Barristers' duties and *Dyer v Chrysanthou (No 2)*

Russ Johnson

Ground Floor Wentworth Chambers

2 March 2022

Introduction

This paper summarises the duties of lawyers[1], both to the court and to third parties, by reference to the recent decision in ***Dyer*** *v Chrysanthou (No 2)*.[2]

Dyer was an application brought by a former client seeking orders in the court's inherent jurisdiction and under s.23 of the *Federal Court of Australia Act* that the barrister for the applicant be restrained advising and appearing on behalf of Christian Porter in his defamation case against the ABC and one of its journalists.

Dyer was determined in the (sadly) not too uncommon context of a prominent figure being accused of committing serious sexual misconduct many years, if not decades, in the past. As with any sensational scandal, extensive media coverage is to be expected.

The details of the accusations and Mr Porter's actions in response are largely irrelevant for purposes of this paper and presentation, which is intended to further two purposes:

1. to serve as a refresher in respect of lawyers' duties generally, including under the NSW Barristers Rules[3], and, in particular, in respect of conflicts of duty.

- and -

2. to highlight the relevant principles where a lawyer's duties come into conflict by reference to this recent "real-world" example.

Overview of lawyers' duties

Lawyers have duties both to the court and to third parties, such as clients and former clients. Each are briefly summarised below.

---

[1] The term 'lawyer' is used to capture both barristers and solicitors. Where there is a distinction between the duties of solicitors and barristers, as in the case of the specific rules governing barristers (FN3), the appropriate term is used.

[2] [2021] FCA 641 per Thawley J.

[3] *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) (**NSW Barristers Rules**),

Duties to the court

In what would become a well-known publication, Ipp J writing extrajudicially in 1998[4] observed that a lawyer's duty duties to the court fall within 4 broad categories:

(a) a general duty of disclosure owed to the court;

(b) a general duty not to abuse the court's process;

(c) a general duty not to corrupt the administration of justice; and

(d) a general duty to conduct cases efficiently and expeditiously.

More specific examples of these general duties are as follows, seriatim:

(a) the duty not to mislead the court, whether as to the law or the facts;[5]

(b) the duty not to use the court process as a means of achieving an objective that is inconsistent with the role of that process;[6]

(c) the duty to be courteous to the court and other lawyers, to assist the court in matters of legal principle[7] including by bringing relevant authority to the court's attention;[8] and

(d) the duty to use best endeavours to avoid unnecessary expense and waste of the court's time.[9]

The Honourable Kenneth Martin, formerly Chief Justice of the Supreme Court of Western Australia, in a 2012 piece[10] referring to Ipp J's article, identified various aspects of a lawyer's duty to the court, including:

[4] Ipp J, 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63.
[5] *Clyne v New South Wales Bar Association* (1960) 104 CLR 186.
[6] See e.g. *Saragas v Martinis* [1976] 1 NSWLR 1762, where, in a dispute over possession of leased property, the lessee's solicitors commenced a frivolous appeal with the object of securing a form of moratorium in respect of the premises.
[7] *Accurate Financial Consultants Pty Ltd v Koko Black Pty Ltd* (2008) 66 ACSR 325.
[8] *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [112] per McHugh J; *Rondel v Worsley* [1969] 1 AC 191 at 227-228.
[9] Each state has conduct rules for barristers that seek to ensure that the barrister's work is done so as to (1) confine the case to the identified issues which are genuinely in dispute; (2) have the case ready to be heard as soon as practicable; (3) present the identified issues in dispute clearly and succinctly; (4) limit evidence, including cross-examination, to that which is reasonably necessary to advance and protect the client's interests at stake in the case; and (5) occupy as short a time in court as is reasonably necessary to advance and protect the client's interests at stake in the case: See e.g. NSW Barristers Rules r.58.
[10] The Hon Kenneth Martin, 'Between the Devil and the Deep Blue Sea', Hearsay, Issue 55 (April 2012)

1. ***Paramountcy***. The lawyer's duty to the court is paramount and must be performed even if the client is disadvantaged or gives instructions contrary to the duty. [11] Counsel could never been in breach of duty to the client by fulfilling the paramount duty.[12]

2. ***Court as an extension of the community***. The duty is not to be construed as being owed to a particular court or judge, but rather to the community reflecting the public's interest in the administration of justice. A court enforcing the duty acts as a guardian of the due administration of justice.

3. ***Personal legal duties***. Lawyers' duties to the court are personal in nature and cannot be delegated. They are legal duties imposed under the general law.

4. ***Breach is unlawful***. A breach of a lawyer's duty to the court amounts to unlawful conduct. Unlawful conduct is not necessarily unethical and vice versa. Breach may be the subject of sanction imposed by summary procedure.

5. ***Enforcement action***. A lawyer's breach of duty to the court will not provide a basis for an independent cause of action for a purpose of founding a civil claim for damages.

6. ***Enforcement action by a court – summary procedure***. The court's inherent jurisdiction to proceed summarily against a lawyer for breach is both punitive and compensatory. When a compensatory order is sought against the lawyers, some causal connection must be demonstrated linking the breach to the financial loss. The court retains its inherent jurisdiction to this end[13] although it now appears more common in practice for the court to exercise an appellate jurisdiction on appeals from a disciplinary tribunal.

7. ***Enforcement by a court – application for restraint.*** Where there is a lack of independence or the potential for conflict between interest and duty, it is open to the court to disqualify a lawyer from acting or appearing in the proceedings. **The exercise of this jurisdiction is anchored to preserving the proper administration of justice**[14]

---

[11] This has also been referred to as an 'overriding' duty: *Giannerelli v Wraith* (1988) 165 CLR 543 at 555-556 per Mason CJ.

[12] *Ibid* at 572.8 per Wilson J.

[13] *Re a Barrister and Solicitor* (1979) 40 FLR 1 at 17 per Blackburn CJ, Connor and Davies JJ; *Re a Legal Practitioner* (1981) 55 FLR 405 at 419; *Re Robb* (1996) 134 FLR 294 at 297; *Bektas v McGarvie* [2015] VSC 78 at [15]-[19] per Kaye JA. See also the *Legal Profession Uniform Law 2014* (NSW) s. 264(1).

[14] *Dyer* at [133]-[138] and decisions there cited; *Abse v Smith* [1986] QB 536, [1986] 1 All ER 350; *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2007] NSWSC 350 at [42] per Bergin J.

but may also be activated on the ground of protection of confidential information[15] (which is what occurred in *Dyer*, albeit the jurisdiction was not invoked summarily).

Other aspects of the paramount duty include:

8. ***Undertakings***. The lawyer must be diligent in observing any undertakings he or she has given to the court, which is enforceable in the same way as an injunction is enforced,[16]

9. ***Conflict of interests***. The lawyer must not act in a matter where his or her own personal interests conflict with his or her duty as an officer of the court.[17]

10. ***Prompt response***. *The* lawyer must promptly and candidly respond to inquiries regarding his or her professional conduct from the court or other competent authority.

11. ***Undermining confidence in the court***. A lawyer may be the subject of professional disciplinary sanction for behaviour where that behaviour has the capacity to undermine the confidence the court (and others) may have in that lawyer.

A convenient summary of the above duties as they apply to barristers in New South Wales is in the NSW Barristers Rules at rr.23 to 34, 57 to 60, and 69.

Duties to third parties – clients and former clients

Practitioners should refer to NSW Barristers Rules 35 to 38, which in summary require barristers: to promote the client's best interests without regard to his or her own interest (35); tell clients and solicitors about alternatives to fully contested adjudication (36); assist the client in understanding the issues so the client can give proper instructions (37); and advise clients in criminal cases of advantages to the client if they plead guilty (38).

Other Rules of note

At issue in *Dyer* was whether the barrister should be restrained from acting for the client on two separate yet overlapping bases, including: (1) danger of misuse of confidential information received by the barrister in the context of her dealings with Ms Dyer; and (2) the need to protect

[15] A lawyer is liable to be restrained from acting for a new client against a former client if a reasonable observer, aware of all the relevant facts, would think that there is a real, as opposed to a theoretical, possibility that confidential information given to the lawyer by the former client might be used by the lawyer to advance the interests of a new client to the detriment of the former client: *Dyer* at [74]-[78] and decisions there cited.

[16] *R v Khazaal* (2006) 167 A Crim R 565 at [20] per Whealy J.

[17] It is noteworthy that the duty to avoid conflicts of interests also falls within the rubric of duties to clients, and former clients.

the integrity of the judicial process and the due administration of justice, including the appearance of justice. Thawley J observed at the outset of the decision (at [2]):

> Whilst these two bases provide distinct justifications for preventing a legal practitioner from acting, there is potential overlap. The fact that confidential information generally is, and might be shown in fact to have been, provided to a legal practitioner in the course of acting for a client is relevant to whether 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 in a situation which might, or might be seen to, be against the former client's interests.

Although somewhat curiously not mentioned in the decision, it seems relevant to refer to Rules 17, 101, 103, 114, 115, and 118 of the NSW Barristers Rules. Those rules provide in relevant part:

> **17 Cab-rank principle**
>
> A barrister must accept a brief from a solicitor to appear before a court in a field in which the barrister practises or professes to practise if:
>
> (a) the brief is within the barrister's capacity, skill and experience,
>
> (b) the barrister would be available to work as a barrister when the brief would require the barrister to appear or to prepare, and the barrister is not already committed to other professional or personal engagements which may, as a real possibility, prevent the barrister from being able to advance a client's interests to the best of the barrister's skill and diligence,
>
> (c) the fee offered on the brief is acceptable to the barrister, and
>
> (d) the barrister is not obliged or permitted to refuse the brief under rule 101, 103, 104 or 105.
>
> **101 Briefs which must be refused or must be returned**
>
> A barrister must refuse to accept or retain a brief or instructions to appear before a court if:
>
> (a) the barrister has information which is confidential to any other person in the case other than the prospective client, and:
>
> (i) the information may, as a real possibility, be material to the prospective client's case, and
>
> (ii) the person entitled to the confidentiality has not consented to the barrister using the information as the barrister thinks fit in the case,
>
> (b) the client's interest in the matter or otherwise is or would be in conflict with the barrister's own interest or the interest of an associate,
>
> (c) …
>
> (d) the barrister has reasonable grounds to believe that the barrister may, as a real possibility, be a witness in the case,

(e) …

(f) the barrister has reasonable grounds to believe that the barrister's own personal or professional conduct may be attacked in the case,

…

(m) the barrister has already discussed in any detail (even on an informal basis) with another party with an adverse interest in the matter the facts out of which the matter arises.

103 A barrister must refuse a brief to advise if the barrister has information which is confidential to any person with different interests from those of the prospective client if:

(a) the information may, as a real possibility, affect the prospective client's interests in the matter on which advice is sought or may be detrimental to the interests of the first person, and

(b) the person entitled to the confidentiality has not consented beforehand to the barrister using the information as the barrister thinks fit in giving advice.

114 Confidentiality & conflicts

A barrister must not disclose (except as compelled by law) or use in any way confidential information obtained by the barrister in the course of practice concerning any person to whom the barrister owes some duty or obligation to keep the information confidential unless or until:

(a) the information is later obtained by the barrister from another person who is not bound by the confidentiality owed by the barrister to the first person and who does not give the information confidentially to the barrister, or

(c) the person has consented to the barrister disclosing or using the information generally or on specific terms.

115 A barrister must not disclose (except as compelled by law) or use confidential information under rule 114 (b) in any way other than as permitted by the specific terms of the person's consent.

118 A barrister must return a brief other than a brief to appear as soon as possible after the barrister becomes aware that the barrister has information confidential to a person other than the client which may, as a real possibility, be material to the client's case or to the advancement of the client's interests, being information which the barrister is prohibited from disclosing or using unless the person entitled to the confidentiality consents to the barrister disclosing or using the information as the barrister thinks fit.

It is not difficult to imagine a scenario where the duties (and prohibitions) expressed in the Rules may intersect and/or compete with one another, resulting in tension. For example, the Cab Rank Principle may oblige a barrister to accept a brief from a new client whose interests are not aligned with a barrister's former client, unless overridden by a specific prohibition, e.g. Rules 101, 103 and 114.

The facts in *Dyer* arise in this space of competing duties, obligations and prohibitions.

The *Dyer* Case

The facts may be briefly stated.[18]

A barrister, senior counsel, had been engaged on referral from a junior barrister on her floor, on a "pro bono" basis to consult with Ms Dyer, her solicitor and a close friend and give advice about whether Ms Dyer had grounds to take action against *The Australian* for defamation, in respect of an article which published comments about Ms Dyer possibly being politically motivated to support Mr Porter's accuser.

A conference was held during which time Ms Dyer contended that confidential information was conveyed to the barrister. This was the subject of detailed evidence. However, the barrister claimed to not recall any confidential information being conveyed.

Later, the barrister was briefed to appear in Mr Porter's own defamation action against the ABC and a journalist in its employ. Ms Dyer learned about this and considered that the barrister had confidential information of hers. Ms Dyer through her lawyer contended that the barrister was conflicted as she had confidential information of Ms Dyer and therefore the barrister was required to return the Porter brief.

The barrister consulted other well-known and respected senior counsel on whether she was indeed conflicted and required to return the brief. She said she did not think she had confidential information of Ms Dyer, and if any was conveyed during the conference or in subsequent emails, which she had not retained copies of, she couldn't recall that information. She was advised that on balance, she could continue to act. The advice she received may also have been given on other bases including that the information, whatever it was, would be discoverable in the defamation proceedings in any event.

The barrister, through her lawyers, indicated that she did not think she had received any confidential information that could be against Ms Dyer's interests if used in the case for Mr Porter, and even if that information was conveyed to her, she didn't recall what it was, and therefore there was no conflict. Further, she contended that if she did at some later stage recall the confidential information, if there was any, she would act appropriately at that stage.

[18] For a comprehensive account, see *Dyer* at [3]-[73].

Ms Dyer was not satisfied and, after extensive correspondence between Ms Dyer's lawyers and the barrister's lawyers, Ms Dyer commenced proceedings on the two bases referred to above, seeking that the barrister be restrained from acting for Mr Porter.

Legal principles

Ground 1 – Danger of misuse of confidential information

In *Sent v John Fairfax Publication Pty Ltd* [2002] VSC 429 at [33], Nettle J articulated the test (at [34]-[35]) (footnote added):

> [T]he court will restrain a legal practitioner continuing to act for a party to litigation if a reasonable person informed of the facts might reasonably anticipate a danger of misuse of confidential information of a former client and that there is a real and sensible possibility that the interest of the practitioner in advancing the case in the litigation might conflict with practitioner's duty to keep the information confidential, and to refrain from using that information to the detriment of the former client: see *Farrow Mortgage v Mendel Properties Pty Ltd* (1995) 1 VR at p 5 per Hayne J; *Yunghanns v Elfic Pty Ltd* (1998) Butterworth Cases 9803497 per Gillard J; *Bolkiah v KPMG* [1999] 2 AC 222 especially at 237 in the speech of Millet L; and *World Medical Manufacturing Corporation v Phillips Ormonde & Fitzpatrick* (2000) VSC 196 per Gillard J.
>
> [This ground] is usually seen as being founded upon a contractual or equitable duty to preserve the client's confidential information, which survives the termination of the retainer (*Prince Bolkiah*[19] at 234-235 per Lord Millett)…

In *Nash v* ***Timbercorp*** *Finance Pty Ltd* (2019) 137 ACSR 189 at [64], Anderson J formulated a convenient methodology for applying the above test which included asking the following 6 questions:

(a) What is the relevant information?
(b) Is that information confidential?
(c) Does the legal practitioner have possession of that information?
(d) Is the legal practitioner proposing to act "against" the former client in the requisite sense?
(e) Is there a real risk that the confidential information will be relevant?
(f) Is there no real risk of misuse of the confidential information?

Thawley J broadly adopted this approach by adding a preliminary question of whether there was a lawyer-client relationship between the barrister and Ms Dyer. His Honour emphasised

[19] [1999] 2 AC 222.

however, at *Dyer* at [78], that "these questions provide a framework for analysis as opposed to supplanting the test."

His Honour then proceeded to answer each of the questions after considering the first preliminary question and concluding that there was "no question" that the barrister and Ms Dyer were in a lawyer-client relationship, which was originally denied by Mr Porter, but was ultimately conceded at the hearing.

(a) What is the relevant information?

After considering the authorities holding that it is necessary to precisely identify the confidential information, as doing so is central to the issue of subsequent misuse[20] and the evidence from the attendees at the conference, his Honour was able to identify the topics referred to in the evidence of Ms Dyer and the other attendees which were discussed at the conference, which his Honour labelled "Information A" through to "Information N".

The barrister properly did not review the evidence of the confidential information, so as to preserve her ability to appear if the Court was ultimately against the applicant. As mentioned above, the barrister's account of what was discussed in conference was not consistent with the evidence of the other attendees. It should be noted however that this is consistent with the barrister not recalling having received confidential information and (properly) not reading the other attendees' evidence.

(b) Is the information confidential?

The test for confidentiality is set out at [93] by reference to *Timbercorp* at [73] to [77]. It is sufficient for purposes of this paper to indicate that within the context of a lawyer-client relationship, the concept is not to be narrowly construed. All communications between clients and their lawyers are prima facie confidential. Issues of public domain may also arise: *Dyer* [95] citing *Brand v Monks* [2009 NSWSC 1454 at [180] and [184] per Ward J, as her Honour then was.

Thawley J answered this question in the affirmative.

(c) Does the legal practitioner have possession of that information?

Even though the barrister claimed not to recall any of the confidential information his Honour accepted was imparted during the meeting, and that she had not retained any relevant emails,

[20] *Timbercorp* at [66].

his Honour found that the barrister was in possession of the information. At [99], by reference to *Sent* at [89] per Nettle J, his Honour adopted the following reasoning:

> One knows as a matter of experience that when he has advised on documents and transactions, recollections of them, although long faded, may revive in the course of the sort of close and careful study which precedes the trial of an action. And when one has conferred with a client, recollection of things said and done in conference may be revived long after the event when the same or similar things are said or done in another place.

It is noteworthy that in *Sent*, 14 years had passed since impartation of the confidential information to the lawyer, yet, Nettle J applied the above reasoning to find that the information was still in the lawyer's possession.[21]

(d) Is the legal practitioner proposing to act "against" the former client in the requisite sense?

His Honour held (at [104]), by reference again to *Timbercorp*, that "[r]elevant conflict arises in any situation where a legal practitioner uses confidential information obtained in the confidence and privilege of the lawyer-client relationship without the client's informed consent, particularly where the use of the information may be regarded as against the client's interests, whether legal or otherwise." In that sense, the barrister was proposing to act "against" the former client.

His Honour concluded (at [106]) that it did not matter whether or not Ms Dyer would or might be called as a witness in Mr Porter's defamation proceedings.

It is not necessary to the relief sought that I conclude that Ms Dyer will or might possibly be called as a witness in the defamation proceedings. In the particular circumstances of this case, his Honour reasoned:

> [the barrister][22] obtained information through her dealings with the ABC which was not publicly available and which was confidential so far as Ms Dyer was concerned. The use of such information in the defamation proceedings, a course which Ms Dyer by these proceedings demonstrates that she opposes, would present a conflict with [the barrister's] duty of confidentiality to Ms Dyer and is contrary to Ms Dyer's interests such that it can be said that Ms Chrysanthou would relevantly be acting against Ms Dyer.

[21] See by analogy *Seller v AFP* (2014) 301 FLR 318 at [49].

[22] The decision refers here to Ms Dyer obtaining information, which appears to be a typo.

(e) Is there a real risk that the confidential information will be relevant to the defamation proceedings?

His Honour analysed the pleadings in the defamation proceedings by reference to the topics of information referred to above. His Honour also had the benefit of detailed submissions as to numerous issues which could or would arise in those proceedings. His Honour referred to the defence of qualified privilege under s.30 of the *Defamation Act 2005* (NSW) having been raised by the ABC. His Honour was satisfied that at least some of the confidential information revealed in the conference was relevant both to whether ABC's and the journalist's conduct was reasonable and whether it could be said that it was actuated by malice, which are both relevant to the qualified privilege defence (at [110]). Mr Porter said the *information would be discoverable in any event*, however his Honour considered that was not an answer to the problem (at [112]-[113]). His Honour found as follows (at [125]):

> Irrespective of whether all of this information would ultimately be revealed in the process of discovery or interrogatories, the defamation proceedings ought not be conducted by a barrister who has already obtained information on a confidential basis about those matters. A part of the reason for this is that knowledge of the confidential information might affect, even subconsciously, the manner in which those proceedings are conducted, including with respect to interrogatories and discovery.

(f) Is there no risk of misuse of the confidential information

Mr Porter contended that there was no risk of misuse because the barrister did not recollect anything confidential and that she had undertaken not to use any such information should she later recollect the existence of such information.

The reasoning of Nettle J in *Sent* applied to both of Mr Porter's contentions. In addition, the undertaking was not sufficient as his Honour accepted that the barrister would use confidential information without appreciating its source. Further, his Honour reasoned (at [131]) that "it has long been recognised that a solicitor or barrister who, with the best will in the world, is determined not to make use of a client's confidential information for the benefit of another, may subconsciously do so".

Finally, it was observed that if the barrister did later recall the confidential information, by that time, Mr Porter's defamation proceedings may have significantly progressed, or even worse, the barrister may later realise that she had already used confidential information, for example in preparing for cross-examination.

<u>Ground 2 – The administration of justice</u>

The court has inherent jurisdiction to ensure the due administration of justice and to protect the integrity of the judicial process and, as part of that jurisdiction, to prevent a member of counsel appearing for a particular party in order that the jurisdiction should not only be done but be seen to be done: *Dyer* [133], *Sent* at [112].

The objective test to be applied is whether a fair minded reasonably informed member of the public **would** conclude that the proper administration of justice requires that counsel be prevented from acting; giving due weight to the public interest that litigants should not be deprived of their choice of counsel without good cause: *Dyer* at [133]; *Sent* at [113]; *Dealer Support Services Pty Ltd v Motor Trades Association of Australia* (2014) 228 FCR 252 at [4]; *Kallinicos v Hunt* (2005) 64 NSWLR 561 at [76].

His Honour referred to another formulation of the relevant test.

In ***Mumbin*** *v Northern Territory (No 1)* [2020] FCA 475 at [39], Griffiths J stated the test differently, replacing the word "would" above with "might". Thawley J preferred Griffiths J's formulation on the basis that it was more closely aligned with the test for apprehended bias: *Dyer* at [138]; *Re Refugee Review Tribunal; Ex parte H* (2001) 179 ALR 425 at 434–5 [28]. Griffiths J's preference for the 'would' test as the 'might' test was not novel, however: *Timbercorp* at [62] and decisions there cited.

His Honour concluded that a fair-minded member of the public would say that the barrister should not act for Mr Porter in his defamation proceedings: *Dyer* at [140].

Importantly, his Honour went further, holding that even if he had concluded that there was no real risk of misuse of confidential information, he would have reached the same conclusion: *Dyer* at [140].

His Honour stated at [141]:

> Further, by reason of the events described earlier, there is a real and material risk of the public having less faith in the result of the defamation proceedings between Mr Porter and the ABC, a situation which is as undesirable to Mr Porter and the ABC as it is to the administration of justice. This conclusion is amplified in respect of those members of the public who would consider it entirely possible that Ms Dyer might be a witness in those proceedings. If Ms Dyer is not called as a witness in the defamation proceedings, it might be thought that Ms Dyer was not called because [the barrister] had been her barrister. If she is called as a witness, it might be thought that Mr Porter has an unfair advantage notwithstanding [the barrister's] undertaking not to cross-examine Ms Dyer.

There were no other discretionary reasons to refuse relief to Ms Dyer. Although Mr Porter said he would suffer significant prejudice if the relief sought was granted, he did not give evidence to give content to that claim. Whilst his Honour accepted that the barrister had performed substantial work, Mr Porter had been aware that there might be a conflict for a significant period of time, yet he persisted. His Honour was satisfied that Mr Porter would be able to obtain representation by senior counsel with expertise in defamation of equivalent capability to the barrister.

The barrister was restrained from appearing for Mr Porter under s.23 of the *Federal Court of Australia Act 1976* (Cth).

The author understands that the decision has been appealed, despite the defamation proceedings have settled.

Takeaway

The barrister's decision to speak with other senior members of the bar should be commended. Such action is to be encouraged whenever one encounters a potential conflict, which will inevitably occur. As the *Dyer* decision makes clear, practitioners must at all times be mindful of potential conflicts and take seriously their obligations to avoid conflicts of interest, both in respect of their duties to former clients, but also in respect of their paramount duty to the court and the proper administration of justice.

Where a former client is staunchly opposed to the barrister retaining a potentially conflicting brief, that fact alone should be some indication that cab rank principle in Rule 17 might not win out over the mandatory prohibitions in, for example, Rules 101, 103 and 114.

Stubborn determination to retain a brief in such a case, particularly where the primary defences are having no recollection of the confidential information and that the information would be discoverable away, is likely to be ill-advised. Close consideration, assisted by senior practitioners, and calm self-reflection, would be prudent before persisting.

Simply because one does not remember any confidential information that may have been imparted is not a sufficient basis under the principles discussed in *Dyer*, to seek to retain a brief, no matter how much the new client may wish the barrister to do so. The same can generally be said for the inevitable discovery defence.

Finally, whilst no direct criticism was levelled at the barrister in this case, barristers in other cases might not receive the same treatment.