

Chinese Walls and Client Confidentiality

Elsa Kelly examines the issues raised by the recent House of Lords decision in *Prince Jefri Bolkiah v KPMG (A Firm)*

INTRODUCTION

The decision of the House of Lords in *Bolkiah v KPMG*, handed down on 18 December 1998, has for the first time highlighted, at a higher appellate level, the dangers of erecting 'Chinese walls' within large professional organisations that customarily act for and against large institutional clients and in so doing acquire information of a confidential nature which may subsequently prevent them acting against their former client.

CHINESE WALLS

The term 'Chinese wall' is a reference to the procedures taken by a firm to prevent information obtained in the course of acting for one client being disclosed to other personnel in the same firm who are acting for other clients to whom that information may be important.

Historically, Chinese walls have been the subject of some skepticism, the procedures often amounting to no more than a tacit agreement not to discuss a case with personnel in other departments. In the *Bolkiah* case

however KPMG, one of the largest accountancy firms in the world, went to great lengths to instigate procedures designed to maintain confidentiality between departments within the firm to protect their former client's confidentiality. It is for this reason that the case is of such interest to the legal and accountancy professions in general.

THE FACTS Background

The appellant (Prince Jefri) is the youngest brother of the Sultan of Brunei. They got on well until March 1998, when there was a falling out. Prince Jefri was a former Minister of Finance and for many years was the Chairman of the Brunei Investment Agency (BIA). The BIA was formed to hold and manage the General Reserve Fund of the Government of Brunei and to provide the Government with money management services (the exact size of the BIA's funds is secret but they are valued in many billions of US dollars). Since the BIA's establishment in 1983, KPMG conducted the annual audit of its core funds. Over the years numerous large transfers of capital ('the special transfers') were made out of the core funds but did not form part of KPMG's audit. KPMG were required to accept an annual representation from the Board of the BIA (of which Prince Jefri was Chairman) that the transfers were made on behalf of the Brunei Government. In addition to their audit work, KPMG also carried out associated advisory and consultancy work for the BIA. This resulted in a long and close working relationship between the BIA and KPMG.

Project Lucy

Between 1996 and 1998 KPMG were also retained by one of Prince Jefri's companies on his behalf to conduct an investigation in connection with major litigation in which he was personally involved with former business partners, two brothers named Manoukian.



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named Manoukian.

The investigation was code named *Project Lucy*. It was conducted mainly by KPMG's London forensic accounting department and involved the provision of extensive litigation support services, including tasks usually undertaken by solicitors such as interviewing witnesses and reviewing draft pleadings. They took instructions and obtained information directly from Prince Jefri's own staff without the intervention of solicitors. In the course of *Project Lucy* KPMG acquired extensive confidential information concerning Prince Jefri's assets and financial affairs.

The Manoukian litigation was settled in March 1998 and in May 1998 KPMG was formally instructed to discontinue work on *Project Lucy*.

Soon afterwards the Government of Brunei appointed a Finance Task Force to conduct an investigation into the activities of the BIA. The KPMG auditing team were instructed to report to the Task Force in July 1998. This did not give rise to any conflict of interest in so far as KPMG's relationship with Prince Jefri was concerned because all the information needed for the report could be found in the audited accounts.

Project Gemma

However, also in July 1998, KPMG's forensic accounting department was approached by representatives of the BIA and asked whether KPMG would be able to assist the Task Force in carrying out further investigations into the whereabouts of the money which had been the subject of the special transfers. Senior personnel within KPMG met to consider whether the firm could properly accept these instructions. The meeting was attended by KPMG's solicitors and the view was taken that there was no conflict of interest as KPMG had ceased to act for Prince Jefri more than two months previously and there

was no longer a client relationship with him. It was concluded that the BIA's instructions could properly be accepted, but that it would be necessary to establish special arrangements (a Chinese wall) to provide additional protection against the use or disclosure of confidential information relating to Prince Jefri which was still in KPMG's possession.

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KPMG were then formally instructed by the BIA to work with their legal advisors to identify, trace and recover the assets of the BIA. KPMG code-named this further assignment *Project Gemma*. The partner in charge had never been in receipt of any confidential information in relation to Prince Jefri's business, financial or personal affairs. It was obvious and indeed common ground that at least some of the confidential information obtained by or provided to KPMG in the course of *Project Lucy* was or might be relevant to *Project Gemma*. It was also obvious and again common ground that in relation to *Project Gemma*, the interests of the BIA were adverse to those of Prince Jefri. KPMG did not inform Prince Jefri of their new assignment, nor did they seek his consent to their acceptance of the project.

THE CHINESE WALL

When KPMG accepted instructions in relation to *Project Gemma*, detailed

procedures were put in place to create a Chinese wall within the forensic accounting department. For example, steps were taken to ensure that no staff who had worked on *Project Lucy* were assigned to work on *Project Gemma*. Whereas *Project Lucy* had mainly been conducted through KPMG's London forensic accounting department, *Project Gemma* was mainly carried out in Brunei. Separate computer file servers were used for *Project Gemma* and all electronic information relating to *Project Lucy* was deleted from KPMG's servers. All *Project Gemma* staff were interviewed by KPMG's solicitors and confirmed on affidavit that they were not in possession of confidential information acquired for Prince Jefri whether in the course of *Project Lucy* or otherwise.

THE HIGH COURT PROCEEDINGS

Prince Jefri sought and obtained in the High Court before Mr Justice Pumfrey an injunction preventing KPMG from continuing work on the BIA investigation. In granting the injunction, the Judge found that KPMG had taken all the steps that could be expected to minimise or avoid disclosure of confidential information. He said that the intrinsic difficulty with Chinese walls was that, while they were well adapted to deal with foreseeable disclosure of information, they were not well adapted to deal with disclosure which was accidental, inadvertent or negligent. He was firmly of the view that a former client should not be exposed to the risk of such disclosure unless there were powerful reasons for saying that he should. No such reasons existed in the present case.

ON APPEAL

The Court of Appeal by a majority did not accept, at least in the case of accountants, that there was an

inevitable risk of disclosure or that Chinese walls were incapable of removing any real risk. Lord Woolf MR considered that the continuation of the injunction would 'set an unrealistic standard for the protection of confidential information', which would create unjustified impediments in the way large international firms conduct their business.

On giving judgment, Lord Woolf said that there were issues suitable for the Law Lords to consider, so the injunction was allowed to stand whilst the House of Lords had the opportunity to reconsider the Court of Appeal's decision.

THE HOUSE OF LORDS

The House of Lords upheld the injunction granted at first instance.

Lord Millett, who gave the principal speech, stated that the duty to preserve confidentiality was unqualified. It was a duty to keep the information confidential, not merely to take all reasonable steps

to do so.

Lord Millett went on to observe that it is of over-riding importance to the proper administration of justice that a client should be able to have complete confidence that what he tells his lawyer will remain secret. A solicitor or other person in possession of confidential and privileged information should not act in any way that might appear to put that information at risk of coming into the hands of someone with an adverse interest.

His Lordship went on to say that an effective Chinese wall needed to be an established part of the organisational structure of the firm, not created ad hoc and dependent on the acceptance of evidence sworn for the purpose by the members of staff engaged on the relevant work. His Lordship concluded that he was not satisfied on the evidence that KPMG had discharged the heavy burden of showing that there was no risk that information in their possession, confidential to Prince

Jefri and obtained in the course of a former client relationship, might inadvertently come to the notice of those working on *Project Gemma*. It was for this reason that the appeal was allowed and the injunction maintained.

CONCLUSION

The timing of the decision is opportune given the trend towards globalisation in major law and accountancy firms, the topical issue of multi-disciplinary partnerships and the increase in the number of financial institutions offering litigation support services. The House of Lords decision in *Bolkiah v KPMG* sends a clear warning to all who operate Chinese walls that they must be constructed so as to be truly insurmountable if they are to survive judicial scrutiny.

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「中國圍牆」與當事人資料保密

簡雅思探討最近英國上議院在 *Prince Jefri Bolkiah v KPMG (a firm)* 一案的判決所引起的各項問題

引言

英國上議院於去年 12 月 18 日就 *Bolkiah v KPMG* 一案作出了裁決。此案的重要性，在於上級法院首次表明，經常代表或針對主要機構客戶行事的大型專業組織，往往因在過程中取得機密資料而令致它們日後不能針對前度客戶行事，而即使在這些組織內設立「中國圍牆」亦不一定能去除資料外洩的風險。

中國圍牆

「中國圍牆」一詞，是指公司採取措施，防止公司其中一名員工在代表某當事人過

程中取得的資料洩露予同一公司內另一名員工，特別是當上述資料對該另一名員工所代表的當事人來說是重要的時候。

傳統上，人們對「中國圍牆」一向抱著懷疑態度，認為所採取的措施往往只不過是使隸屬不同部門的員工之間取得默契，不會互相討論個案。然而，在 *Bolkiah* 一案中，全球最大的會計師行之一——畢馬域會計師行（以下簡稱「畢馬域」），費了不少功夫來設立各種程序，使公司各部門維持對其前度客戶資料的保密。這正正解釋了為何該案引起法律和會計專業的廣泛關注。

案情

背景

案中上訴人乃文萊蘇丹王最年幼的弟弟謝菲王子。他們二人關係一向良好，但到 1998 年 3 月出現不和。謝菲王子乃前任文萊財政部長，多年來亦為文萊投資機構 (BIA) 的主席。BIA 成立的目的是持有和管理文萊政府的整體儲備基金，以及向政府提供基金管理服務。（BIA 基金的實際數額不為人知，但估計達數十億美元。）自 BIA 於 1983 年成立以來，其核心基金每年的審計一直由畢馬域負責。歷年來多次有資金從核心基金轉移出去（下稱「特別轉移」），但都不在畢馬域的審計範圍之內。以謝菲王子為主席的 BIA 董事局，每年都要求畢馬域接納該等特別轉移乃代文萊政府進行的。除了審計工作外，畢馬域亦為 BIA 提供相聯的顧問和諮詢服務。故此，BIA 與畢馬域有長久而密切的工作關係。

「露絲計劃」

於 1996 年至 1998 年間，謝菲王子旗下一家公司亦代表謝菲王子聘用了畢馬域就一

宗大規模訴訟進行調查工作。該宗訴訟牽涉到謝菲王子本人以及他的兩名前度商業夥伴，名為 Manoukian 的兩兄弟。

調查工作的代號是「露絲計劃」。工作主要由畢馬域屬下位於倫敦的法律會計部門負責，提供了各式各樣的訴訟支援服務，包括通常由律師處理的工作（例如與證人會面和覆核訴訟書草擬本）。該部門亦在沒有律師干預的情況下直接從謝菲王子的員工收取指示和獲得資料。在進行「露絲計劃」的過程中，畢馬域取得了大量有關謝菲王子的資產和財政事務的機密資料。

與 Manoukian 的訴訟，於 1998 年 3 月庭外和解，而畢馬域亦於同年 5 月正式接到指示，停止進行「露絲計劃」。

隨後不久，文萊政府委任了一個財政特派組（以下簡稱「特派組」），對 BIA 的活動進行調查。畢馬域的審計組接獲指示於 1998 年 7 月向特派組匯報。這就畢馬域與謝菲王子的關係而言並沒有引致任何利益衝突，原因是匯報所需的所有資料都可在經審計後的帳目內找到。

「伽馬計劃」

然而，同樣於 1998 年 7 月，BIA 的代表與畢馬域的法律會計部門接觸，並問及畢馬域可否就特別轉移所涉金錢的下落一事協助特派組作進一步調查。畢馬域內的高層人員隨即開會研究會計師行接受 BIA 的指示是否恰當。畢馬域的代表律師也有參與會議，而會議所持的觀點是接受指示不涉及利益衝突成分，原因是畢馬域已有兩個月以上沒有代表謝菲王子，與他亦再沒有當事人關係。會議最後的結論是：接受 BIA 的指示沒有不妥，但公司需要設立一些特別安排（「中國圍牆」），以加強保護畢馬域管有的有關謝菲王子的機密資料，確保該等資料不被使用或披露。

BIA 繼而正式聘用畢馬域，與 BIA 的法律顧問攜手辨認、追查及討回 BIA 的資產。這項任務的代號是「伽馬計劃」。負責這項的合夥人，從來沒有收到任何有關謝菲王子的商務、財政狀況或私人生活的機密資料。以下兩點相當明顯，也是案中雙方的共同點：其一，是畢馬域在進行「露絲計劃」過程中得到或獲提供的機密資料當中，至少一部分與「伽馬計劃」有關或可能有關；其二，是就「伽馬計劃」而言，BIA 的利益與謝菲王子的利益是敵

對的。畢馬域沒有知會謝菲王子有關「伽馬計劃」一事，在接受「伽馬計劃」的任務前亦沒有尋求謝菲王子的同意。

畢馬域築起的「中國圍牆」

畢馬域接受了「伽馬計劃」後，實行了各種措施，在法律會計部門內築起「中國圍牆」。舉例說，畢馬域採取了步驟以確保曾經處理「露絲計劃」的員工不會被委派處理「伽馬計劃」。「露絲計劃」主要透過畢馬域在倫敦的法律會計部門進行，而「伽馬計劃」則主要在文萊進行。「伽馬計劃」使用獨立的電腦檔案伺服器，而所有關於「露絲計劃」的電子資料也從畢馬域的電腦伺服器刪除掉。所有參與「伽馬計劃」的員工都曾與畢馬域的代表律師面談，並以誓章方式確認他們沒有管有不論透過「露絲項目」與否而替謝菲王子取得的機密資料。

若「中國圍牆」要 經得起司法審查的話， 它便必須穩如泰山， 無人能破了

高等法院的裁決

謝菲王子向高等法院法官 Pumfrey 申請並取得強制令，禁止畢馬域繼續替 BIA 進行調查工作。法官裁定，畢馬域已盡量採取一切步驟防止機密資料外洩或把這情況發生的可能性減至最低。然而，「中國圍牆」在本質上存在一個問題，就是縱使它足以應付可預見的資料外洩，但它並不足以應付意外、無意或疏忽的資料外洩。法官堅稱，除非另存有力的理由，否則不應讓前度當事人承受此等外洩的風險，而本案並不存在此等理由。

上訴法庭的裁決

上訴法庭以大多數裁定，至少就會計師行而言，資料外洩並非必然發生，而「中國圍牆」也未必不能摒除所有風險。民事庭

庭長 Lord Woolf 認為強制令的延續會「替機密資料的保護訂下不切實際的標準」，這將不合理地妨礙大型國際會計師行處理其業務。

Lord Woolf 在判詞中指出案中存在着適合上議院考慮的爭論點，因此強制令可予以維持，但上議院可重新考慮上訴法庭的裁決。

上議院的裁決

上議院維持了原審法院頒下的強制令。

法官 Lord Millett 宣讀主體判詞時指出，保持機密的責任不受任何條件限制。這個責任是保持資料機密，而只是為此而採取所有合理步驟是不足夠的。

法官接著指出，當事人有絕對信心他/她告訴其代表律師的資料不會被披露，這對於公義的恰當施行是極其重要的。管有機密或享有法律保密權的資料的律師或其他人，不應作出任何行為，令資料看似會冒上可能落在敵對的人手中的風險。

法官再而指出，有效的「中國圍牆」須屬公司組織架構中一個妥為建立的部分，而非只是僅為某一件事情而築起並只能取決於負責有關工作的員工的宣誓證據會否被接納。法官結果裁定，案中證據不能令他信納畢馬域已履行沉重的舉證責任，即證明畢馬域在與前度當事人關係過程中取得對於謝菲王子來說是機密的、並仍由畢馬域管有的資料，完全沒有被負責「伽馬計劃」的人士無意地注意到的風險。基於此理由，法官裁定上訴得直，並維持有關的強制令。

總結

現時不少主要律師行和會計師行都趨向把業務全球化，加上備受討論的多重行業實務合夥問題以及提供訴訟支援服務的金融機構數目與日俱增，*Bolkiah v KPMG* 一案上議院的判決可算是來得相當合時。這判決向所有設立「中國圍牆」的公司發出了清晰的警報，若「中國圍牆」要經得起司法審查的話，它便必須穩如泰山、無人能破了。

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