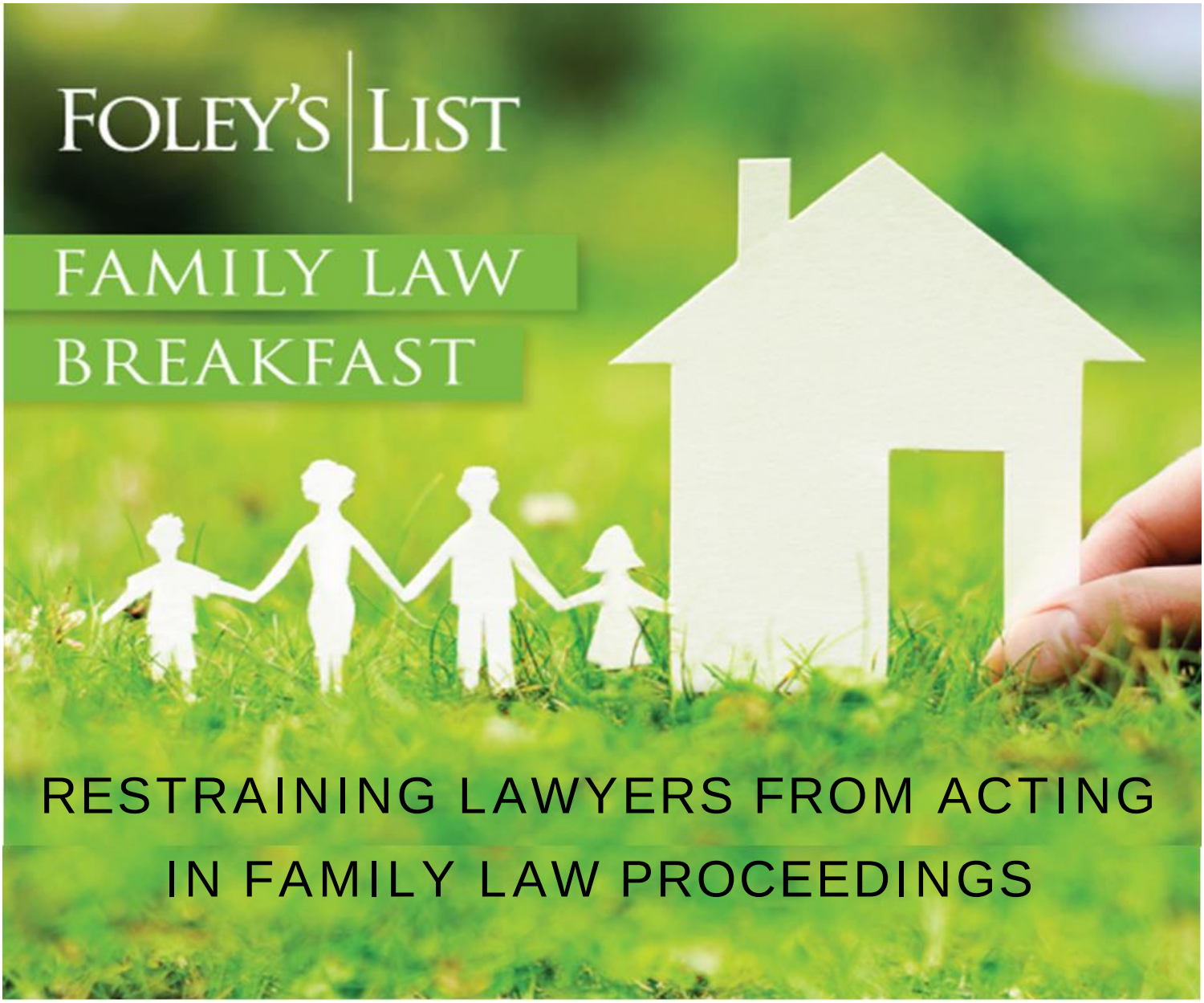

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FOLEY'S LIST

RESTRAINING LAWYERS FROM ACTING ON BEHALF OF CLIENTS IN FAMILY LAW PROCEEDINGS

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Until the recent decision of the Full Court of the Family Court of Australia in *Osferatu & Osferatu*[1], the cases suggested that the courts would take a more lenient approach in family law matters than in commercial law matters when asked to restrain lawyers from acting.

However, in *Osferatu*[2] the Full Court referred to the previous leading authority *McMillan & McMillan*[3] and said 'to the extent that what we have said may be seen to represent a departure from *McMillan* (which we do not necessarily accept), it is to accord with the more recent authority and provide a clearer test'.[4]

I BASES FOR GRANTING AN INJUNCTION

Three bases have evolved for restraining a lawyer from acting or a client from instructing a particular lawyer. Each basis is different[5] and has its own principles that guide its operation, although they may overlap.

[1] [2015] FamCAFC 177 (*'Osferatu'*).
[2] Ibid.
[3] [2000] FamCA 1046 (*'McMillan'*).
[4] Osferatu [2015] FamCAFC 177 at [39].
[5] *Kallinicos v Hunt* [2005] NSWSC 1181 at [33].

Breach of Confidence

The first basis is breach of confidence. In this situation, permitting a lawyer to continue to act would involve a risk that the lawyer might use information in relation to which the lawyer has a duty of confidence to the former client to the disadvantage of the former client. The duty of confidentiality does not end when a lawyer no longer acts for a client; all information previously imparted to the lawyer must be kept confidential.

Most of the family law cases involve confidentiality.[6]

Breach of Duty of Loyalty

The second basis is breach of duty of loyalty. Here, once a retainer has ended, acting against a former client would be inconsistent with the lawyer's fiduciary obligation of loyalty to a client or former client. The confidence owed to the former client cannot be protected if the lawyer acts against him or her.

The Court's Implied Powers and Inherent Jurisdiction

Many of the family law cases describe this basis for restraint as being part of the court's inherent jurisdiction over lawyers who appear before it and over its own processes so that justice is properly administered.

In *Luthra v Betterley*[7] Johnson J described the term 'inherent jurisdiction' as inaccurate. He suggested that the third basis for restraint is part of the Family Court's implied powers, which flow from the establishment of the court as 'a superior court of record' pursuant to s 21(2) of the *Family Law Act 1975* (Cth).

[6] *Osferatu* [2015] FamCAFC 177**;** *Billington vBillington* (No 2) [2008] FamCA 409; *McMillan* [2000] FamCA 1046; *Thevenaz & Thevenaz* (1986) FLC 91-748 (*'Thevenaz'*).
[7] [2015] FamCA 1080.

Johnson J rejected the description of "inherent jurisdiction" because the High Court of Australia had rejected the concept in *DJL v The Central Authority*[8]*:* His Honour said that in that case:

> … the plurality (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) said as follows (at 240-241):
>
> > The Family Court is … not a common law court as were the three common law courts at Westminster. Accordingly, it is "unable to draw upon the well of undefined powers" which were available to those courts as part of their 'inherent jurisdiction'. The Family Court is a statutory court, being a federal court created by the Parliament within the meaning of s 71 of the Constitution. A court exercising jurisdiction or powers conferred by statute "has powers expressly or by implication conferred by the legislation which governs it" and "[t]his is a matter of statutory construction"; it also has "in addition such powers as are incidental and necessary to the exercise of the jurisdiction or the powers so conferred". **It would be inaccurate to use the term "inherent jurisdiction" here and the term should be avoided as an identification of the incidental and necessary power of a statutory court**.
> >
> > (Emphasis added)
>
> Kirby J said as follows at page 268:
>
> > … I agree with the joint reasons that it is desirable, in relation to courts created by statute, that the expression "inherent powers" should not be used. That appellation may be appropriate to courts originally created out of the Royal Prerogative. It is not apt to a court, such as the Family Court, which is created by federal legislation. In such a case it is necessary to attribute the power (where it is not conferred expressly by or under such legislation) to an implication derived from the legislation establishing the body. It may also be implied from the character of the court as a court of the designated kind, and from the place which it enjoys in the Judicature of the Commonwealth for which the Constitution provides. There is no difficulty in ascribing these implications to the Family Court within the field of its jurisdiction.[9]

[8] [2000] 201 CLR 226.
[9] *Luthra & Betterley* [2015] FamCA 1080 [52] (emphasis in original).

II THE TEST

In *Grattan v Grattan (No 3)*[10] Cronin J discussed when the court will exercise its power.[11] His Honour said:

> The power of the Court will be exercised where a fair minded reasonably informed member of the public would conclude that the proper administration of justice requires that the legal practitioner be prevented from acting for a client (see *Spincode Pty v Look Software* [2001] VSCA and *Grimwade v Meagher* [1995] 1 VR 446). The test involving the fictitional member of the public is an objective test based on what the general public could expect of the administration of justice (op cit *Grimwade v Meagher*).
>
> Whilst litigants should not be deprived of their choice of representation without good cause and the power of the Court should be exercised very cautiously, the public's interest in the administration of justice must override that right of legal representation. It is not just the administration of justice but also the public's confidence in the legal profession and if that is seen to be undermined the court should intervene.[12]

In *Osferatu*[13] the Full Court set out three considerations in cases involving breach of confidentiality:

1. whether a firm is in possession of information which is confidential to the former client;
2. whether that information is or may be relevant to a matter in which the firm is proposing to act for another party with an interest adverse to the former client;
3. whether there is any risk that the information will come into the possession of those persons in the firm working for the other party.

[10] [2014] FamCA 839 (*'Grattan'*).
[11] This case involved an application against a solicitor acting for a company under the husband's control and ultimately found that the wife had slept on her rights.
[12] *Grattan* [2014] FamCA 839 [37]-[38].
[13] [2015] FamCAFC 177 [34].

Burden of Proof

The burden of establishing the first two propositions lies with the party making the application. However, the burden of establishing the third proposition moves to the firm proposing to act or acting for the respondent.

In *Osferatu* the Full Court referred to previous leading cases and said 'nothing appears in *Stewart*, *Theranaz* or *McMillan* that obviates the need for an applicant seeking such relief from discharging his burden of proof by adducing cogent and persuasive evidence'.[14]

Further Considerations

In considering an application to restrain a lawyer from acting, the court will balance:

- the nature of the information against a consideration of the person to whom the information was given
- when the information was given
- the relevance of that information to the current proceedings
- the risk of disclosure
- any proposed protective measures required before any determination can be made
- whether any relief is required and if so the appropriate relief.[15]

Legal practitioners involved in a case that may involve conflict or where conflict is alleged should carefully address each of the above considerations in preparing their case and advising the client.

Risk

Before *Osferatu*,[16] the cases followed *Thevenaz*.[17] In that case, Frederico J took the view that a restraint was justified even where the risk that confidentiality may be

[14] Ibid [26].
[15] Ibid [35].
[16] Ibid.
[17] *Thevenaz* (1986) FLC 91-748.

breached was more 'theoretical' than practical. In *McMillan*[18] the Full Court confirmed the 'theoretical risk' approach in *Thevenaz* and held that the aggrieved party only had to show:

1. that she had conveyed confidential information to the lawyer; and
2. that she believed the information might be used, not unreasonably, against her or at least to her disadvantage.

The level of risk that a party needs to show was reconsidered by the Full Court in *Osferatu,*[19] where the phrase 'theoretical risk' was found to be unhelpful. The court clarified the test, saying:

> The consideration should be whether there is a real risk of misuse as opposed to one which is merely fanciful. To the extent that what we have said may be seen to be a departure from McMillan (which we do not necessarily accept), it is to accord with more recent authority and provides a clearer test.[20]

Timing

In *McGillivray & Mitchell*[21] the Full Court observed that the failure to protest or take steps to restrain the involvement of the other party's lawyers was a most important consideration, which would be taken into account adversely to the person who later complained.

In *Grattan*[22], Cronin J held that a fair minded member of the public would be advised that one cannot sleep on one's rights.

Accordingly, lawyers should note that acquiescing to a lawyer acting in circumstances where conflict is alleged may prove fatal to a later application to restrain the lawyer from acting. It is critical that as soon as it is determined that a conflict may exist, this should be discussed with the client and instructions sought.

[18] *McMillan* [2000] FamCA 1046.
[19] [2015] FamCAFC.
[20] Ibid [39].
[21] [1998] FamCA 96.
[22] [2014] FamCA 839.

Final or interim order

An order made restraining a lawyer from acting is considered a final order.[23]

Cross-examination

To allow cross-examination, whether the case is interlocutory or final, is a discretionary matter for the court.[24]

In most cases involving restraint of a lawyer acting in the Family Court, witnesses have not been cross-examined. The view expressed in *McMillan*[25] was that there was little room for cross-examination in cases of this type once a former client has sworn that he or she had provided the lawyer or clerk with information which can be classified as confidential. In *McMillan*, the court held that it would not weigh the conflicting evidence.

However, the Full Court has now clarified the test of risk and referred to matters to be considered by the court in applications to restrain a legal practitioner from acting. There may therefore be circumstances where cross-examination will be necessary. For example, cross-examination may be needed when testing a proposal that information barriers should be put in place and considering how they would be effective in protecting confidentiality and loyalty.

Costs

The award of costs against a solicitor is discretionary and the facts of each case will determine the outcome. As Coleman J noted in *Burns & Caldwell & Anor* (Costs) [2011] FamCAFC 84, the court has to balance public interests when considering whether to make an order against a solicitor. His Honour cited with approval *Ridehalgh v Horsfield* [1994] 3 All E R 848 at 855:

[23] *Osferatu* [2015] FamCAFC.
[24] *CD and Y* (1995) FLC 92-581 [81764].
[25] [2000] FamCA 1046.

> [L]awyers should not be deterred from pursuing their clients' interests by fear of incurring a personal liability to their clients' opponents; that they should not be penalised by orders to pay costs without a fair opportunity to defend themselves; that wasted costs orders should not become a back-door means of recovering costs not otherwise recoverable against a legally aided or impoverished litigant; and that the remedy should not grow unchecked to become more damaging than the disease. The other public interest, recently and clearly affirmed by Act of Parliament, is that litigants should not be financially prejudiced by the unjustifiable conduct of litigation by their or their opponents' lawyers. The reconciliation of these public interests is our task in these appeals. Full weight must be given to the first of these public interests, but the wasted costs jurisdiction must not be emasculated.[26]

Costs sought against the solicitors who acted for an unsuccessful applicant was also considered by Cronin J in *Marney and Anor & Garnett and Anor*.[27]

The successful respondent submitted that the court should find that the action by the lawyer acting for the applicant was a serious dereliction of duty because the application had no worthwhile prospect of success.

After considering the tests articulated by the courts, Cronin J found that nothing in the evidence satisfied him that the lawyers acted improperly or even unreasonably.

In exercising his discretion not to order costs against the unsuccessful applicant's lawyers, his Honour adopted the approach of Sifris J in *Jane v Bob Jane Corporation Pty Ltd & Anor (No 2)* [2013] VSC 467. Cronin J said:

> (the husband) was entitled to run his case and endeavour to convince the Court that his explanation was valid and sufficient. The fact that I disagreed with him says nothing about his entitlement to make the argument. His case was that he did not disregard the known facts but disputed the accuracy and impact of those facts. His evidence fell short and he failed. The facts as found by the Court were only after a trial with evidence and cross-examination. The conclusion after a trial does not necessarily mean that at the outset it was

[26] *Marny and Anor & Garnett and Anors* [2014] FamCA 247 [39].
[27] [2014] FamCA 247.

inevitable that the claim would fail. The Court must avoid hindsight analysis, a point made by counsel for (the husband).[28]

III CASES

I have selected a few cases that illustrate the type of situations that may arise and the courts' treatment of them.

McMillan v McMillan [2000] FamCA 1046

Before *Osferatu, Mcmillan* was considered the leading case in family law proceedings in which lawyers were restrained from acting.

This case was an appeal by the wife against an order made by the court in the first instance whereby the wife's solicitors were restrained from acting on behalf of the wife in property and parenting proceedings.

The restraint was imposed because a non-legally qualified law clerk who had previously been employed by solicitors acting in the proceedings for the husband and who in the course of that employment worked on the husband's case had moved to work as a secretary to the wife's solicitors.

The appeal was dismissed. It was sufficient in those circumstances that the husband had given instructions to the law clerk when the clerk worked for the husband's solicitor as to how he wished his matter to be conducted and the position to be put to the wife. Those matters were held to come within the description of confidential information which may be relevant to the family law matter.

The court held that it was particularly important to maintain public confidence in the legal system and adopted a passage from a minority judgment of the Supreme Court of Canada in *Martin & MacDonald Estate (Gray)* [1991] 1 WWR 705:

[28] *Marny and Anor & Garnett and Anors* [2014] FamCA 247 [40].

> Our judicial system could not operate if this was not the case. It cannot function properly if doubt or suspicion exists in the mind of the public that the confidential information disclosed by a client to a lawyer might be revealed.

The court confirmed that it cannot be said that this important consideration ceases to apply when the disclosure by the client has been made not to a lawyer, but only to a non-legally qualified member of the lawyer's staff.

Billington & Billington (No 2) [2008] FamCA 409

This case involved an application by the husband to restrain the firm of solicitors acting for the wife in the husband's appeal to the Full Court. The application was made after the first instance judgment had been delivered when the only proceedings pending were an appeal to an intermediate appeal court.

A solicitor in the firm retained by the wife had previously been employed by the firm of solicitors retained by the husband and had appeared at a direction hearing on behalf of the husband.

The application was dismissed as there was no finding that the solicitor would have come into possession of confidential information relating to the husband through appearing at the direction hearing. Even if the solicitor had come into possession of confidential information, the husband had not shown how such information was actually or potentially relevant to the husband's appeal.

In this case the husband sought an order restraining the wife from instructing her solicitor and the junior counsel acting for her.

The substantial case involved complex property and parenting issues and the application arose because earlier in the proceedings the husband had instructed different lawyers to arrange for a second opinion and conference with senior counsel. Senior counsel met with the husband in conference for about 90 minutes. Over a year later the same senior counsel accepted a brief to act on behalf of the wife, not recalling that he had advised the husband in the same case.
Senior counsel appeared at a subpoena hearing, which the husband did not attend, and at an interim hearing where the parties negotiated a settlement and the husband never saw senior counsel as he was facing the court.

The senior counsel was then briefed to appear with junior counsel at the mediation, where the husband's lawyers raised concerns that senior counsel for the wife may have previously acted for a family matter of the husband. Senior counsel had no recollection of having conferred with or advised the husband. However, when he checked his records he saw that he had advised the husband.

Upon discovering this, senior counsel returned to the mediation and advised the mediator and other parties of these facts and confirmed that he had no recollection of acting for the husband nor had he informed either his instructing solicitor or junior counsel of any matter of fact or circumstances in relation to the husband's case.

After the mediation senior counsel withdrew from the proceedings and no longer acted for the wife.

The husband sought orders restraining the solicitors and junior counsel who had appeared with senior counsel at the mediation from continuing to act for the wife.

The court found that as the husband had acquiesced in writing to the solicitors for the wife remaining involved, his right to object to the solicitor acting passed by virtue of

acquiescence. As such, the wife's solicitor would not be restrained from acting for the wife.

The court came to a different conclusion regarding junior counsel acting for the wife and restrained the wife from continuing to facilitate or brief the junior counsel.

In doing so, the court stated that the court does not know what information, if any, passed into senior counsel's mind after providing advice to the husband and if any of that information was passed on subconsciously by senior counsel to his junior. The husband for example would not know whether an assessment of the husband may be in part formed from the subconscious material from the conference with the husband which in turn is passed on to senior counsel's junior.

Marny and Anor & Garnett and Anor [2014] FamCA 247

In this case the husband raised the issue of conflict on a number of occasions over several years but did not bring his application until the litigation was beginning its final pathway to trial. The husband was found to have slept on his rights and was unsuccessful.

The court considered whether costs should be awarded to the successful party being the wife who retained the solicitor in question. The court made an order that the wife be paid costs taxed and refused to make the order on an indemnity basis.

In considering that there was nothing in the case that satisfied a conclusion of indemnity costs, Cronin J said:

> Indeed there is much to be said for the proposition that if the principles favoured the solicitors, the husband was still entitled to point to the need to have the court contemplate whether to not to exercise discretion.[29]

The successful party also applied for costs against the solicitors for the unsuccessful applicant husband and the application was dismissed. In doing so Cronin J adopted

[29] *Marny and Anor & Garnett and Anor* [2014] FamCA 247 [28].

the approach of Sifris J in *Jane v Bob Jane Corporation Pty Ltd and Anor (No 2)* [2013] VSC 467[30] as set out above.

Grattan & Grattan (No 3) [2014] FamCA 389

By application to the court, the wife sought to:

1. restrain the husband, his servants and his agents from interacting or briefing, or in any manner engaging or taking advice from or otherwise discussing matters arising from the breakdown of the parties' marriage with Solicitor X, his firm or any counsel engaged by them and;
2. restrain a company related to the husband, couched in similar terms to the restraint relating to the husband and Solicitor X.

The husband gave undertakings in the same terms as the orders sought by the applicant wife not to instruct or brief Solicitor X in his personal capacity.

The outstanding issue for the court to determine was whether to allow Solicitor X to remain on record for the company, a company controlled by the husband.

The basis for the wife's application was that there had been an imparting of information by virtue of Solicitor X acting for her, giving rise to the fiduciary obligation of Solicitor X and that his continued involvement might give rise to a difficulty if he was acting for a client with a competing interest, such as the company

The court took the view that the injunction should not be granted, having particular regard to the fact that the husband's undertaking severely limited that which he could talk about with Solicitor X and there was not sufficient evidence to find that Solicitor X would not honour his obligation as an officer of the court.

[30] Ibid [40].

The court accepted Solicitor X's assurance that he would be diligent in his consciousness about the role that he fulfilled as an officer of the court in relation to the husband.

From a factual perspective, the court concluded that although the wife complained vociferously about Solicitor X in relation to the husband she not only allowed Solicitor X to act in various forms but unequivocally indicated that she had no concerns about his acting for the company. The fair-minded member of the public would be advised that one cannot sleep on one's rights.

Osferatu v Osferatu [2015] FamCAFC 177

In this case a solicitor of the firm representing the husband previously worked for the firm representing the wife. The solicitor in question had no dealings with the wife during his previous employment and provided undertakings to establish and maintain effective information barriers.

The undertaking was in the following terms:

> I…undertake to the Family Court of Australia and to Solicitors X and their client, [the wife], that I will not disclose any information that I may be aware of concerning either [the wife] or the proceedings before the Family Court of Australia between [the wife] and [the husband] to any other person. In that regard, I undertake not to:
>
> 1. speak with [the husband] or any person at Solicitor Y concerning any information I may have concerning [the wife] or her proceedings;
> 2. disclose directly or indirectly any information that I may have in my possession or control concerning [the wife] and her proceedings;
> 3. have any involvement with the proceedings;
> 4. view any correspondence files, tax invoices, briefs or emails either sent to Solicitor Y or received by them, nor be involved in the matter in any manner whatsoever in the future;
> 5. convey to any person any information about the affairs of [the wife] which I may have as a result of my employment with Solicitor X.[31]

[31] *Osferatu* [2015] FamCAFC 177 [5].

This case was concerned with the misuse of confidential information and this case can be distinguished from *McMillan* in that the solicitor concerned had never taken instructions from the wife or even spoken to her.

The Full Court held:

> It is clear that the wife need not, for obvious reasons, divulge the evidence of confidential information she asserts is held by the solicitor she is trying to restrain. However, for evidence to be persuasive and cogent, she should have identified the nature of the information received or likely to have been received by Mr F between 24 June 2011 and February 2012 that was now, or could now be, relevant to the current proceedings. She did not do so. It is not sufficient to say that, as family proceedings cover a range of matters, any information at all received by Mr F could have been relevant. This was especially so given that three years had passed since he could have received any information and both sets of substantive proceedings (parenting and property) had resolved. [32]

The trial Judge did not consider the proposed undertaking and consequently there was no consideration as to whether there was, in light of the proposed undertaking, a real risk of disclosure or misuse.

The Full Court held that the strong and appropriate measures to quarantine the solicitor in question from having any advertent or inadvertent contact with the proceedings including undertakings to the court by partners of the firm led to the conclusion that a restraint against the husband instructing solicitors should be dismissed.

Wong & Shen & Ors [2016] FCCA 1143

In this case the husband sought to restrain the wife's solicitor from acting. The wife's solicitor was a migration agent who did some work in that capacity for the husband and wife. There had been a friendly relationship between the solicitor and the husband and wife, more than just a migration agent, in that the husband and wife had been

[32] *Ibid* [48].

invited to the solicitor's daughter's birthday party. At the time of the application it was common ground that:

- the solicitor was the father of the child that the wife was expecting; and
- the solicitor and the wife were living together.

In determining the matter, Judge Roberts said:

> If the fair minded and informed observer was aware that the duty owed to the Court is higher than the duty owed to the client, then I think that the fair minded observer would sit back and say, 'how can a person who is sharing the bed of the client bring an objective approach to the matter?'[33]

The solicitor was not acting for the husband as a solicitor; he was acting in relation to migration matters and was a solicitor. The husband was a client in the broader sense of the word; not a 'solicitor and client' but he was still a client and there was a relationship.

The potential for lack of "objectivity" by the solicitor together with the fact that the husband had been his client in migration matters, led the court to determine that the solicitor should be restrained from acting for any of the respondents in the proceedings.

In doing so, Judge Roberts referred to an unreported decision of Gilliard J of the Supreme Court of Victoria.[34] The unreported decision is *Yunghanns v Elfic*:[35]

> …the relationship between solicitor and client may be such that the solicitor learns a great deal about his client, his strengths, his weaknesses, his honesty or lack thereof, his reaction to crisis, pressure or tension, his attitude to litigation and settling cases and his tactics. These are factors which I would call the 'getting to know you' factors. The overall opinion formed by a solicitor of his client as a result of his contact may in the circumstances amount to confidential information that should not be disclosed or used against the client.[36]

[33] *Wong & Shen & Ors* [2016] FCCA 1143 [17].
[34] Ibid [22].
[35] (Unreported, Supreme Court of Victoria, Gilliard J, 3 July 1998) 10.
[36] Ibid.

Luthra & Betterley [2015] FamCA 1080

During substantial proceedings in the Family Court, the husband sought an order that the wife's solicitor be restrained from acting on behalf of the wife.

The husband had had counselling with a psychologist who was the mother of the wife's solicitor and the husband had disclosed confidential information to the psychologist in his counselling sessions.

The psychologist gave evidence that she had never discussed anything the applicant said to her with the respondent's solicitor.

In this case there was no contractual or fiduciary relationship between the husband and the wife's solicitor and so there could be no breach of loyalty as the wife's solicitor had not acted for the husband.

The jurisdiction was founded in the implied powers of the court to control its process and aid in the administration of justice.

The court held that the relevant test is whether a fair minded, reasonably informed member of the public would conclude that the proper administration of justice requires that the wife's solicitor be prevented from acting for the wife in the interests of the protection of the integrity of the judicial process and the due administration of justice including the appearance of justice.

The court held that the fair minded member of the public would not consider it necessary for the wife's solicitor to be restrained from continuing to act for the wife in order to protect the integrity of the juridical process and due administration of justice because the member of the public would be informed that the psychologist has a professional duty under her contract with the parties and under the rules of the professional organisation of which she is a member not to disclose any information

received from them as her client and that she had informed the court that she took this duty seriously describing her position of trust as 'a position of total confidentiality'.[37]

In bringing the application, the husband arranged for a subpoena requiring the psychologist to produce all the notes that she held in relation to the husband and wife over the period of her professional relationship with the wife. Both parties inspected the psychologist's notes with leave of the court. The practical reality of the inspection of the document by both parties' lawyers meant that whatever confidentiality there had been was lost by the husband's own actions that could be analogous to waiver of legal privilege.

The wife had been instructing her solicitors for approximately four years and she said that she had confidence in her solicitors and felt distress at the prospect of changing solicitors.

Although the court accepted that the husband had promptly brought the application upon becoming aware of the relationship between the wife's solicitor and the psychologist, and the application had not been brought to harass the wife or prolong proceedings, the court refused to exercise its discretion to restrain the wife's solicitors from continuing to act for her.

Carmella Ben-Simon

Barrister

Owen Dixon Chambers West

11 August 2016

[37] *Luthra & Betterley* [2015] FamCA 1080 [91].