horrifying picture of an unwitting purchaser of the Barbican's freehold being subjected to an option to purchase owned by the occupier of a single flat. This did not deter Robert Walker L.J., and rightly so, for the real problem lies in the discoverability of an occupier, not in the nature or extent of his or her interest.

Judicial notice has been taken of the danger of the hidden occupier—see Vinelott J.'s criticism in *Kling* v. *Keston Properties* (1985) 49 P.&C.R. 212—but so far the weight of authority considers that notice of the occupation is irrelevant, and Mustill L.J.'s suggestion in *Lloyd's Bank* v. *Rosset* [1989] Ch. 350 that notice should flavour the construction of the section has generally been treated as heretical. The Joint Working Group recommended that the occupation under section 70(1)(*g*) should be apparent, and this reform is urgent. If implemented, both occupiers and purchasers would be sufficiently and fairly protected. The judgment in *Ferrishurst* could then be left intact, as a logically coherent part of the whole scheme. A purchaser would merely have to make reasonable enquiries to be protected.

In the meantime, however, and pending such reform, a purchaser of registered land will need to guard against the risk of a hidden occupier with extensive equities. Thus he will be well advised to make elaborate enquiries – *plus ça change, plus c'est la même chose*.

A final point to consider is the reputation of *Ashburn*, and the extent to which it can still be treated as authoritative. In its relatively short life, it has been overruled by the House of Lords (in *Prudential Assurance Co. Ltd.* v. *London Residuary Board* [1992] 2 A.C. 386) on the issue of certainty of a leasehold term, and now not followed by the Court of Appeal. One must question whether its remaining tenet, that a contractual licence is not proprietary, is now quite as impregnable as it formerly seemed. Lord Denning's ghost may yet have the last laugh.

LOUISE TEE

CHINESE WALLS

UNDER what circumstances may a solicitor or forensic accountant who has obtained confidential information from a client act against him? This question was considered by the House of Lords in *H.R.H. Prince Jefri Bolkiah v. KPMG* [1999] 2 W.L.R. 215, where the House reconsidered *Rakusen v. Ellis, Munday & Clarke* [1912] 1 Ch. 831 and found the criticisms, both academic and judicial, of the test laid down by the Court of Appeal to be well founded.

Prince Jefri was the chairman of the Brunei Investment Agency (BIA). Since the BIA was established, KPMG had acted as its auditor. Subsequently, KPMG acted personally for Prince Jefri. Differences emerged between Prince Jefri and the Sultan and it was suspected that

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transfers of the BIA's funds had been made for Prince Jefri's own benefit. KPMG were instructed to investigate these transfers and to recover any assets belonging to the BIA. The same department which had acted for Prince Jefri was to carry out the investigation for the BIA.

Prince Jefri sought an injunction to prevent KPMG from continuing to act in the investigation. Pumfrey J. granted the injunction. By a majority the Court of Appeal discharged it. The House of Lords unanimously restored it. It was conceded by KPMG that an accountant providing litigation support services should be treated in the same way as a solicitor. Confidential information having been provided, the appeal turned on the extent of the duty owed by KPMG. *Rakusen* requires "that real mischief and real prejudice will in all human probability result", *per* Cozens Hardy M.R. or that "mischief is rightly anticipated", *per* Fletcher Moulton L.J. In effect the client is required to show on the balance of probabilities that confidential information will be disclosed or misused. This test has been subjected to trenchant academic criticism. Essentially, *Rakusen* ignores the potential for unintentional disclosure, exposes the former client to an avoidable risk, fails to take account of the rule that a solicitor must make full disclosure of all relevant information to the second client, and may result in the appearance of justice not being done. *Rakusen* has regularly been distinguished (*e.g. David Lee & Co.* v. *Coward Chance* [1991] Ch. 259, *Re a Firm of Solicitors* [1991] 1 Q.B. 959) and has been rejected in the United States, and Canada (*MacDonald* v. *Martin* [1990] 3 S.C.R. 1235). The trend of Australian authorities is also towards a stricter approach.

Lord Millett considered that the duty to preserve confidentiality was unqualified. It was a duty to keep the information confidential and not merely to take all reasonable steps to do so. The court should therefore intervene unless satisfied that there was no risk of disclosure. KPMG relied on a Chinese wall. Although there was no rule of law that Chinese walls or similar arrangements were insufficient to eliminate all risk, the starting point was that unless special measures are taken, information moves within a firm. In this case the wall had been established *ad hoc* within a single department. Lord Millett concluded that "an effective Chinese Wall needs 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 members of staff engaged on the relevant work" (p. 229B).

Although this is a welcome clarification of the law, a number of issues remain undecided:

(*a*) Does the approach of the House of Lords apply to all fiduciaries? The position of solicitors is in many respects a special one. They are officers of the court and confidential information possessed by solicitors will often be privileged. However, this consideration may not justify the imposition of an absolute standard of "no risk" on other fiduciaries, *e.g.* investment advisers.

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(*b*) Is any difference to be made in terms of the type of information or the nature of the proceedings or transaction? Where legal professional privilege or litigation privilege are absent, it may be inappropriate to grant an injunction where the client would suffer little prejudice from disclosure, or where the effect of the injunction on the defendant would be disproportionate (*Young* v. *Robson Rhodes*, unreported, Laddie J., 30 March 1999, although *cf. Davies* v. *Davies*, unreported, C.A., 4 March 1999).

(*c*) Lord Millett stated that in the case of existing client conflicts "a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position" (p. 224H). It follows that a solicitors' firm that acts at the same time for two clients with opposing interests is in breach of fiduciary duty (*Bristol and West Building Society* v. *Motthew* [1998] Ch. 1). This would appear to presage an increase in the number of actions for the disqualification of a firm (*cf. Re Baron Investments*, unreported, Pumfrey J., 16 April 1999). Clients who suffer loss should in future claim equitable compensation for breach of fiduciary duty as well as damages for negligence to take advantage of equity's more generous approach to causation and remoteness (*Britannia Building Society* v. *Druitts*, unreported, Judge Malcolm Lee, 21 March 1997) and the irrelevance of contributory negligence (*Nationwide Building Society* v. *Balmer Radmore* [1999] Lloyd's Rep. P.N. 241).

(*d*) What is the future for Chinese walls? The courts have in the past adopted a sceptical approach. The House of Lords eschews such scepticism, although the "no risk" standard means that only in rare situations will a Chinese wall suffice to eliminate all risk of disclosure. However, in *Young* v. *Robson Rhodes* Laddie J. held that a Chinese wall was effective on the merger of two firms of accountants. It was possible to identify all the persons in possession of confidential information and to prevent business contact between them. Laddie J. also considered that it was not necessary for a wall to form part of the institutional structure of the firm if it was effective. Chinese walls are used for a number of purposes other than the protection of confidential information (*e.g.* to prevent insider dealing and to comply with regulatory requirements). It is not thought that the House of Lords intended to cast doubt on their effectiveness for these purposes.

TOLEK PETCH

TAMING THE UNFAIR PREJUDICE REMEDY: SECTIONS 459–461 OF THE COMPANIES ACT 1985 IN THE HOUSE OF LORDS

THE shape of the unfair prejudice remedy—sections 459–461 of the Companies Act 1985—owes much to the influence of Lord Hoffmann, for

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