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.
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.

**It was a duty to keep the information confidential, not merely to take all reasonable steps to do so**

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，在於上議院首次明確，經常代表或針對主要機構客戶行事的大型專業組織，往往在過程中取得機密資料而令其日後不能對前度客戶行事，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透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離職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 — 瑞華會計師行（以下簡稱「瑞華會計師行」），費了不少工夫並設立各種程序，使公司各部門維持對其前度客戶資料的保密。這正亦解釋了為什麼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之幼弟謝菲王子。二人 Dark 為一間良好，但到 1986 年 3 月出現不和，謝菲王子乃曾任文萊財政部長，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國有股權基金，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威負責。歷年多次有資金從核心基金轉移出去（下稱「特別轉移」），但都不在畢馬威的審計範圍之內。以謝菲王子為主席的 BIA 競選局，每年都要根據畢馬威為畢馬威會計師行（下稱「畢馬威會計師行」）進行的審計工作外，畢馬威亦為 BIA 提供相關的顧問和諮詢服務。故此，BIA 與畢馬威有長期而密切的工作關係。

畢馬威計劃
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威就一
對的，畢馬沒有知會謝非王子有關「個

馬計劃」一事，在接受「個馬計劃」的任

務前亦沒有尋求謝非王子的同意。

畢馬建築的「中國圍牆」

畢馬接受了「個馬計劃」後，實行了各

種措施，在法律會計部門內架起「中國圍

牆」。舉例說，畢馬採取了步稱以確保

屬職能「露穀計劃」的員工不會被委任

處理「個馬計劃」。而「露穀計劃」主要透

過畢馬在倫敦的法律會計部門進行，而

「個馬計劃」則主要在中文文進行。「個

馬計劃」使用獨立的電腦檔案伺服器，而所

有關於「露穀計劃」的電子資料也從畢馬

域的電腦檔案伺服器刪除。所有參與「個

馬計劃」的員工都與畢馬的代表律師會

談，並以普通方式確認他們沒有接觸過

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

謝非王子向高等法院法官 Pumfrey 申請並

取得緊急禁制令，禁止畢馬建築在 BIA 應

行調查工作。法官批准，畢馬已經盡量採取

一切步稱防止機密資料外洩。有關情況發

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，就是確保它

足可應付可預見的資料外洩；但它並足

以應付意外、無意或無意的資料外洩。官

家無難，除非另有強烈理由，否則不應

讓畢馬建築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」亦未必不能消除所有風險。民事庭

庭長 Lord Woolf 認為強制令的延展會「替

機密資料的保護訂下不切實際的標準」，

將不會合理地妨礙大型國際會計師行處理

其業務。

Lord Woolf 在判詞中指出家中存在著

一封合上院議案的爭論點，因此強制令可

以維持，但上訴院可重新考慮上訴庭的

裁決。

上訴院的裁決

上訴院維持了原審法庭頒下的強制令。

法官 Lord Millett 宣讀主審判詞時指出，

保持機密的責任不受任何條件限制，

 redistribute 這對於公義的恰當施行是極其重要

的，且任何保留不僅法律保密機密資料的

律師或其他人士，理應作出任何行為，令

資料看似會不會落在敵對人手中的風

險。

法官再指出，有效的「中國圍牆」須

在公司組織架構中一個簡要為建立的一事

非只是須為某一件事而建起並只能取

決於負責有關問題的員工的宣誓書及會

被取消，法官結果裁定，案中證據不予令

令法庭將畢馬建築的聲明取消，即

律師在會計師行於今取消有關的

「中國圍牆」的人士無意地注意到的風險。基

於此理由，法官裁定上訴得宜，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，加上經濟的多行業實

務合併問題以及提供核數及會計師行的金融

機構數目與日俱增，Bulletin + KPMG 一家

的上訴院的判決可算是來得相當合時，這

判決對所有設立「中國圍牆」的公司發出了

訓示的警告，若「中國圍牆」要經得起司法

審查的話，它便必須穩如泰山，凡人能破了。