. Whilst our client is more than happy to participate in an accounting of any development project undertaken in association with your client he will not accede to ambit claims without any substantiation whatsoever. We would be grateful if you could advise how your client calculated the figure of $2,000,000.

As previously advised our client is not in any way seeking to avoid any responsibilities or obligations which may exist to your client, however, a proper determination needs to be made with respect to the existence of any liability. Based upon the contents of your letter dated 9 November 2001, we believe the consideration of an application to the Supreme Court of New South Wales for the appointment of a receiver is grossly premature. In circumstances where any such application is made without providing proper notice this letter will be relied upon by the Court in the question of costs.

13 Thereafter, further strata lots in the Abbco site were sold. Relevantly, lot 3/SP62568 was sold for $485,000 by transfer registered on 27 June 2002; lot 11/SP62568 was

sold for $499,000 by transfer dated 5 September 2002; lot 12/SP62568 was sold for $495,000 by transfer registered on 5 October 2002; and lot 13/SP62568 was sold for $438,000 by transfer dated 21 November 2002. Mr Kallinicos alleges that the defendants have failed to acknowledge Chepan's entitlements, or to account for and make payment in accordance with those entitlements, in respect of the sales of lots 3, 11, 12 and 13. Mr Kallinicos further alleges that the transfer of lot 3/SP62568 was effected by memorandum of transfer containing a signature which falsely purported to be that of Mr Kallinicos, and that the transfers of lots 11 and 12 were effected by memoranda of transfer signed by one Ms La Forest, who was not authorised to sign on behalf of Rowntree.

14 It is common ground that Mr Moloney acted for Rowntree on the sale of unit 3. By letter dated 21 June 2002 on the letterhead of Eddy & Moloney, solicitors - reference "PM:90601", which I take to be a reference to Mr Moloney – and over the signature block of "Patrick Moloney", addressed to Hunt & Hunt, payment of settlement moneys of $436,552.82 was directed as follows: to Perpetual Trustee Company Limited (presumably the outgoing mortgagee) as to $325,000; to Heidtman and Co (presumably solicitors for Perpetual) $313.50; to the Owners Corporation, SP62568 (adjustment of levies) $1,910.82; to Eddy & Moloney (presumably for costs) $1,395; and to Dibsenta, $107,933.50. Mr Kallinicos complains that, and wishes to investigate why, the whole of the balance proceeds were apparently paid to Dibsenta, Mr Hunt's company, and none to Chepan or as directed by himself or for his benefit. The transfer of lot 3, to which the seal of Rowntree is attached, bears a signature purporting to be that of Mr Kallinicos, which he denies is his.

15 It is also common ground that Mr Moloney acted for Rowntree on the sale of unit 11. A letter on the letterhead of Eddy & Moloney, signed over the signature block of Patrick Moloney, although not by him, addressed to Minter Ellison and dated 4 September 2002, directs payment of the balance purchase moneys as follows: to South Sydney City Council $408 (presumably rates adjustment), to the Owners Corporation SP62568 $2,177.52 (presumably levy adjustment), to Perpetual Trustee Company Limited $310,000 (presumably discharge of mortgage), to Eddy & Moloney $1,349 (presumably costs), to Heidtman and Co $313.50 (presumably costs of acting for Perpetual), to D C Balog and Associates $2,815 (possibly costs of acting for second mortgagees), to each of Denis John Roast, Phillip Alan Renne and John Clarence Thorn $43,258.75 (perhaps second mortgagees), and to Geoffrey Robert Ralph $2,854.76. Mr Kallinicos wishes to ascertain the nature of the payments to Roast, Renne, Thorn and Ralph. The transfer of lot 11 bears, as one of the attesting signatures, that of Ms La Forest, purportedly as a director of Rowntree, which she was not.

16 It is also common ground that Mr Moloney acted for Rowntree on the sale of unit 12. A letter on the letterhead of Eddy & Moloney dated 9 September 2002 addressed to Robert Napoli and Co, the solicitors for the purchaser, and signed, although not by Mr Moloney personally, over his signature block, directs payment of the balance purchase moneys as follows: to South Sydney Council $408 (presumably rates adjustment), to Sydney Water $124.50 (presumably water rates adjustment), to Perpetual Trustee Company Limited $337,830 (presumably discharge of mortgage), to Eddy & Moloney $1,385.70 (presumably costs), to Accos Australia Finance Limited $80,000 (presumably discharge of second mortgage), and to Dibsenta Pty Limited $50,726.85. Mr Kallinicos complains that, and wishes to investigate why, the balance proceeds were paid only to Dibsenta, and none to Chepan or otherwise as might be directed by him or for his benefit. The transfer of lot 12 apparently bears the signature of Ms La Forest attesting affixation of the seal of Rowntree.

17 It is also common ground that Mr Moloney acted for Rowntree on the sale of unit 13. By letter on the letterhead of Eddy & Moloney dated 19 November 2002 addressed to Scara Trimarchi, the solicitors for the purchaser, and signed although not by Mr Moloney over his signature block, with a reference "PM: 9125" (which I take to be a reference to Mr Moloney), payment of the balance purchase moneys upon settlement was directed as follows: to South Sydney City Council $272 (presumably adjustment of rates), to Owners Corporation SP6258 $2,535.43 (presumably adjustment of strata levies), to Ian McPhee Real Estate $10,984.45 (possibly selling costs or commission), to Perpetual Trustee Company Limited $354,715.83 (presumably partial discharge of mortgage), to Heidtman and Co $313.50 (presumably mortgagee's costs on discharge), to Eddy & Moloney $1,353 (presumably costs), and to Randall $68,355.13. Although a Westpac Bank cheque dated 20 November 2002 in favour in Randall refers to a sum of $54,075.84 rather than the greater sum referred to in the letter of 19 November 2002, the practical significance is unchanged: Mr Kallinicos complains that, and wishes to investigate why, the balance proceeds were apparently paid to Randall, controlled by Mr Hunt, to the exclusion of any interest of Mr Kallinicos. This transfer was purportedly executed by Mr Hunt, as sole director, which he never was.

18 Although Mr Kallinicos' assertion that he did not consent to the transfers of the lots in question and had no prior knowledge of them was tested in cross-examination, and it became apparent that his agency had acted on and received commission in respect of sales of some of the lots, all the sales in respect of which it was shown that he had any notice predated November 2001. He was not shown to have had notice of, nor to have acquiesced in, the sales of Lots 3, 11, 12, or 13.

History of Proceedings

19 Mr Kallinicos instituted these proceedings by summons filed on 8 January 2003. On or about 4 February 2003, Mr Moloney filed a notice of appearance, originally on behalf of all five defendants. On 10 July 2003, Mr Kallinicos filed a statement of claim. The proceedings to date have largely involved procedural issues concerning pleadings and particulars.

20 On 13 October 2003, Mr Moloney filed a notice of change of solicitor, the effect of which was that he ceased to act for Rowntree (save for a limited purpose, by arrangement between the parties, which can be disregarded for present purposes), and thereafter acted only for Mr Hunt, Dibsenta, Randall and P&K.

21 On 26 April 2005, Konstan wrote to Mr Moloney, purporting to challenge his retainer to act for Rowntree (on the basis that Mr Kallinicos, one of the two directors and

shareholders, had never consented to him so acting), and also suggesting that there was a potential conflict between the interests of Mr Hunt on the one hand and those of Rowntree on the other, by reason of which it was inappropriate for him to have continued to act for either of them. Mr Moloney replied by letter dated 3 May 2005, asserting that since October 2003, Rowntree had not been represented, and was not represented by him (as a result of the notice of change of solicitor filed on 14 October 2003). He sought precise particulars of any objection taken on grounds of conflict.

22 The present notice of motion, seeking an order restraining Mr Moloney from acting for any of the defendants, was filed on 27 April 2005. Unfiled copies of it and a supporting affidavit had been provided to Mr Moloney on 26 April 2005.

23 On 28 June 2005, Konstan took issue with Mr Moloney's denial that he had acted or was acting for Rowntree, but added that Mr Kallinicos not only challenged the retainer of Mr Moloney by Rowntree, but also challenged his retainer in respect of others of the defendants:-

Further, the flow of funds claimed by our client to have occurred between Dibsenta Pty Limited and Rowntree Properties Pty Ltd when viewed in the context of Mr Moloney having acted for Rowntree Property Pty Ltd in respect of the transactions which generated those funds, must be such as to put Mr Moloney in a position of conflict in continuing to act for Mr Hunt and Dibsenta Pty Limited.

Moreover, once it is established that Mr Moloney acted for Rowntree Properties Pty Ltd at some stage, even if he ceased doing so, the fact that he once so acted would preclude him from continuing to act for Mr Hunt and Dibsenta Pty Limited.

In these circumstances, the notice of motion challenging Mr Moloney's retainer in respect of those parties is being relisted forthwith.

24 Although, as I have recorded, unfiled copies had been provided on 26 April 2005, the notice of motion, which had originally been filed on 27 April 2005, together with the affidavit of Mr Kallinicos sworn 26 April 2005, was formally served under cover of a letter dated 28 June 2005 from Konstan to Mr Moloney. On 4 July 2005, the Registrar by consent directed that the plaintiffs file and serve any further affidavit material in support of the notice of motion by 8 July, and that the first to fourth defendants serve any material with respect thereto by 29 July, and stood the matter over for further directions or referral to the Duty Judge on 5 August 2005.

25 By letter dated 14 July 2005 to Konstan, Mr Moloney sought further particulars of the objection to his acting for the defendants other than Rowntree, and in particular whether it was alleged that he was in receipt of confidential information which disentitled him to continue to act for them, and if so what that information was and what the alleged prejudice was. If a conflict of interest were asserted, he asked that it be identified, and if the injunction was sought on some other basis, he sought particulars of the objection.

26 Konstan replied, ultimately by letter dated 3 August 2005. In essence, the allegation particularised was that Mr Moloney having acted for Rowntree as vendor on the sales of lots 3, 11, 12 and 13 at Marshall Street, the balance proceeds of which were distributed to Mr Hunt's interests to the exclusion of Mr Kallinicos' interests, he might be, at least, a material witness, as to how and why those distributions were made, including the source and nature of the instructions for the directions for payment. To this was added that there was no evidence of Mr Kallinicos having consented to Mr Moloney acting for any of the defendants of which he was a director, and that there was the potential for conflict between at least the interests of Dibsenta and Randall on the one hand, and Rowntree on the others, and also between the right of Mr Kallinicos to information as a director of the fifth defendant, and the interests of the other defendants in relation to that information about the unit sales.

27 The plaintiffs filed an amended statement of claim on 19 July 2005. On 27 July 2005, Eddy & Moloney produced to the court on subpoena conveyancing files relating to the sales on which they had acted, and on 5 August 2005 the Registrar stood the motion over to 5 September 2005 for hearing.

Issues

28 In respect of P&K, Mr Burton SC, who appears for Mr Kallinicos, submitted that while there was no suggestion that Mr Moloney had acted for it on the sale of any relevant unit, there was nonetheless potential for a conflict between Dibsenta (which had received some relevant sale proceeds) and P&K (for which he remains on the record), in circumstances where Mr Kallinicos seeks leave, pursuant to *Corporations Act* 2001 (Cth), ss 236 and 237, to bring proceedings against Mr Hunt to account for the proceeds of sale by P&K of properties at 270 and 442 Darling Street, Balmain. Moreover, he submits that there is no evidence that the retainer of Mr Moloney was ever duly authorised by P&K, of which Mr Kallinicos and his wife are two of the four directors and Mr Kallinicos an equal shareholder with Mr Hunt. For Mr Moloney and his present clients, Mr Ireland QC says that it has been apparent that he has been acting for P&K from the outset; that he ceased to act for Rowntree when the issue as to

authority or retainer was raised in respect of it; and that if similar objection were taken in respect of P&K, then the appropriate course was that P&K be unrepresented. He acknowledged that Mr Moloney might not be able to sustain a retainer by the fourth defendant, in which case it should be left unrepresented.

29 If Mr Moloney's actions for P&K were the only issue, that would resolve the present application, but it is not. Mr Burton contends that there is a significant risk that Mr Moloney, the solicitor on the record for the defendants other than Rowntree, either will be a material witness, or, if he is not called by the defendants, the fact that he is the solicitor acting for Dibsenta, Randall and P&K may be a matter of some forensic embarrassment. He submits that there is a live issue as to the disbursement of the nett proceeds of two of the strata units to Dibsenta, and of one to Randall, and that it will be material to explore the source and nature of instructions which Mr Moloney received for the directions as to payment upon completion; also that it will be material to explore the source and nature of his instructions for the disbursement to the three persons who each received $43,000. He submits that who gave such instructions, and their content and context, will be relevant, and also that the plaintiffs may wish to test the bona fides of Mr Hunt and any assertion he makes about those payments, by eliciting evidence of what he may have told Mr Moloney. Thus, says Mr Burton, if Mr Moloney's explanation were the innocent one (from his perspective) that he sent the transfers to Mr Hunt for execution and received instructions from Mr Hunt that they had been duly executed and that Mr Hunt and Mr Kallinicos were agreed as to the directions as to payment, even that would be important evidence against Mr Hunt.

30 Mr Burton also points to the circumstance that over the period from June to November 2002 during which the four transfers in question took place, their execution evolved from the transfer of Lot 3 (in which the affixation of the seal of Rowntree was purportedly attested by the two directors), through the transfers of lots 11 and 12 (in which the attestation of the seal was apparently attested by one director (Mr Hunt) and an unauthorised person (Ms La Forest)), until the transfer of lot 13 (which was purportedly executed by Mr Hunt as sole director), (which he never was), all these being handled by the same solicitor on the record. It is implicit in Mr Burton's submission that from the dissolution of the partnership and these facts, Mr Moloney ought to have been alerted to the possibility that the interests of Mr Kallinicos were being disregarded.

Jurisdiction to restrain lawyers from acting

31 Mr Burton's submissions did not invoke the power of the court to restrain a solicitor from acting due to the risk of imperilling confidences of a former client. Rather, he relied on what is said to be the broader scope of the court's inherent jurisdiction to preserve the proper administration of justice by restraining a legal practitioner from acting in a particular case, for which he referred to *Bowen v Stott* [2004] WASC 94 (Hasluck J), [51]; *Re LPO Transact Pty Ltd (In Liq); Williamson v Nilant* [2002] WASC 225 (McKechnie J), [25]; and *Holborow v Rudder* [2002] WASC 265 (Heenan J). Mr Ireland emphasised that the application was apparently not based on the proposition that Mr Moloney was in possession of any information confidential to the plaintiffs, but on the possibility that he may be a material witness.

32 The acceptance in New South Wales of the authority of *Prince Jefri Bolkiah v KPMG* [1998] UKHL 52; [1999] 2 AC 222 for the view that, in a case where the retainer is no longer active, the jurisdiction of the court to intervene at the suit of a former client to restrain a solicitor from acting is founded solely on obligations of confidence, and is not and cannot be connected with some principle of conflict of interest [*Prince Jefri*, 234-5; *Belan v Casey* [2002] NSWSC 58 (Young CJ in Eq), [15]-[21]; *British American Tobacco Australia Services Limited v Blanch* [2004] NSWSC 70 (Young CJ in Eq), [97]-[104]; *Asia Pacific Telecommunications Limited v Optus Networks Pty Limited* [2005] NSWSC 550 (Bergin J), [51]-[55]], requires that closer consideration be given to the nature of the jurisdiction which Mr Burton's submissions invoke, and in particular, whether it survives in New South Wales.

33 As Young CJ in Eq pointed out in *Belan v Casey*, [15], until *Prince Jefri* three bases were advanced for granting injunctions restraining solicitors from acting in proceedings. The first was a breach of confidence, where to permit the solicitor to continue to act (usually, though not invariably, against a former client) would involve a risk that the solicitor might use, or be bound to use, information which he or she held subject to a duty of confidence to the former client. The second was breach of a duty of loyalty, where acting against a former client was said to be inconsistent with the solicitor's fiduciary obligation of loyalty to that former client. The third was the court's inherent supervisory jurisdiction over solicitors.

34 The first basis – breach of confidence – involves a claim to enforce a contractual or equitable right, namely, the protection of a confidence which the solicitor was bound, by the contract of retainer and/or in equity, to maintain, even after termination of the retainer. It depends on ordinary contractual and equitable principles. The second was also framed as depending on ordinary equitable principles, said to be derived from a solicitor's fiduciary duty. Thus each of the first two bases involved the assertion of legal rights which might as easily arise in relationships other than between solicitor and client (for example, as in *Prince Jefri*, between accountant and client). The third basis was quite different, depending not at all upon equitable (or other) rights of the parties, but on the court's inherent supervisory jurisdiction over its officers, including its solicitors. It is that third basis for intervention that the plaintiffs seek to invoke in this case.

35 The importance of *Prince Jefri* was in clarifying and distinguishing the basis for the Court's intervention in each of an "existing client" case, and a "former client" case. Lord Millett affirmed the basis of the court's jurisdiction to intervene at the suit of a *former* client to be the protection of confidences, and *not* the avoidance of any perception of possible impropriety [*Prince Jefri*, 234F-H]. In a former client case, the court's jurisdiction could not be based on any conflict of interest, because there was none: the fiduciary relationship formerly subsisting between solicitor and client had come to an end with the termination of the retainer, and the solicitor thereafter had no obligation to defend and advance the interests of the former client, to whom the only surviving duty was one to preserve the confidentiality of information imparted during the subsistence of the relationship [*Prince Jefri*, 235C-D]. *Prince Jefri* holds that a former client who seeks to restrain its former solicitor from acting against it must show (i) that the solicitor is in possession of the former client's confidential information, to the disclosure of which the former client has not consented, and (ii) that the information is or may be relevant to the new matter, in which the interests of the solicitor's new client may be adverse to those of the former client [*Prince Jefri*, 235D-E]. On the other

hand, where the court's intervention is sought by an *existing* client, the solicitor's disqualification from acting has nothing to do with the confidentiality of client information, but is based on the inescapable conflict of interest (to use Lord Millett's word, but perhaps "duty" is more pertinent) inherent in the situation of acting both for and against the same person [*Prince Jefri*, 234I-235A].

36 Does *Prince Jefri* deny the availability of the court's supervisory jurisdiction to restrain a solicitor from acting against a former client other than where confidences are put in jeopardy?

37 Before *Prince Jefri*, the court's inherent jurisdiction to restrain a solicitor from acting in a particular case as part of its supervisory jurisdiction was well-established, as the following, far from exhaustive, review of the authorities shows.

38 In *Davies v Clough* [1837] EngR 360; (1837) 8 Sim 262; 59 ER 105, albeit that questions of confidential information arose, Shadwell VC, in a judgment which was affirmed by Lord Cottenham LC, founded the jurisdiction to intervene on the Court's authority over its own officers as to the propriety of their behaviour.

39 In *Mills v Day Dawn Bloch Gold Mining Co Limited* (1882) 1 QLJ 62, the Full Court of the Supreme Court of Queensland, albeit in a case concerning confidential information, held that the jurisdiction to restrain a solicitor from acting against a former client rested on the power of the court to keep control over all its officers.

40 In *Rakusen v Ellis Munday and Clarke* [1912] 1 Ch 831, Cozens-Hardy MR [at 835] referred to "the special jurisdiction over solicitors", Fletcher-Moulton LJ [at 841] mentioned "the power that we certainly possess of directing what the officers of the court should and should not do", and Buckley LJ [at 843] referred to the jurisdiction over solicitors as officers of the court.

41 In *Abse v Smith* [1986] QB 536, Donaldson MR [at 546] referred to the inherent right of a court, incidental to the proper administration of justice, to refuse to hear any individual barrister or solicitor when the proper administration of justice necessitates it.

42 In *Wan v McDonald* [1992] FCA 4; (1992) 33 FCR 491, Burchett J said [at 512-513] that while the emphasis in earlier judgments had been on the solicitor's duty to safeguard confidential information, recent attention had been drawn to at least two other aspects of the problem: a solicitor's duty of loyalty which could not be treated as extinguished by the mere termination of the period of the retainer, and the important consideration of public policy which gives a special quality to the relationship of solicitor and client that the law will not generally permit to be stained by the appearance of disloyalty.

43 In *Everingham v Ontario* (1992) 88 DLR (4th) 755, the Full Court of the Ontario Divisional Court [at 761-762] held that it was within the inherent jurisdiction of a superior court to deny the right of audience to counsel when the interests of justice so required by reason of conflict or otherwise, and that this power did not depend on the rules of professional conduct made by the legal profession and was not limited to cases in which those rules were breached. The issue was not whether a rule was breached, but whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice required the removal of the solicitor, the goal being to protect not just the interests of the individual litigant but more importantly public confidence in the administration of justice.

44 In *Black v Taylor* [1993] 3 NZLR 403, the New Zealand Court of Appeal dismissed an appeal from a declaration that a solicitor should not act further as counsel in certain proceedings on the ground of conflict of interest arising from the solicitor's past receipt of confidential information, but did so on a basis which did not rest on protection of confidential information. Cooke P said [at 406] that the inherent jurisdiction of courts to determine who may be allowed to represent parties to argue cases before them extended to the propriety of a representative appearing in a particular case, which pertained not to the right of practice generally, but to what was needed or may be permitted to ensure in a particular case both justice and the appearance of justice; though the jurisdiction was one to be exercised with circumspection. Richardson J [at 408-409] said that the court had an inherent jurisdiction to control its own processes, which included determining who should be permitted to appear before it as advocates, one aspect of which was the control of a particular proceeding in the court. His Honour described the right to choice of counsel as an important but not an absolute value. After reference to *Everingham v Ontario*, his Honour held that where it was satisfied that the interests of justice so required, the High Court had an inherent jurisdiction to restrain a barrister from continuing to act as counsel for a particular party in proceedings before the court. His Honour agreed with the approach of the Ontario court, holding that disqualification (in a particular case) would ordinarily be the appropriate remedy where the integrity of the judicial process would be impaired by counsel's adversarial representation of one party against the other [at 42]:

The decision to disqualify is not dependent on any finding of culpable conduct on the lawyer's part. Disqualification is not imposed as a punishment for misconduct. Rather it is a protection for the parties and for the wider interests of justice. The legitimacy of judicial decisions depends in large part on the observance of the standards of procedural justice. Where the integrity of the judicial process is perceived to be at risk from the proposed or continuing representation by counsel on behalf of one party, disqualification is the obvious and in some cases the only effective remedy although considerations of delay, inconvenience and expense arising from a change in representation may be important in determining in particular cases whether the interests of justice truly demand disqualification.

45 In *Kooky Garments Limited v Charlton* [1994] 1 NZLR 587, Thomas J said that the court had an inherent jurisdiction to supervise the conduct of counsel in court, which included the ability to intervene when counsel or solicitors appeared in a matter in which they had an actual or potential conflict of interest, or where, by reason of their relationship with the client their professional independence might be doubted - because the integrity of the judicial process is undermined if the lawyers do not have the independence and objectivity which they are presumed to have.

46 In *Grimwade v Meagher* [1995] VicRp 28; [1995] 1 VR 446, Mandie J held that the court had inherent jurisdiction to ensure the due administration of justice and to protect the integrity of the judicial process, and as a part of that jurisdiction to prevent counsel appearing for a particular party in order that justice not only be done but be seen to be done. His Honour said that the objective test to be applied was whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice required that counsel be prevented from acting, giving due weight to the public interest that litigants should not be deprived of their counsel of choice without good cause. In what his Honour described as the "unique, extraordinary and highly exceptional circumstances" of that case, a sufficient real and sensible risk of a lack of objectivity by counsel was found to give rise not only to an undue risk of unfairness or disadvantage to the plaintiff, but also to a substantial concern that a fair trial would not be had, and thus to a concern for the integrity of the judicial process and the due administration of justice.

47 In *Yunghanns v Elfic Limited* (VSC, 3 July 1998, Gillard J, unreported), Gillard J thought that the authorities established three bases for the grant of a injunction to restrain a solicitor acting against his former client: protection of confidences; breach of fiduciary obligations of trust and integrity; and the administration of justice. With respect to the third basis his Honour said [at 9] that the court had an inherent power to control and deal with members of the legal profession and to ensure that the administration of justice was not brought into disrepute by the conduct of members of the profession.

48 *Prince Jefri* was a "former client" case. Significantly for present purposes, it concerned accountants, not solicitors, although their Lordships' speeches are expressed in terms which relate to solicitors, and it was accepted that accountants providing litigation support services should be treated for relevant purposes in the same way as a solicitor. As the question of confidential information was at the heart of *Prince Jefri*, that assumption was an appropriate one in that context. Lord Hope of Craighead considered that the nature of the work which a firm of accountants undertakes in the provision of litigation support services required the court to exercise the same jurisdiction to intervene on behalf of a former client as it exercises in the case of a solicitor, the basis of that jurisdiction being found in the principles which apply to all forms of employment where the relationship between the client and the person with whom he does business is a confidential one [*Prince Jefri*, 226H-227A]. His Lordship's application to accountants of the jurisdiction relating to solicitors was thus plainly in the context of the protection of confidential information. Lord Millett, with whom Lords Browne-Wilkinson, Clyde and Hutton agreed, said that the duties of an accountant could not be greater than those of a solicitor and may be less, but that insofar as some of the information obtained by KPMG was likely to have attracted litigation privilege though not solicitor/client privilege, it was conceded by KPMG that an accountant providing litigation support services must be treated for present purposes in the same way as a solicitor [*Prince Jefri*, 234C-D]. Again, this application to accountants of the

rules relating to solicitors was plainly in the context of confidential or privileged information.

49 Accountants are not officers of the court, and are not subject to the supervisory jurisdiction of the court to which its officers are subject. The court's inherent supervisory jurisdiction over its officers, including its solicitors was not relevant to *Prince Jefri* and was not considered in it. In limiting the basis on which a former client could have a solicitor restrained from acting for another to the protection of confidential information, the House of Lords should be taken as having done so to the exclusion of enforcement of any supposed duty of loyalty. However, their Lordships should not be taken as having excluded the court's inherent supervisory jurisdiction over solicitors.

50 Many subsequent authorities have maintained the same view of the supervisory jurisdiction as appears in the cases before *Prince Jefri*.

51 In *McVeigh v Linen House Pty Ltd* [1999] VSCA 138; [1999] 3 VR 394, Batt JA (albeit in a judgment in which *Prince Jefri* was not cited) said that the authorities established that a court would restrain a solicitor from acting for a litigant, not only in order to prevent disclosure of confidences of a client or former client, but also to ensure that the solicitor's duty of loyalty to the former client was respected notwithstanding termination of the retainer, and to uphold as a matter of public policy the special relationship of solicitor and client.

52 In *Oceanic Life Limited v HIH Casualty and General Insurance Limited* [1999] NSWSC 272, Austin J said [at 48] that, in addition to fiduciary duties and the duty not to misuse confidential information, a solicitor acting in litigation owed a relevant legal duty to the court as well as an ethical duty:-

[48] The duty to the court arises from the court's concern that it should have the assistance of independent legal representation for the litigating parties: see D A Ipp, *"Lawyers' Duties to the Court"* (1998) 114 LQR 63, 93. In the realm of conflicts of interest and conflicts of duty, the solicitor's duty to the court may not be much different from his or her fiduciary duties to former and present clients. However, the duty to the court tends to be expressed in such a way as to emphasise the public interest in preserving confidence in the administration of justice, and therefore in the appearance as well as the reality of independence, and the court's practical approach to its supervisory discretions: *Fruehauf Finance Corp Pty Ltd v Feez Ruthning* [1991] 1 QdR 558; *Murray v Macquarie Bank Ltd* (1991) 33 FCR 46; *Carindale Country Club Estate Pty Ltd v Astill* [1993] FCA 218; (1993) 42 FCR 307; *Macquarie Bank Ltd v Myer* [1994] VicRp 22; [1994] VR 350; *Kooky Garments Limited v Charlton* [1994] 1 NZLR 587; *Watson v Watson* (SCNSW, Santow J, unreported, 25 May 1998).

53 In *Newman v Phillips Fox* [1999] WASC 171, Steytler J granted an injunction restraining Phillips Fox, a law firm, from representing its client corporation in an arbitration, and from disclosing to that corporation certain confidential information which had earlier been provided by the other parties to the arbitration to a firm which had subsequently merged with Phillips Fox. His Honour identified that there had traditionally been three bases for intervention by the court in applications of this kind: the protection of confidential information, restraint of a breach of fiduciary duty in the context of a conflict of interest, and the court's control over the conduct of solicitors as its officers. Of the third, his Honour said:-

[21] As to the third of the bases mentioned above, while it might be so that the basis for the court's intervention has, more recently in England, not been that of a possible perception of impropriety (see, in this respect, what was said by Lightman J in *Re A Firm of Solicitors,* above [1997] Ch at 9, and again by Lord Millett in [*Prince Jefri*] *Bolkiah,* above at 224), the jurisdiction to exercise authority over officers of the court as to the propriety of their behaviour has long been recognised both in England and elsewhere. Thus, in *Davies v Clough* [1837] EngR 360; (1937) 8 Sim 262; 59 ER 105 Sir Lancelot Shadwell VC said (at 267; 106-107):-

The cases ... appear to afford this general principle, namely, that all courts may exercise an authority over their own officers as to the propriety of their behaviour: for applications have been repeatedly made to restrain solicitors who had acted on one side, from acting on the other, and those applications have failed or succeeded upon their own particular grounds, but never because the court had no jurisdiction.

(See also *Re A Solicitor* [1987] 131 SJ 1063).

[22] In Australia the courts have, on a number of occasions, shown a willingness to intervene upon this third basis. So, for example, in *Yunghanns* above at 9, Gillard J affirmed that the court has an inherent power to control and deal with members of the legal profession and to ensure that the administration of justice is not brought into disrepute by the conduct of those members (see also in *Re J A Grieve* [1861] 1 WWL 197).

54 His Honour referred to observations by Drummond J, in *Carindale Country Club Estate Pty Ltd v Astill* [1993] FCA 218; (1993) 42 FCR 307 [at 311], that there is a public element in the work that a solicitor does as an officer of the court and thus performing an integral part in the administration of justice, and to the observations mentioned above of Austin J in *Oceanic Life v HIH Casualty and General*, before concluding that there was sufficient foundation for intervention not only on the first but also on the third of the bases mentioned.

55 In *Mitchell v Pattern Holdings Pty Ltd* [2000] NSWSC 1015, Bergin J refused an application by the defendant for an order that the plaintiff's solicitors cease to act. Her Honour noted observations of Mandie J in *Tricontinental Corporation Limited v Holding Redlich* (VSC, Mandie J, 22 December 1994), in which his Honour had said that it was a serious matter to prevent a party from retaining the legal representative of its choice, particularly upon the application not of a former client but of an adverse party. Her Honour also referred to *Grimwade v Meagher*, but thought the circumstances very distinguishable. Nonetheless, her Honour affirmed the availability in an appropriate case of the supervisory jurisdiction [at 34]:-

I am of the view that as an incident of its inherent jurisdiction, this court may decide upon the propriety of a legal practitioner representing a party in a particular case to ensure justice and the appearance of justice. It has been said that such jurisdiction should be exercised with circumspection: *Black v Taylor* [1993] 3 NZLR 403 per Cooke P at 406; *State of Western Australia v Ward and ors* [1997] FCA 585; (1997) 145 ALR 512 per Hill and Sundberg JJ at 518-519.

56 *Prince Jefri* was cited, and it does not appear to have been suggested that it excluded the third basis for intervention.

57 In *Spincode Pty Ltd v Look Software Pty Ltd* [2001] VSCA 248; (2001) 4 VR 501, the Victorian Court of Appeal dismissed an appeal from the grant of an injunction at the suit of defendants in proceedings, restraining a firm of solicitors from acting or continuing to act for the plaintiff. The principal basis for the decision was that it was a clear case of confidential information relevant to the matters in dispute having been received by the solicitors from the defendants, and that not only had it not been shown that there was no real risk of misuse of that information, but there was a real and sensible possibility of such misuse.

58 However, Brooking JA went further. His Honour concluded that, since the earliest days of attempts to prevent solicitors acting against former clients, one basis of the jurisdiction has been the inherent jurisdiction which the court has over solicitors as its officers [*Spincode*, 511 [32]]. Brooking JA observed that the supervisory jurisdiction had not been discussed in *Prince Jefri* [at 514 [37]]:-

In [*Prince Jefri*] *Bolkiah* the House of Lords disposed of the question whether a basis could be found for restraining a solicitor from acting against a former client other than the protection of confidential information without discussing it at any length. Quite apart from decisions in the United States there is and was a considerable body of

authority bearing on that question. I have already drawn attention to some of the many cases which accept that, where a solicitor is an officer of the court, the jurisdiction of the court to restrain the solicitor form acting may be founded not only on the general power which a court exercising equitable jurisdiction has to grant injunctions for the protection of a right but also on the control which a court may exercise over its own officers. Lord Eldon himself was one of the first to speak of this other jurisdiction, and he seems to have been the first to raise the procedural question whether it could be exercised in a cause, in the absence of objection from the solicitor to a defect in the procedure. It may be argued that the existence of the special jurisdiction over officers of the court is not inconsistent with the view that the only basis on which that jurisdiction will be exercised is the existence of a right to prevent the misuse of confidential information. On the other hand, it may be said that the nature and object of the jurisdiction exercised over officers of the court are such as to prevent it being so confined.

[38] There is a good deal of authority for the view that a solicitor, as an officer of the court, may be prevented from acting against a former client even though a likelihood of danger of misuse of confidential information is not shown. ...

59 His Honour's examination [at 508-511, [26]–[31]] of *Earl Cholmondeley v Lord Clinton* [1815] EngR 511; (1815) 19 Ves Jun 261; 34 ER 515, shows that it is at best unclear that Lord Eldon's decision was dependant upon the apprehended misuse of confidential information, though at least in one later case Lord Eldon suggested that it was [*Bricheno v Thorp* [1821] EngR 542; (1821) Jac 300, 301; [1821] EngR 542; 37 ER 864, 865], and it seems to have been treated as dependant on misuse of confidential information in *Rakusen v Ellis.* His Honour also referred to *Black v Taylor*; *Grimwade v Meagher*; and *Holdsworth v M R Anderson and Associates Pty Ltd* (VSC, J D Phillips J, 26 August 1994, unreported).

60 Brooking JA concluded that the law in Australia had diverged from that in England; that in Australia the danger of misuse of confidential information was not the sole touchstone for intervention; and that there were two other possible bases for intervention: first, that it was a breach of duty for a solicitor to act against a former client in the same or a closely related matter (such duty being potentially an equitable obligation of "loyalty", or an implied contractual obligation in the retainer; and secondly, that where the conduct of solicitors is so offensive to common notions of fairness and justice they should "as officers of the court" be brought to heel notwithstanding that they have not infringed any legal or equitable right [521-525, [52]-[58]].

61 Ormiston JA did not address the further issues discussed by Brooking JA, though his Honour said that, with the luxury of further time to consider them, his Honour may have reached agreement with Brooking JA [at 525, [61]]. Chernov JA found it unnecessary to decide them, although observing that Brooking JA's judgment made a compelling case [at 526, [63]]. As will become apparent, Brooking JA's judgment has not won acceptance in New South Wales, insofar as it differs from *Prince Jefri*.

62 In *Williamson v Nilant*, McKechnie J said that it was well settled that the court's inherent jurisdiction to preserve the proper administration of justice extended to restraining a legal practitioner from acting in a particular case, repeating the objective test: whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice required that counsel be prevented from acting, but at all times giving due weight to the public interest that a litigant should not be deprived of his or her choice of counsel without good cause. [An appeal from his Honour's decision to the Full Court succeeded [*Williamson v Metaxas & Vernon* [2004] WASCA 248], but the Full Court accepted the test and principles to be as stated by McKechnie J, though differing in their application to the facts of the particular case].

63 In *Holborow*, Heenan J dismissed an application by the defendant to restrain a solicitor from acting for the plaintiffs, in circumstances that he was not in fact acting for them though he had previously done so, and it was sought to prevent him from having any communication at all with his former clients, advising them in any way, or taking any part in the proceedings except as a witness. The application was said to be founded on the power of the court to control the conduct of its own officers in order to protect the due administration of justice and the integrity of the judicial process. His Honour, having observed that no case had been cited, nor authority advanced, for the proposition that the court's inherent jurisdiction to protect its own proceedings and control its own officers should be exercised against a practitioner who was not acting or proposing to act on the record in the proceedings, nonetheless affirmed the existence and breadth of the supervisory jurisdiction while also recognising that caution should accompany its exercise:-

[23] The power of this Court to restrain a solicitor from acting in an action or other cause because of an alleged conflict of interest is not limited to those instances in which the future action of the solicitor concerned may imperil confidences of the client for whom the solicitor previously acted. It is an ample power to supervise the conduct of legal practitioners, as officers of the Court, to ensure that they do not act in any way contrary to their obligations to their former client. The broader scope of this power has frequently been referred to as ensuring "that the solicitor's duty of loyalty to the former client is respected, notwithstanding termination of the retainer, and to uphold as a matter of public policy the special relationship of solicitor and client" - *McVeigh v Linen House Pty Ltd* [1993] 3 VR 394 per Batt JA at 398 and *Wan v McDonald* [1992] FCA 4; (1992) 33 FCR 491 per Burchett J at 513. Examples of this are to be found in *Clay v Karlson* (1997) 17 WAR 493; *Afkos Industries Pty Ltd v Pullinger Stewart* [2001] WASCA 372 and *Re LPO Transact Pty Ltd (In Liq); Williamson v Nilant* [2002] WASC 225. In those cases legal practitioners were restrained from acting in various instances where: there was a potential that the legal practitioner might be a witness in the case; where the subject matter of the litigation was likely to involve an evaluation of the conduct of the solicitor concerned and the efficacy of documents prepared by his firm; and where a solicitor was acting for a liquidator in connection with the liquidator's investigations into the prior activities of an insolvent company where the solicitor had, prior to the insolvency, been acting for the company. In some of these cases it is obviously apposite to speak of the solicitor's duty of loyalty to the client which continues even after the termination of the period of his retainer. This seems to be a broad general recognition of the scope of the duties which a solicitor owes to a client, even a former client, arising from the fiduciary relationship between them.

...

[26] Consequently, when an application is made to restrain a legal practitioner from acting in a cause for reasons other than the risk of disclosure or misuse of information provided to the practitioner in confidence by the former client, it is of importance to identify precisely what obligation towards the former client or to the court may be breached or imperilled by the practitioner acting in the cause or against the former client. This approach is important because, otherwise, there may imperceptibly develop an expectation that the freedom of a client to engage a legal practitioner of his or her own preference, and the freedom of a legal practitioner to act even against a former client, where such a course does not involve any breach of his fiduciary obligations arising from the earlier retainer, is open to adventitious challenge as a means of harassing an opponent in a cause.

64 After referring to the words of Mason J in *Giannarelli v Wraith* [1988] HCA 52; (1988) 165 CLR 543, [555-556] in which the paramount duty of counsel to the court and its incidents were outlined, his Honour described the test under the third basis for intervention as depending on objective perception of a want of independence:-

[28] If there are circumstances which are likely to imperil the discharge of these duties to a court by a legal practitioner acting in a cause, whether because of some prior association with one or more of the parties against whom the practitioner is then to act, or because of some conduct by the practitioner, whether arising from associations with the client or a close interest which gives rise to the fair and reasonable perception that the practitioner may not exercise the necessary independent judgment, a court may conclude that the lawyer should be restrained from acting, even for a client who desires to continue his service – *Clay v Karlson*; *Wan v McDonald* [1992] FCA 4; (1992) 33 FCR 491; *National Mutual Holdings Pty Ltd v Sentry Corp* (1989) 22 FCR 209 and *Afkos Industries Pty Ltd v Pullinger Stewart* [2001] WASCA 372.

65 In *Belan v Casey*, Young CJ in Eq dismissed an application by a defendant for orders that the plaintiff's solicitors, who had previously acted for both parties as defendants in defamation proceedings against them, be restrained from acting for the plaintiff against him in proceedings in which the plaintiff sought contribution to the adverse judgment in the defamation proceedings. His Honour said that, until *Prince Jefri*, courts had gleaned three bases for granting injunctions restraining solicitors from continuing to act: breach of a duty of confidence, breach of a duty of loyalty, and the inherent jurisdiction over solicitors; but that in *Prince Jefri* the House of Lords had held that in a case where the retainer was no longer active, jurisdiction was founded solely on confidential information and was not connected with any principle of conflict of interest. Observing that *Prince Jefri* decided two points - (1) that the basis of the claim (in a former client case) was the duty of confidence, and (2) that it was sufficient for a plaintiff to demonstrate a real and not fanciful risk of disclosure - his Honour said that *Prince Jefri* had been followed on almost every occasion, except in Victoria, though mainly in respect of the second proposition. His Honour concluded that, since *Prince Jefri* "the overwhelming weight of authority is to the effect that where the applicant to restrain a solicitor is a former client, the sole consideration is whether there is a real risk of disclosure of confidential information and one does not delve into matters of conflict of interest or conflict of duty. In other situations this delving may be material".

66 I take his Honour to have held that *Prince Jefri* excludes from consideration, in a "former client" case, any question of a breach of a duty of loyalty, and to have declined to follow *Spincode* insofar as Brooking JA suggested that in Australia an equitable obligation of loyalty (or even arguably a contractual obligation of loyalty, which Brooking JA contemplated) survived termination of the retainer. But I do not take his Honour to have held that the court's well-established inherent jurisdiction over solicitors no longer extends to restraining a solicitor from acting in a particular case on ground other than threatened breach of confidence. His Honour was applying, but not extending, *Prince Jefri*.

67 In *Photocure ASA v Queens University at Kingston* [2002] FCA 905; (2002) 56 IPR 86, Goldberg J took the view of *Prince Jefri* that it limited the basis of intervention in a former client case to the protection of confidential information and not the existence of a conflict of interest, preferring *Belan v Casey* to the views of Brooking JA in *Spincode* [53]-[56]. This is probably the strongest direct expression of a view that the supervisory jurisdiction is no longer available.

68 In *Law Society of New South Wales v Holt* [2003] NSWSC 629, Grove J declined to grant an injunction restraining a solicitor who had been employed by the Law Society from acting for the defendant solicitor in a disciplinary matter. His Honour cited the observations of Bergin J in *Mitchell v Pattern Holdings* as authority for the existence of jurisdiction to make the order sought. It will be remembered that those observations expressed the jurisdiction to be an incident of the court's inherent jurisdiction, to ensure justice and the appearance of justice. His Honour referred to *Prince Jefri* on the extent of the duty to protect confidential information and the circumstances in which a court would intervene, but plainly did not read it as excluding the third basis of intervention.

69 In *British American Tobacco*, Young CJ in Eq was asked to reconsider what his Honour had said in *Belan v Casey*, but adhered the same view [[101] – [104]]. The applicant had contended that it was entitled to an injunction first, on the basis of the solicitor's fiduciary obligations; secondly, on the basis of a contractual duty of loyalty surviving the termination of the retainer; and thirdly, on the basis of the court's supervisory jurisdiction [34]. While this, and the fact that his Honour recorded the invitation to reconsider *Belan v Casey* in terms "Mr Gleeson invited me to reconsider my reasoning in *Belan v Casey* insofar as I held that only the first of these is available" might suggest that the third basis was raised and rejected, his Honour ultimately decided the case on the first basis alone and, in reviewing *Belan v Casey*, acknowledged that there might be exceptional cases where equity would give relief in favour of a former client, even though there was no confidential information to be protected, while maintaining that it was clear that there was no rule forbidding a lawyer acting against a former client [105], [112]. I do not read his Honour's judgment as intending to deny that the court retained inherent jurisdiction in an appropriate case, as an incident of its control of its process and officers, to restrain a solicitor from acting in a particular case. Once again, his Honour was applying, but not extending, *Prince Jefri*.

70 In *Bowen v Stott*, Hasluck J granted an injunction at the suit of the plaintiff restraining the defendants from engaging any solicitor associated with Minter Ellison from acting for them, and requiring that Minter Ellison be removed from the record as solicitors for the defendants, finding that there were circumstances which might suggest to a fair-minded, reasonably informed member of the public that, if evidence were given of the kind likely to be given by the legal practitioners involved in the negotiations, a conflict of interest might arise which could interfere with the proper administration of justice, because the practitioners might not be able to conduct themselves with proper objectivity. His Honour recorded that while counsel for the plaintiffs submitted that there were three recognised grounds for intervention, reliance on the first two was eschewed – the first being protection of confidential information of a former client, where that information might be relevant to a matter in which the solicitor is instructed by a later client; and the second being where a solicitor in possession of a client's confidential information subsequently becomes employed or engaged in a second firm which is acting against the solicitor's former client, in circumstances in which that information is or might be relevant to the conduct of those proceedings, and there is a risk that the information will be disclosed to those having the conduct of the proceedings. The plaintiff relied only on the third basis for relief, namely that "the court may intervene where restraining the solicitor is in the interests of the court exercising proper control over the conduct of an officer of the court" [47].

71 After reference to *Williamson v Nilant*, Hasluck J focussed the test on the independence and objectivity of the solicitor [at [53]]:-

The most obvious case in that regard would be a situation in which a solicitor had some direct pecuniary interest in the outcome. It might seem to an independent observer that a solicitor, notwithstanding his best efforts to be impartial and objective, might adjust his evidence in some way to procure a result that suited his interest. The decided cases suggest also that the same principles apply in circumstances where a solicitor might feel impelled to justify or defend his conduct in representing a client, notwithstanding that the solicitor did not have any specific pecuniary interest in the outcome other than the obtaining of his professional fees.

72 His Honour added observations to the effect that the exercise of the power must be regarded as exceptional; that it was generally undesirable for a practitioner aware that he was likely to be called as a witness other than in relation to formal or non-contentious issues to continue to represent the client; that a clear case should be required that the practitioner in question is fixed with an interest conflicting with his duty to the court, but that if a practitioner's credibility is at stake as a witness so that his or her personal integrity may be put in issue, that may constitute a personal interest inconsistent with the practitioner's duty to the court or to the client; and that the cost, inconvenience or even impracticality of a firm ceasing to act may provide a reason for refusing to grant relief, due weight being required to be given the public interest that a litigant should not without good cause be deprived of his or her choice of counsel.

73 In *Sent v John Fairfax Publications Pty Limited* [2002] VSC 429, Nettle J noted that Brooking JA's observations in *Spincode* appeared to have taken the law further than in England or New South Wales, but indicated that if it were necessary to decide, he would follow Brooking JA.

74 In *Asia Pacific Telecommunications*, Bergin J declined to restrain solicitors from further acting for the defendant. The plaintiff's claim was advanced first on the basis of protection of confidential information provided to the solicitors in the course of another retainer, secondly on the basis of breach of an obligation of loyalty arising from that other retainer, and thirdly on the basis of public policy. In respect of the duty of loyalty, her Honour reviewed *Spincode*, *Sent* and the decisions of Young CJ in Eq in *Belan v Casey* and *British American Tobacco*. Pointing out that the delivery of legal services nowadays takes place in an environment which has changed markedly from that which prevailed when the rules governing when Courts would restrain solicitors from acting emerged - there now being a statutory regime as to the conduct of legal practitioners, a statutory complaints authority, and many layers of conduct committees within professional organisations, so that the court is no longer the only "regulator" of the conduct of legal practitioners, her Honour thought that prior to *Prince Jefri*, confusion emanated from the blurring of the line between the court's "supervision of its officers" on the one hand, and the entitlement to have the courts intervene to protect the equitable right to confidence on the other, and that with regard to solicitors acting against former clients, the line between disciplinary supervision and consideration of the entitlement to injunctive relief for the protection of confidential information and/or for breach of duty was now best accommodated by the approach taken in *Prince Jefri* and adopted by the Court of Appeal in *Beach Petroleum NL v Abbott Tout Russell Kennedy* [1999] NSWCA 408; (1999) 48 NSWLR 1*,* and by Young CJ in Eq in *Belan v Casey*, and in *British American Tobacco*.

75 However, her Honour added "The court's jurisdiction over its officers is of course accepted both as to its existence and its breadth". Accordingly, I take her Honour's preference for *Belan v Casey* and *British American Tobacco* over the Victorian cases to be addressed to the supposed duty of loyalty, rather than to the supervisory jurisdiction. This is reinforced by the circumstance that her Honour then proceeded separately to examine the public policy question, with reference inter alia to *Grimwade v Meagher* (and without any hint of disapproval), applying the objective test mentioned repeatedly above by concluding that, in that case, a fair-minded, reasonably informed member of the public would conclude that the administration of justice was not adversely affected in the circumstances.

76 The foregoing authorities establish the following:-

· During the subsistence of a retainer, where the court's intervention to restrain a solicitor from acting for another is sought by an existing client of the solicitor, the foundation of the court's jurisdiction is the fiduciary obligation of a solicitor, and the inescapable conflict of duty which is inherent in the situation of acting for clients with competing interests [*Prince Jefri*].

· Once the retainer is at an end, however, the court's jurisdiction is not based on any conflict of duty or interest, but on the protection of the confidences of the former client (unless there is no real risk of disclosure) [*Prince Jefri*].

· After termination of the retainer, there is no continuing (equitable or contractual) duty of loyalty to provide a basis for the court's intervention, such duty having come to an end with the retainer [*Prince Jefri*; *Belan v Casey*; *Photocure*; *British American Tobacco*; *Asia Pacific Telecommunications*; contra *Spincode*; *McVeigh*; *Sent*].

· However, the court always has inherent jurisdiction to restrain solicitors from acting in a particular case, as an incident of its inherent jurisdiction over its officers and to control its process in aid of the administration of justice [*Everingham v Ontario; Black v Taylor*; *Grimwade v Meagher*; *Newman v Phillips Fox*; *Mitchell v Pattern Holdings*; *Spincode*; *Holborow*; *Williamson v Nilant*; *Bowen v Stott*; *Law Society v Holt*]. *Prince Jefri* does not address this jurisdiction at all. *Belan v Casey* and *British American Tobacco* are not to be read as supposing that *Prince Jefri* excludes it. *Asia Pacific Telecommunications* appears to acknowledge its continued existence.

· The test to be applied in this inherent jurisdiction is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice [*Everingham v Ontario*; *Black v Taylor*; *Grimwade v Meagher*; *Holborow*; *Bowen v Stott*; *Asia Pacific Telecommunications*].

· The jurisdiction is to be regarded as exceptional and is to be exercised with caution [*Black v Taylor; Grimwade v Meagher; Bowen v Stott*].

· Due weight should be given to the public interest in a litigant not being deprived of the lawyer of his or her choice without due cause [*Black v Taylor; Grimwade v Meagher; Williamson v Nilant; Bowen v Stott*].

· The timing of the application may be relevant, in that the cost, inconvenience or impracticality of requiring lawyers to cease to act may provide a reason for refusing to grant relief [*Black v Taylor; Bowen v Stott*].

Resolution

77 Mr Ireland submitted that it would be a serious prejudgment of Mr Moloney's role to restrain him from acting at this stage. He suggested that the more likely explanation for the distribution of the balance proceeds of sale apparently in favour of Mr Hunt's interests was that the plaintiffs had in fact given their authority to Mr Hunt to so direct Mr Moloney. Though conceding that Mr Moloney might be a relevant witness, who either party might call, he submitted that it was too early to tell.

78 I am unable to accept this submission. I do not overlook Mr Ireland's submission that it would be a serious prejudgment of Mr Moloney's role to restrain him from acting at this stage, and I make no judgment at all about Mr Moloney's role, but I have to make a judgment about the likelihood of his being a material witness or having an interest in the outcome. Mr Ireland concedes that there is a live issue as to whether or not Mr Hunt was authorised on behalf of Mr Kallinicos to give directions to Mr Moloney in respect of the sales after the alleged termination date. Mr Ireland also concedes that Mr Moloney might be a material witness (though, he submits, not that he might be exposed to suit). For the reasons which follow, I have come to the conclusion that not only is he almost certainly a material witness, but depending on how the evidence turns out as to how the directions to the purchasers' solicitors were given, he might well be exposed to suit, and he has an interest in how the evidence turns out.

79 There is going to be an examination of the circumstances surrounding the application of the balance proceeds of sale to which Rowntree was entitled from the sale of units 3, 11, 12 and 13 and, in particular, why apparently the whole of the surplus proceeds after payment of adjustments and costs and discharge of mortgages was paid to Mr Hunt's entities to the exclusion of Mr Kallinicos. There will be an important issue in the case as to what instructions were given for the disbursement of the balance proceeds of sale and by whom. It is common ground that Mr Moloney acted for Rowntree on each of those sales. The letter directing payment of settlement moneys was in each case signed by or on behalf of Mr Moloney. It may reasonably be inferred that Mr Moloney has knowledge, or the means of knowledge, as to the instructions which resulted in those directions being given. Mr Moloney is almost certainly a material witness on that issue.

80 Further, it is clear that at relevant times Mr Moloney was on notice (from Konstan's letter of 9 November 2001) that Mr Kallinicos claimed to have terminated the partnership and was demanding accounts and payment of his share of the partnership assets. There will be an issue as to whether he ought to have been alerted to the position of Mr Kallinicos by the form of execution and attestation of the four transfers. There will also be an issue as to how the funds came to be so disbursed, when Mr Moloney was prima facie on notice of the dissolution of the partnership. Mr Moloney is likely to be a material witness on that issue, and it may be inferred that there will be a challenge to his conduct in that respect.

81 There are a number of hypothetical possibilities. One, as Mr Ireland posits, is that Mr Kallinicos in fact authorised Mr Hunt to deal with the proceeds in the manner in

which they were applied. But as Mr Ireland acknowledged, there is a live issue as to authority; and Mr Kallinicos disputes that he gave any such authority, which only serves to highlight the centrality of Mr Moloney's evidence.

82 A second would be that having forwarded the transfers to Mr Hunt for execution, Mr Moloney received instructions from Mr Hunt (which Mr Moloney believed, but which were in fact false) that they had been duly executed, and that Mr Hunt and Mr Kallinicos were agreed as to the directions as to payment. Even that leaves open the likelihood of a complaint that Mr Moloney should have obtained instructions directly from Mr Kallinicos in those circumstances when on notice of the dissolution of the partnership. And evidence (by Mr Moloney) that Mr Hunt had given such instructions, if contrary to the fact, would be important evidence against Mr Hunt.

83 A third possible explanation is that despite knowledge of the interest of Mr Kallinicos, Mr Moloney cooperated or acquiesced in the diversion of Mr Kallinicos' entitlement to Mr Hunt. In that event, Mr Moloney might be in the position of potential accessorial liability under *Barnes v Addy* (1874) LR 9 Ch App 244; (1874) 43 LJ Ch 513; (1874) 30 LT 4; (1874) 22 WR 505. Mr Moloney's evidence would be both an important material witness, and an interested party, in that event.

84 Accordingly, in my opinion, Mr Moloney will be a material witness on issues of substance which appear to be controversial and in respect of which questions of credibility and integrity (not necessarily his own) are likely to arise.

85 Moreover, there is a high degree of probability that Mr Moloney's evidence and/or conduct will come under scrutiny. It seems almost inevitable that Mr Kallinicos would query how being on notice of the interest and claims of Mr Kallinicos, Mr Moloney could accept instructions to distribute the entire balance of proceeds for the benefit of Mr Hunt. There may be a perfectly good explanation, but one can anticipate that it will be the subject of rigorous testing.

86 Thus, the propriety of Mr Moloney's conduct is likely to be examined in the proceedings, and his evidence is likely to be material. He will be in a position in which his client's interest, his own interest, and his obligation to the Court may well be in conflict. Mr Moloney will owe obligations of loyalty to his present client Mr Hunt, he will have an interest in presenting the facts in a manner which exonerates himself, and he will have a duty to the court to be frank. His evidence may crucially corroborate or refute Mr Hunt's version, and his own position and conduct may come under scrutiny. Yet Mr Moloney would not likely be called in Mr Hunt's case to prove that Mr Hunt had given false instructions. If he continues to act, loyalty to his client would be a disincentive to give evidence if those were the circumstances. Yet failure to give evidence would result in submissions being made that his evidence would not have assisted his own client's case.

87 It is generally undesirable for a practitioner who is aware that he is likely to be called as a witness, other than in relation to formal or non-contentious issues, to continue to act. If a practitioner's credibility is at stake as a witness, his personal integrity may be put in issue and that may constitute a personal interest inconsistent with the practitioner's duty to the court or to the client. In those circumstances, it is relevant though far from decisive to note that the *Revised Professional Conduct and Practice Rules* 1995 provide as follows:-

19. A practitioner must not appear as an advocate and, unless there are exceptional circumstances justifying the practitioner's continuing retainer by the practitioner's client, the practitioner must not act, or continue to act, in a case in which it is known, or becomes apparent, that the practitioner will be required to give evidence material to the determination of contested issues before the court.

88 In *Bowen v Stott*, the ultimate issue was whether a settlement had been concluded of earlier proceedings, and counsel and a solicitor who claimed to have negotiated the settlement on behalf of their client swore affidavits to that effect. For the plaintiff, it was argued that counsel and solicitor were bound to end up giving evidence in respect of contentious matters; that the defendants' case depended on their evidence; and that it might strike an independent observer that counsel and solicitor were necessarily compelled to present their evidence in a light which would assert that a settlement was arrived at, so that an independent observer might think that the defendants' legal advisors understandably desired to ensure that the settlement that they said had been negotiated was upheld – otherwise the events might be thought to bear upon their competence. For the defendants, it was submitted that the evidence of counsel and solicitor was uncontroverted, and the only relevant matter in dispute was whether on the facts an enforceable compromise was reached, there being no dispute on the evidence as to what took place. It was argued that the lawyers were witnesses as to non-contentious issues, and that as a result no basis for an injunction arose; alternatively, that proceedings were so far advanced that their involvement could not reasonably be avoided. Hasluck J noted that if the pleadings were amended as proposed and the matter proceeded to trial, there would be an evidentiary issue as to whether a settlement was effected, and it would be likely that evidence would be required from the solicitor and counsel in question on that issue. It would be almost inevitable that they would be challenged about the relevant events, and there would be a contentious issue as to whether agreement was reached on certain matters. Hasluck J concluded that a fair-minded, reasonably informed member of the public might think that there was a conflict of interest which might interfere with the proper administration of justice, because counsel and solicitor might not be able to conduct themselves with proper objectivity. For that reason, his Honour granted an injunction.

89 In *Holborow*, Keenan J remarked that it had long been accepted that a legal practitioner who was likely to be a witness should not act as counsel or continue as counsel if a situation arises where he is unexpected required to give evidence, since the personal integrity of the practitioner may be put in issue if his word or credibility is at stake as a witness, and that will or may constitute a personal interest inconsistent with the practitioner's duty to the court or to the client. Similar conflicts of interest can arise if, for example, the counsel or solicitor had a substantial personal stake in the litigation such as, for example, if he or she were to be a partner in a firm which was a party to the litigation, or a substantial shareholder in a corporation which was a party [*Holborow*, [29]].

90 In my opinion a fair-minded, reasonably informed member of the public would conclude that the independent objectivity of Mr Moloney as solicitor and/or witness was compromised by conflicts between his obligation of loyalty to his client Mr Hunt, his role and knowledge as a witness of material facts, and his potential personal interest. Although I do not think that fair-minded and reasonably informed members of the public conceive that legal representatives are entirely impartial, as most would see them as aligned with the parties whom they represent, and while it needs be borne in mind that the alternative to legal representation is self representation, in which case none of the controls which legal representation imposes on the conduct of litigation would apply, nonetheless, fair-minded and reasonably informed members of the public expect that lawyers will provide advice to their clients, and conduct litigation in which they act, free of and unaffected by any personal interest in the outcome.

91 I have taken into account the circumstance that Mr Moloney would not be the sole legal representative for the defendants: senior and junior counsel have been retained, and the court can have confidence that appropriate independent judgments will be made in the conduct of the defence. I have also taken into account that the concerns which might be entertained as to the objectivity of Mr Moloney's evidence will not evaporate if he ceases to act for the defendants, nor would he thereupon become a witness available to all parties - his obligations to Mr Hunt will continue to require him to keep confidential, and treat as privileged, communications between him and Mr Hunt, and it cannot be anticipated that he will feel free to discuss them with those acting for Mr Kallinicos. It follows that requiring Mr Moloney to cease to act is not a panacea for all the associated difficulties. But ultimately these considerations are not weighty: they do not alter the fundamental problem, that the fair-minded reasonably informed observer would think that Mr Moloney's independence and objectivity *as a solicitor* would be comprised. The scrutiny which Mr Moloney's conduct will attract, and his knowledge of the instructions for the disbursement of the proceeds of the relevant units, means that in the context of this case, fair-minded members of the public would perceive Mr Moloney as not being able, however well intentioned, to advise his client and conduct the proceedings free of and unaffected by the impact of personal interest. In my opinion, therefore, fair-minded, reasonably informed members of the public would conclude that the proper administration of justice requires that Mr Moloney not act for the defendants in these proceedings.

92 The inherent jurisdiction is discretionary. The cases emphasise that consideration is to be given to the prima facie right of a party to be represented by the lawyer of its choice, to the inconvenience, cost and disruption which might be occasioned by requiring a party to change lawyers, and to the "exceptional" nature of the jurisdiction. Mr Ireland submitted that the defendants would be prejudiced by such an order at this stage, since Mr Moloney had acquired knowledge of the matter over the period of more than two years that it had taken the plaintiffs to deliver a proper statement of claim. He submitted that the plaintiffs were in effect trying to head off all the progress which had so far been made in getting the case into order. He pointed to the circumstance that the plaintiffs must have known about the allegedly forged signatures in 2002 (which date appears on their searches).

93 However, the proceedings are at a relatively early stage. Although they have been on foot since 8 January 2003, a defence has not yet been filed; to date the parties

have litigated procedural issues concerning pleadings and particulars. While an injunction restraining Mr Moloney from acting for the defendants would no doubt occasion some inconvenience, there is ample time for alternative representation to be obtained; the loss of Mr Moloney's knowledge of and familiarity with the matter to date would not be oppressive; and the proceedings are not so advanced that a requirement to obtain other representation would be unduly disruptive.

94 As to the question of delay, the most important material came from Mr Moloney's files, which were produced only in July 2005. Although the retainer issue about P&K was evident from an early date, its only consequence would have been to leave the fourth defendant unrepresented, and it did not have the same significance in terms of requiring a response in the interests of the administration of justice, as did the appearance of material which would make Mr Moloney a relevant and material witness.

95 Accordingly, although the prima facie right of a party to be represented by the lawyer of his or her choice is an important one, this is a case in which it should succumb to the higher interests of the administration of justice, and relevant discretionary considerations do not significantly weigh against that result.

96 As the jurisdiction invoked involves the court's supervisory jurisdiction over its solicitors, the appropriate order is one directed to Mr Moloney, and as he appeared by counsel to oppose the application, it is he who should bear the costs.

97 I make the following orders:

1. Order that Patrick Moloney cease to act as solicitor for the defendants herein.

2. Order that Patrick Moloney pay the plaintiff's costs of the application.

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