

# Commercial Property Agents and Conflicts of Interest

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**March 2016**



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The authors would like to thank Critical Interviews for their role in sourcing the interview participants in this report, and for their professionalism and efficiency throughout.

## Contents

	Page
Introduction	1
Chapter 1 – The Context of the Study	5
Chapter 2 – The Role of Market Forces	19
Chapter 3 – The Deterrent Effect of the Law	31
Chapter 4 – The Effectiveness of Self-Management	76
Chapter 5 – The Content of the RICS Guidance: an Appraisal	93
Chapter 6 – The RICS Guidance in Practice	138
Conclusion	151

## Introduction

The commercial real estate sector is vitally important to businesses in Britain. It should 'provide business premises on terms that meet occupiers' needs, subject to market conditions'.<sup>1</sup> Commercial property agents play a crucial role in this regard. Very often, property agents will be helping their clients to make 'a key financial decision with potentially serious implications'.<sup>2</sup>

When commercial property agents have conflicts of interest, this has the potential to undermine the service that they provide to their clients. This study, the first in England and Wales, looks at conflicts of interest in this sector, and how they are managed and regulated. Our focus is chiefly on conflicts of interest that arise due to agents having multiple clients. Such conflicts can occur in any commercial real estate firm. Our discussion is of relevance to all agents in this market. It is, however, of particular significance to 'full service' (or 'dual agency') firms. These are ones whose agents provide services to both landlords and tenants. They may even act for landlords and tenants in negotiations against one another. It is with these firms that conflicts are most likely to occur and where they are potentially most pronounced.

The research questions which we address in this report are as follows:

- a) How far do market forces ensure that commercial property agents will maintain high standards of conduct in dealing with conflicts of interest?
- b) To what extent does the law that governs commercial property agents promote high standards of conduct in managing conflicts of interest?
- c) How far can clients trust the self-management of conflicts by firms, particularly by ad hoc information walls?

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<sup>1</sup> Office for the Deputy Prime Minister, *Commercial Property Leases: Options for Deterring or Outlawing the Use of Upwards Only Rent Review Clauses* (May 2004), Appendix A, at [9].

<sup>2</sup> RICS, *UK Commercial Real Estate Agency Standards* (RICS, Coventry 2011), p 1.

- d) How far does the content of the guidance issued by the Royal Institution of Chartered Surveyors ('RICS') promote high standards of conduct in dealing with conflicts of interest?
- e) How effective is the enforcement of the RICS guidance in practice?

After we have set out the context of this study, each one of these questions is addressed in a separate chapter. Our answers to them draw upon a combination of academic research and the findings from eleven qualitative interviews. The interviews were conducted with experts with a range of perspectives on the issues. The participants include leaders from business organisations, senior officers at commercial real estate firms and legal practitioners. We stress, however, that the arguments and conclusions that are advanced in this report are attributable to the authors alone.

Our conclusions may be summarised as follows:

**(a) Market forces are of limited effectiveness in this area.**

Conflicts of interest that undermine clients in subtle ways may well go unnoticed and unpunished. Many clients will not have the time, expertise or information adequately to assess whether an unmanaged conflict has led to them receiving a poorer service than they would otherwise have received.

**(b) The law offers some useful safeguards to clients, but it does not go far enough. Its deterrent effect is also reduced by the difficulties of spotting and litigating legal wrongs.**

The law contains some helpful rules for the protection of clients. But these rules are also lacking in some key respects. A good example of this is the scope to

contract out of the 'no conflict' rule. Another is the absence of any requirement that firms must avoid any conflicts of interest that are not in the best interests of all of the affected parties. Clients will often also face difficulties in proving legal wrongs in court, owing to a variety of reasons. The time and costs involved with litigation may also deter some of them from bringing a claim to begin with.

**(c) There are clear risks with relying on the self-management of conflicts by property agents, in particular by information walls.**

There are various well-established risks with information barriers (also known as 'information walls', 'ethical walls' or 'Chinese walls'). They include the scope for informal breaches of them, the problem of persons having to sit astride the wall, and the difficulty of having truly separate teams in smaller firms. None of our findings suggest that these issues are any less relevant in this sector. Indeed there are also further dangers in this area, due to the fact that information walls between property agents are only set up ad hoc, when a firm deems them to be necessary. Such ad hoc walls are more prone to being breached than permanent ones. In addition, some firms may take a much more lenient view of when such a wall is necessary than other ones.

This study turned up no specific evidence about *how common* such breaches are. The property market interviewees believed that any problems were exceptional. Further study into this issue is highly desirable.

**(d) The RICS guidance on this issue is inadequate in some crucial respects. It needs to be substantially re-written.**

We identify numerous flaws in the RICS guidance. It lacks clarity. At times it sets the bar lower than even the general law does. In some crucial respects it is not

worded strongly enough. For these reasons it may fail to encourage suitably high standards of conduct by commercial real estate agents who are RICS members.

**(e) More could be done to promote the enforcement in practice of the RICS guidance.**

At present, RICS is not doing enough to help clients, not only to understand the duties of member agents under its guidance, but also to know how to bring complaints against them. It is also concerning that many agents are not subject to any code that is as strong as the RICS guidance, even despite its weaknesses.

It is time for action to be taken. At the very least, we propose that RICS beefs up its guidance in this area and does more to help clients. The codes issued by The Property Ombudsman Scheme ('TPOS') and the National Federation of Property Professionals ('NFOPP') also need to be strengthened. But even this may not be enough. It will probably not do much to help clients and managers who oversee commercial property agents to spot the sort of subtle wrongdoing that may occur in practice. The scope for such actions to go undetected is a thread that runs through this report. Unless such conduct is identified frequently, there will not be a sufficient deterrent against it.

There is hence a danger that such subtle wrongdoing *could* occur. What this report does not turn up is any specific evidence about *how common* it may be. Our interviewees in the property sector, indeed, felt that it would be exceptional. It is possible that they could be right. But further investigation in this area is clearly needed. It is in the interests of all stakeholders that a larger-scale study takes place. Interviews should be conducted with not only clients of agency firms, managers within them and experts in the area, but also with lower-level employees in these firms. These interviews should be anonymous. All property agents should be keen to get to the bottom of this matter. If our concerns are baseless, they will be happy to see this proven beyond doubt. If they are justified, all good agents should welcome the chance to make changes to improve their practice. We hope that this report will mark the start of a more open and honest discussion about conflicts of interest than has occurred to date. Such a discussion is long overdue.

## Chapter 1

### The Context of the Study

#### 1.1 Introduction

In this chapter, we will set the scene for this report. The following matters are dealt with:

- the context of the study (section 1.2);
- previous research in this area (section 1.3);
- our research questions (section 1.4);
- the rationale for the study (section 1.5); and
- our research methodology (section 1.6).

#### 1.2 Context: single and dual agency, and the 'conflicts of interest' debate

We begin then by providing some context to our study. The first thing to note is that **a firm that hires commercial premises will do so under a lease or a licence**. The parties to a lease are called the 'landlord' and the 'tenant'; those to a licence are the 'licensor' and the 'licensee'. Generally speaking, a lease will exist if the occupant is entitled to use the land exclusively and the premises are not serviced. A licence will arise if this is not the case. No more needs to be said about this distinction for the purposes of this report. In what follows **we will refer throughout to 'tenants' and 'landlords'**,



**but what is said applies equally to licenses.** The terms 'tenant' and 'landlord' will also be used to refer to parties *looking for* a lease/licence, or *looking to let/licence out* property, respectively.

Many firms which are intending to lease commercial space will seek out expert help. Lawyers, for example, may play a role in drafting leases and dealing with other legal formalities. Commercial real estate agents are often also used. These firms are property market experts. They 'specialise in the acquisition and disposal of leasehold and freehold commercial... property.'<sup>3</sup> As **Interviewee A** explained, they offer '**basically every service in the book**'. For a firm looking to hire commercial space, these services could include:

- i. guidance on how premises should be designed to suit the tenant's business specifications;
- ii. facilities management services;
- iii. carrying out searches for, and inspections of, suitable premises;
- iv. rental valuations;
- v. conducting negotiations over the terms of new leases and over rent reviews; and
- vi. providing financial analyses of the terms of any prospective leases.

The actual services to be provided to any client will depend on what was agreed in their retainer. Some clients will merely want information to be laid before them; others will want more extensive help.

A business which is looking to hire commercial space may opt to use either a '**dual agency**' ('**full service**') firm or a **single agency firm**.

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<sup>3</sup> See: <http://www.rics.org/uk/knowledge/glossary/commercial-estate-agency>.

### *Dual agents*

The largest firms in the market are dual agency ones. As well as representing tenants, they take instructions from landlords. They offer a broad range of services to them. For those looking to build new premises to let, these services include identifying development sites for leasing, conducting financial appraisals and securing development partners. Landlords who want to lease their existing space can get help with marketing campaigns, securing occupiers and conducting negotiations.

### *Single agents*

Single agency firms have a different business model to dual agency ones. They only accept instructions from tenants. They contend that this makes them more reliable representatives of tenants than dual agency firms.

From time to time, there is **debate about the 'conflicts of interest' that affect these firms**. The term 'conflict of interest', however, is a slippery one. Different persons may use the expression with varying understandings of it in mind. **Some agents may take narrower views of the concept than other ones**. A number of our interviewees remarked upon this fact (see p. 25). Anyone who reads the arguments about 'conflicts of interest' on the internet and in the trade press, therefore, must do so with this point in mind.

What *is* clear is that **the expression 'conflict of interest' has a legal meaning**. This legal definition may be at variance with some popular understandings of the term. We will explore the law on this point in some detail in chapter 3 (see pp. 50–55). For now we will just summarise it briefly.

Legally speaking, a 'conflict of interest' can take one of two forms:

- An 'own interest conflict' ('agent-client conflict'): this occurs when the agent has a personal interest which conflicts, or which may possibly conflict, with any legal duty that they owe to their client.
- A 'client conflict': this happens when an agent owes legal duties to different clients that are in actual or potential conflict with one another.

In this report **we use the term 'conflict of interest' in this legal sense**. Whether we are referring to one or both forms of the legal definition will be apparent from the context.

As will become clear during the law chapter of this report (chapter 3), **all commercial property agents will sometimes face conflicts of interest**. No firm can truly claim to be 'conflict free'. What also seems to be plain, however, is that conflicts are in principle **more common with dual agency firms** than with single agency ones. This is because the former represent *both* landlords and tenants. The scenario of having two clients (a landlord and a tenant) negotiating directly with one another is not one that is faced by single agents. Legally speaking it involves an obvious conflict of interest (see p. 54). This type of client conflict is also likely to be of a greater intensity than any other one that could arise.

This study, therefore, is relevant to all commercial property firms, but especially to dual agency ones. Many of the hypothetical examples that we use are ones that could only occur in a dual agency firm.

Having defined the term 'conflict of interest', we now come to make some other introductory points about the law. Crucially, it does **not prohibit dual agency. Nor indeed does it make having conflicts of interest inherently unlawful**. That would be too extreme an approach. If having *any* conflict of interest was automatically a breach of the law, commercial property agency would be almost totally impracticable. The costs of running such businesses would shoot up. These expenses would in turn have to be passed onto clients. Clearly this would not be satisfactory. When regulating conflicts of interest, therefore, the law pursues a middle course. In general terms, it seeks to strike a balance between the protection of clients, on the one hand, and the desire not to overly burden agents, on the other hand. It does this in two ways.

- It confines the rule against an agent having any conflict of interest to certain types of case only (i.e. to those involving a so-called 'fiduciary relationship').
- Even when the rule does apply, the law offers agents some defences to it (such as gaining the informed consent of all of the affected clients).

These and other related matters are all fully explained later in this report. The point for now is that the law takes a nuanced approach to conflicts of interest. Crucially, it thereby **allows agents to manage them**. But how appropriate is the balance that is struck? This is one of the key issues that we will discuss in this report. Our views on this matter are set out in chapter 3.

As well as having to comply with any legal requirements, **many commercial property agents are also members of the Royal Institution of Chartered Surveyors (RICS)**. This fact adds a further dimension to our study. Unlike with some professions which are governed by statute, RICS adopts a self-regulation model. It issues its own guidelines to its members. To a large extent they are 'best practice' rather than being mandatory. Nevertheless, they are important. RICS's guidance is more thorough than anything in the other codes to which commercial property agents may sign up. Its view of 'best practice' may influence how even some non-member agents deal with conflicts of interest. It is therefore imperative that our report looks at this guidance in detail. We assess the RICS guidelines and their enforcement in practice in chapters 5 and 6 respectively.

Finally, our contextual overview would not be complete without a mention of **two further issues**. Both of them recur frequently in debates about conflicts of interest.

- The first issue is **the role of market forces**. Those who seek to dismiss concerns about conflicts of interest in this sector sometimes rely on this consideration. In particular, they contend that firms that did not avoid or properly manage conflicts of interest would suffer reputational damage. The result would be that these firms would lose custom. On this view competition should promote high standards. There is no need for greater regulation.
- The second issue is the **effectiveness of client conflict management in practice**. Large dual agents often claim that they are very successful in this regard. One of their

preferred strategies is to use 'information walls'. These are designed to stop confidential information from passing between the representatives of different clients.

Given that they often feature in debates about conflicts in this area, we consider both of these issues in this report. Our assessment of them is to be found in chapters 2 and 4 respectively.

### 1.3 Previous study in this area

To date, there has been **no detailed academic scrutiny of conflicts of interest in the English commercial real estate sector**. Attention has instead been focussed on other areas. These include the legal profession<sup>4</sup> and the financial services market.<sup>5</sup> At best, some of this writing is tangentially relevant to our discussion. But clearly these sectors are not the same as the commercial property one.

In the United States, the debate about conflicts of interest and commercial property agents is slightly more developed. Of relevance here is **a report by Peter Smirniotopoulos**, of George Washington University, that was published in November 2014. It raised questions about the management of conflicts of interest by dual agency firms. It suggested that such conflicts were more likely to be resolved against the interests of tenants than landlords. This is because a firm may well secure more custom from parties (such as lenders, equity investors, developers and large property owners) whose interests pull in favour of better deals for landlords than they do from tenants.

The report proposed:

- further study into the incidence and intensity of actual conflicts of interest in the dual agency sector;

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<sup>4</sup> See for example J. Loughrey, 'Large Law Firms, Sophisticated Clients, and the Regulation of Conflicts of Interest in England and Wales' (2011) 14 *Legal Ethics* 215

<sup>5</sup> See for instance C. Band, 'Conflicts of Interests in Financial Services and Markets' (2006) 21 *Journal of International Banking Law and Regulation* 677.

- the creation of an organisation devoted to the commercial real estate sector; and
- the development of a model code of conduct for commercial real estate firms.

Smirniotopoulos's findings are of some relevance to our study. His report contains a useful overview of how commercial real estate firms operate in the United States. Nevertheless, and **for our purposes, the report does have its limitations.**

- Most obviously, it focusses on the US market. No account is therefore taken of the practice in this jurisdiction. Nor indeed is the effectiveness of the law in England and Wales discussed.
- Secondly, the report does not sufficiently consider the issue of conflict management. We noted earlier the claims by dual agents that they deal appropriately with conflicts of interest. Smirniotopoulos does not explore whether their strategies, such as information walls, are adequate in this regard.
- Thirdly, the call for a 'model code of conduct' is not relevant in the UK context. In this country, RICS already purports to have issued one. It is offered as 'best practice' for RICS members. Our task is hence to assess the code that already exists.

For these three reasons, Smirniotopoulos's report, though it is of some help in framing the debate, does not fully address the issues that are explored in this paper.

#### 1.4 Research questions

The research questions which we address in this report flow logically from our discussion of its context. They are as follows:

- a) How far do market forces ensure that commercial property agents will maintain high standards of conduct in their management of conflicts of interest?
- b) To what extent does the law that governs commercial property agents promote high standards of conduct in managing conflicts of interest?
- c) How far can clients trust the self-management of conflicts by firms, particularly by ad hoc information walls?
- d) How far does the content of the guidance issued by the Royal Institution of Chartered Surveyors ('RICS') promote high standards of conduct in dealing with conflicts of interest?
- e) How effective is the enforcement of the RICS guidance in practice?

A chapter is devoted to each of these issues, in the order in which they are mentioned above.

#### 1.5 Rationale for this study

There are many good reasons for studying conflicts of interest in the commercial real estate sector. They include the following ones:

(a) There is a **distinct lack of research in this area**.

This point has just been explained. We saw how there has been no sustained academic research into the issue in the UK context.

(b) Conflicts of interest are **topical in the commercial real estate sector**.

RICS states in the introduction to one of its guidance documents that:

*'The publication of this guide to best practice in commercial agency coincides with a period of increased emphasis on ethical practice and responsibility in this sector.'*<sup>6</sup>

The issue of conflicts of interest is seen as being increasingly significant. A number of our interviewees specifically welcomed the fact that the matter was being investigated. **Colin Standbridge**, for example, described it as 'a very important issue'.

(c) The issue is **particularly relevant to small businesses**.

If conflicts of interest are not being properly managed, they are most likely to be resolved against the interests of those clients who are the individually least profitable ones to firms, and who are least likely to notice any wrongdoing. **Small businesses are vulnerable in this regard**. Their position is often comparable to that of consumers. A 2014 report published by the Federation of Small Businesses, for instance, set out various reasons why small businesses may lack sophistication

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<sup>6</sup> RICS, *UK Commercial Real Estate Agency Standards* (RICS, Coventry 2011), p 1 (our emphasis).



in the marketplace. It called for them to be protected in the same way as consumers.<sup>7</sup>

The **importance of small businesses to the UK economy cannot be understated.**<sup>8</sup> In 2015, businesses with nine or fewer employees ('micro-businesses') employed over 8.4 million people, and produced a turnover of £673 billion. This amounts to almost one-third of all employment, and getting on one-fifth of all turnover. Firms with between ten and forty-nine employees had some 3.9 million employees, and generated a turnover of around £543 billion. If the conflicts of interest faced by property agents are resolved against the interests of small businesses, the knock-on effects for the UK's competitiveness are plain.

Consistently with this rationale, our study draws on interviews with leading representatives of small businesses. They spoke chiefly about the approach of small firms when they are looking to lease commercial property.

- (d) The matter is becoming ever more important as **market share continues to concentrate in a smaller number of firms.**

In recent years, the largest dual agency firms have grown in size. As Smirniotopoulos wrote in 2014, in his US report on conflicts of interests:

'Over the past nine years, [dual agency] firms have grown in size, geographic reach, [and] breadth of services offered'.

This process has continued apace since then. In September 2015, for example, DTZ purchased Cushman and Wakefield. A new combined firm was thereby

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<sup>7</sup> A. Fletcher, A. Karatzas and A. Kreutzmann-Gallasch, *Small Businesses as Consumers: are they sufficiently well protected?* (ESRC, 2014).

<sup>8</sup> For the source of these statistics, see: House of Commons Library, *Business Statistics* (Briefing Paper 06152, 7 December 2015) ([www.parliament.uk/briefing-papers/sn06152.pdf](http://www.parliament.uk/briefing-papers/sn06152.pdf)).

created. It boasts 43,000 employees and over 4.3 billion square feet under its management.<sup>9</sup>

These developments throw the issue of conflicts of interest into ever sharper relief. **Interviewee B**, for example, noted during an interview that '[t]here are now a limited number of extremely large firms in the market; and that in itself can pose problems'. **Interviewee A** added that:

'With the world consolidating more and more, and [bigger firms buying up other businesses], they're buying in more and more skills sets to be able to provide more and more advice to their clients. Obviously with that, you will get more and more reason for there to be potential conflicts unless it is managed properly'.

**(e) RICS is currently reviewing its guidelines on conflicts of interest.<sup>10</sup>**

This review began in 2015. It is being led by Will Glassey, a partner at Mayer Brown. Consultations commenced in September 2015. It is anticipated that any recommendations will be implemented in time for early 2017.

All of this makes it a most opportune time for a study in this area. Given that the law has a lot to say about conflicts of interest, and given further than RICS claims that its guidance reflects the law, there are obvious reasons for the input of academic lawyers into the review process. Our report looks at the debate from a different perspective to that of property agents, industry bodies or the general public. We believe that academic lawyers have a vital contribution to make to this review.

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<sup>9</sup> See: <http://www.cushmanwakefield.co.uk/en-gb/news/2015/09/merger-closes>.

<sup>10</sup> See: <http://www.rics.org/uk/news/news-insight/press-releases/industry-leaders-to-oversee-new-conflict-of-interest-guidelines>.

With this final point in mind, we welcome the interest which RICS has already shown in this study to date. We treat this as a sign of RICS's willingness to take seriously the recommendations that are made in this paper.

For all of these reasons, a detailed assessment of conflicts of interest in commercial real estate is very timely. We hope that this paper will become a starting point for future debate in this area. The recommendations that we make are put forward with the aim of promoting best practice across the sector.

#### 1.6 Research methodology

The views that are offered in this study draw in part upon the findings from eleven qualitative interviews. These interviews were conducted between July and October 2015. The interviewees were selected on the basis of their various perspectives and expertise. They fell broadly into three classes. The first two categories included leading business representatives and senior practising lawyers in the area of commercial real estate. Arranged alphabetically by surname, these participants were as follows:

##### **Amanda McNeil**

A partner at the law firm Howard Kennedy, who specialises in all areas of commercial and residential property, advising and acting for landlords, tenants, developers and investors.

##### **David Miles**

Has been a Member of the Board of Directors at the Federation of Small Businesses since 2009.

**Sara Parker**

Sara was the Chief Membership Director at the Confederation of British Industry ('CBI') between April 2014 and October 2015. Before that she was a Director at the CBI, between November 2010 and April 2014.

**Belinda Solomon**

Belinda is a partner in the Real Estate Department at Brecher Solicitors, and has over 20 years' experience in all facets of commercial real estate.

**Colin Standbridge**

Has been the Chief Executive of the London Chamber of Commerce and Industry (LCCI) since 2002.

**Adam Walford**

Currently a partner at the law firm Howard Kennedy, who specialises in commercial real estate, particularly in acquisitions and disposal work in relation to the retail and leisure sectors.

Into the third category fall five experts who work in the commercial real estate sector. Due to the special sensitivities involved, the decision was taken to anonymise the responses of these five individuals. Consistently with this approach, their specific credentials are not set out here. We do however observe that they have all held senior roles in commercial real estate firms and/or organisations.

All of the interviews were recorded in the interests of transparency. The interviews were based around a series of open-ended questions, relating to each of the five research issues that we described

above. Follow-up questions could then follow, depending on how the open-ended questions were answered. So for example, on the issue of the RICS code, interviewees were asked two open-ended questions to begin with:

- How clear is the guidance on conflicts of interest for those who use it?
- Could the wording of the code be usefully strengthened in any way?

As a final question at the end of each interview, the participants were asked whether there was anything else that they thought could be reasonably done to prevent, or to mitigate the impact of, conflicts of interest in the commercial real estate sector.

The authors wish to make it clear that **the views that are advanced in this report are not to be attributed to the interviewees**. The interview responses are used only to offer evidence for the authors' own opinions. **This report does not constitute an endorsement by any of the interviewees of any of the assertions that are made in it.**

Finally, the authors wish gratefully to acknowledge that the costs of this study have been met by Devono, a single agency firm based in London. All of the views that are expressed in this report, however, are those of the authors alone.

## Chapter 2

### The Role of Market Forces

#### 2.1 Introduction

Consider the following statement, put out by a prominent dual agency firm:

'The most ethical tenant representation firms succeed not only because of their talented professionals, but because of their strong reputation in the market. An established brokerage firm will walk away from an unavoidable [conflict of interest] before jeopardizing their esteem and respect among tenants and landlords alike. Since a larger, more established firm has potentially more to lose from such an ethical breach, they are, if anything, even more likely to avoid such a risk at all costs. They know that one short-term gain is hardly worth the danger of putting the future of their organization in peril.'<sup>11</sup>

This claim is an important one. It is relied on in part to dismiss the concerns that are sometimes raised about conflicts of interest disadvantaging tenants. The appeal to market forces is clear. It is much the same contention that is deployed in various other contexts. It cannot be denied that it has some force. But how potent is it in the present context? To what extent do market forces ensure that commercial property agents will manage conflicts of interest in the best interests of their clients? In this chapter we will explore this issue. Our conclusion is that market forces do play role, but that they are hampered in various respects. They do not reasonably guarantee that high standards of conduct are met.

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<sup>11</sup> JLL, 'Conflict of Interest: Separating Myth from Reality' (<http://www.joneslanglasalle.com/SiteCollectionDocuments/tenant-representation-conflict-of-interest.pdf>), p 2.

## 2.2 The market forces argument

The market discipline argument is one that is used in numerous spheres. In the present context, it holds that agents who do not properly manage conflicts will be punished by market forces. The tools of market discipline here are the landlords and tenants themselves. Clients will form a view about whether they feel that their agent represented them effectively. They will ask themselves whether their deal was a good one. Those who have a negative experience may well take their custom elsewhere in future. They may also cause others to do so by word of mouth. Even if no foul play was suspected, therefore, market forces could take their toll on a firm which is thought to offer worse value than its competitors. Perception of itself is important. Yet more damaging still would be the issuing of formal proceedings against the firm, based on specific allegations of wrongdoing, which lawsuit became known of by others. These threats are enough to focus minds. Service that is perceived to be poor is going to be punished.

Closely allied to this view are arguments about freedom of contract. Particularly when they are sophisticated and substantial businesses, the courts feel that the contracting parties are able to determine their own best interests. As two judges in the Supreme Court have recently stated in another context:

'In a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate'.<sup>12</sup>

This suggests that clients will, through the pursuit of their own interests, encourage property agents to meet high standards. Otherwise they will take their business elsewhere. Landlords would not list their properties with a firm that was not trusted by tenants. Tenants would also stay away, reducing the draw of the firm for landlords.

Arguments of this sort are common in many spheres. In each case they are offered as a reason against any further regulation, or for scaling back existing regulation. They are often thought to have particular appeal when the clients involved are businesses rather than consumers. The latter may

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<sup>12</sup> *Makdessi v Cavendish Square Holdings BV* [2015] UKSC 67; [2015] 3 W.L.R. 1373, at [35] (Lord Neuberger PSC and Lord Sumption JSC).

require greater protection. Businesses are seen to be capable of looking after their own interests. In commerce, moreover, more regulation means more costs. This can reduce competitiveness. The starting point should thus be to avoid regulation, unless a positive case for it is shown.

### 2.3 Factors that undermine the market forces contention

How much force does this view carry? That market forces play an important role is undeniable. If a firm managed conflicts in a way that was evidently poor, this would be reflected in the quality of its service. The firm would doubtless be punished in the market in consequence. But this idea should not be overstated. If conflicts of interest are not dealt with properly by agents, market discipline will not always reliably deal with the problem. Any claims to the contrary are unpersuasive. Why is that so? Our starting point is that such claims are stronger or weaker according to the context in question. Some markets work well; whereas others do not. In order for market forces to be effective in the commercial real estate sector, a number of features would need to be present. They are as follows:

If conflicts of interest are not dealt with properly by agents, market discipline will not always reliably deal with the problem.

- a. clients must be alive to the issue of conflicts of interest, including the potential risks that it presents to them;
- b. clients must be able to judge without undue cost the conflict management strategies that are adopted by different firms; and
- c. clients must be able to discern relatively easily when an unmanaged conflict has been resolved against their best interests.

It is very doubtful whether these factors are consistently present. We will look at each of them in turn.



### 2.3.1 Clients must be alive to the issue

Unless clients take the issue of conflicts sufficiently seriously, they are unlikely to act in large enough numbers against agents who do not manage them well. The matter must be in their minds when they are choosing an agent. When the client is a tenant, they must also be aware of the alternative of using a tenant-only representative.

None of our interviewees, however, indicated that perceptions about conflicts had a big effect on client choices. It may indeed be that the issue does not even occur to some parties.

- a. From a small business perspective, neither **David Miles** nor **Sara Parker** listed the dual agency/tenant-only status of a firm as being one of the significant factors that small businesses consider when they are seeking a property to lease.
- b. **Amanda McNeil** and **Adam Walford** both confirmed that they did not tend to get questions from clients about the single agency/dual agency distinction.
- c. **Interviewee B** did not regard conflicts of interest as something that clients initially think to be important.
- d. **Colin Standbridge** stated that:

'I don't think [this issue] is top of mind with tenants... I wouldn't say it was the first thing... I suspect you go and choose [your agent] on the basis of are they going to get the best rent for you.'

It therefore seems that **the single/dual agency question is not a primary one for clients**. One could argue, of course, that this is because they are relaxed about the matter. But there are reasons to think that **the issue is as much about a lack of awareness as anything else**. From a small business perspective, **David Miles** noted that tenant-only firms are not well-known in the market at

present. Certainly, all of the biggest firms are dual agents. These full service firms are also more noticeable, as when representing landlords they will use on-site signs that advertise spaces to let. Single agency firms need to work harder to be seen. If clients are not familiar with them, they cannot begin to make an informed choice about which type of agent to instruct.

One reason why small businesses may be unfamiliar with issues about conflicts of interest is that they tend to be far from frequent users in this market. It is by repeat custom that one may become more knowledgeable about the issues involved. **Market forces are weakened when, for the clients, 'transactions are one-off events in which [they] have little experience'**.<sup>13</sup> Many businesses are far from regular users of property agents.

- The average length of a commercial lease is now 6.8 years.<sup>14</sup> This means that businesses that are located on only one site are unlikely to dip often into the market.
- Small businesses also have a high failure rate in their early years: potentially up to half of them do not survive beyond five years.<sup>15</sup> So the first lease that they take may well be the last one. Start-up businesses are also likely to be especially unversed in the issues that are discussed in this report (though there may be exceptions, for instance with serial entrepreneurs).

For all of these reasons, a substantial number of clients (and particularly small business ones) may well not be sufficiently alive to the issue of conflicts of interest.

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<sup>13</sup> A.F. Tuch, 'Financial Conglomerates and Information Barriers' (2014) 39 *Journal of Corporation Law* 563, 588 (emphasis our own).

<sup>14</sup> Property Industry Alliance, *Property Data Report 2015* (<http://www.bpf.org.uk/sites/default/files/resources/PIA-Property-Data-Report-2015-are.pdf>), p 9.

<sup>15</sup> See E Anderson, 'Half of UK start-ups fail within five years' (<http://www.telegraph.co.uk/finance/businessclub/11174584/Half-of-UK-start-ups-fail-within-five-years.html>). See also University of Reading, *Monitoring the 2002 Code of Practice for Commercial Leases* (ODPM, March 2005), p.296.

### 2.3.2 Clients must be able to judge agents' conflict management policies

If market forces are to help to fine tune how firms manage conflicts of interest, prospective clients **need to be able to judge their policies and practices**. Their ability to do so is however hampered. There are various reasons for this. One of them is the time and cost involved in building up anything like an accurate picture. **A client would need considerable expertise to do so**. Even if they did have it, they may then struggle actually to compare different policies. One would also need to consider issues such as the actual risk of an unmanaged conflict occurring, and the extent of any harm that it may cause in this event. All of this would then need to be weighed in the balance with the other pros and cons of choosing each firm.

Even to describe this process gives us an idea of **how unrealistic it could be**. Nor do agents do enough to help prospective clients in this regard. They could make their policies clearer and more easily findable. This would give clients a better chance to assess them. At present, however, such information is lacking. A search for 'conflicts of interest' on the website of one large dual agency firm, for example, turns up only two results.<sup>16</sup> Neither of them shed any light on the matter for a would-be client. The 'occupiers/tenants' section of the same website makes no reference whatsoever to the issue. Other firms do not offer much more. Conflicts policies are often to be found only by searching specifically for them on a website. Even then, they are often too vague to give a clear idea of a firm's practice. The policy of one large dual agency firm, for example, is that:

'We seek to avoid any conflicts of interest. Where a conflict of interest does arise, we make a clear disclosure of that conflict to the parties concerned and of the steps taken to ensure that fair treatment is maintained.'<sup>17</sup>

A slightly fuller policy is set out on the website of another substantial firm:

'We will not act for a client where there is a potential conflict of interest with any other [of the firm's] client[s], or with [the firm] itself, without first disclosing the potential conflict and receiving each client's written confirmation that it nevertheless wishes us to continue. An example of a

<sup>16</sup> See: [http://www.cushmanwakefield.co.uk/en-gb/search-results/?q="conflicts%20of%20interest"](http://www.cushmanwakefield.co.uk/en-gb/search-results/?q=).

<sup>17</sup> See: [http://www.colliers.com/en-gb/uk/about/corporate-responsibility/~/\\_media/de1835412fc64056a103df2cefc5dea6.ashx](http://www.colliers.com/en-gb/uk/about/corporate-responsibility/~/_media/de1835412fc64056a103df2cefc5dea6.ashx).

conflict that must be disclosed in advance would be where Leasing and Management represents the owner of a property while Tenant Representation represents a tenant at the same property.

[An agent] must refer any unresolved conflict of interest to the appropriate Client Relationship Manager and one of our Ethics Officers. The Client Relationship Manager will, with any necessary guidance from the Ethics Officer, decide whether and under what circumstances [the firm] can continue to act upon those client instructions.<sup>18</sup>

Further guidance is then said to be available on the firm's intranet. This is of course not made available to the general public.

That firms only make such limited information available does little to drive competition. For one, what they do tell us is quite open-ended. No precise details are given. The principles that guide the 'Client Relationship Manager' who is mentioned in the second quotation, for example, are not stated. Even the very notion of a 'conflict of interest' is not defined in either statement. Property agents do not always use the term consistently. As **Interviewee D** observed: 'There is a lot of confusion about it, and understanding of when conflicts can and do arise, and what is acceptable market practice.' They also explained that different cultural understandings of the term can arise: what is often regarded as acceptable in one country may be viewed otherwise in another. Even the big firms take different approaches as between themselves. **Interviewee B** gave a good example of this:

Even the very notion of a 'conflict of interest' is not defined in either statement.

'Some of the major firms do not regard a shareholding of less than 3% of the market capitalisation of the business as being a significant shareholding. I could have £100,000 shares in British Land Securities through my pension scheme, and yet put myself forward as a valuer for that business, and not feel that there was a conflict there and not feel it necessary to disclose it.'

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<sup>18</sup> See: <https://www.jll.com/InvestorPDFs/JLL-Code-of-Ethics.pdf>.

At present, therefore, there is not enough competition on the specific issue of conflict management. Clients may form a view about the practices of different firms, but it is unlikely to be a clear or a confident one. That a client then instructs a particular firm is hence difficult to treat as being an informed approval by them of its conflict management policies. Other factors are likely to be more important. If later on, the client does become a repeat customer with the same agent, or indeed if it chooses to go elsewhere, it will tend to be because of its overall view of the service provided.

### 2.3.3 Clients must be able to spot conflicts that are resolved against their interests

We come then onto our third pre-condition for market forces to be truly effective. This is that clients must be able to identify when conflicts of interest have been resolved against their interests. Again there are real problems here. The chief way by which a client may be able to spot such conduct is by considering the service that they have been provided. If a client feels that they have had a poor service, they may sometimes attribute it to a conflict of interest. The difficulty, however, is that many clients are not at all well-positioned to judge the outcome of any deal that is arrived at for them. Agents are significantly better informed than their clients: they are hired precisely because of their knowledge and contacts.

Clients will trust their agents. In many cases they will have little choice but to do so.

Clients will hence trust their agents. In many cases they will have little choice but to do so. We base this conclusion on four points that emerged from the interviews:

#### **(a) Agents gain a lot of information through channels that are not open to their clients.**

These channels include contacts, conferences and networking events. This information can be very helpful to have. To quote from three of the interviews:

[Relationships] are absolutely crucial... Whilst the databases are a useful starting place for gaining and accessing information, there is other information which is gleaned from hearsay and conversations and

market sentiment, which you can pick up through relationships built at networking events and conferences.'

**Interviewee D**

'[Market information] is picked up on the grapevine'.

**Interviewee B**

'All of these things are based on relationships.'

**Colin Standbridge**

In sum, the property market is '**a people profession**' (Interviewee D), in which '**knowledge is all**' (Interviewee C). As Interviewee A added:

'It's the most relationship driven business, I think, of any of the capital markets.'

Well-connected agents will be in demand. **Belinda Solomon** gave an example of a client who stuck with a particular agent, despite the agent's clear conflict of interest, because of the contacts that that agent could introduce. As she explained: 'This agent is the one who knows the people that they need to know to get the property they need... So the idea of a conflict and the terms of the deal are secondary to [my client's] need for a particular property.'

(b) **Relevant market data is not reasonably available** to many clients.

The second reason why clients will trust their agents is that lots of relevant market data is not freely available to the clients. Such information could give them a better chance of assessing any deal that they get.

With residential home sales, sold prices are freely available on the internet. The same is not true of commercial leases. There are online providers – notably Co-Star and EGi – that offer information such as agreed headline rents. But these sites are subscription ones. Very few businesses, having hired an agent, would regard this extra expense as being worthwhile. Smaller firms are particularly unlikely to incur it. From a small business perspective, neither **David Miles** nor **Sara Parker** even mentioned these websites as places where small business tenants would go for information when they are looking to lease premises. For these businesses the costs of doing so are very likely to be disproportionate.

(c) Even for clients who do have access to such data, it may **not be easy for them to use it**.

Such data may require an expert to interpret. As **Interviewee C** stated, you do need someone to help 'steer you through the process, because it is a minefield'. The online information does not always tell the full story. **Interviewee B** gave a good example of the problem in this regard:

[The online databases] don't necessarily give the complete picture... Whilst there is a heavy focus on headline rents in the industry, the key thing is the incentives and the rent frees that are granted to tenants, in order to persuade them to actually pay those headline rents, and those are the things that are often anonymised and not disclosed. So you may well find that XYZ Ltd took a ten-year lease of a property at a headline rent of £90 *per* square foot, but what you don't know is, in order to get there, that we gave them 18 months rent free and a break after the fifth year. So it's only partial disclosure of information.'

**Interviewee B** also identified other variables, such as the certainty of performance and the reliability of the parties. **Belinda Solomon** put across much the same idea: 'There might be information in the market as to who got other deals, but then there are variables like the strength of the covenants of those people who got them'. The tenant may for example have a guarantor for their covenants, who may be very reliable. Other factors may also be identified. A client's bargaining power, for instance, will differ markedly from firm to firm, and from time to time. Local market conditions may vary significantly. Clients will have different relative priorities; different business models; and ask for different types and levels of service. Every case will be unique. Even if, hypothetically, one could obtain the full copies of many leasehold agreements, attempts to offer clear interpretations of them would be futile. The context of each case would be lost.

It therefore requires a lot of experience, contacts and knowledge to know what to make of the market data offered by websites such as Co-Star. The relevant contextual information will almost certainly not be known by the client. But it may be known by their agent. This fact only underscores why a client will frequently have to rely on them.

- (d) The 'best deal' is something that is particularly subjective, which makes bargains hard to scrutinise.

Closely linked to the third reason is a fourth one: that deals in the property market are very subjective. The lawyer interviewees – **Amanda McNeil**, **Adam Walford** and **Belinda Solomon** – all agreed that it is very difficult to know what an 'optimal' bargain looks like. The real estate market 'is heavily based on negotiation' (**Interviewee A**); and '[t]he best deal is two people sitting in a room and haggling' (**Belinda Solomon**). The idea of spotting a sub-optimal deal is 'fraught with difficulty' (**Interviewee C**).

Different clients will vary in terms of their ability to scrutinise a deal. As **Interviewee A** pointed out, much 'depends on the savviness... of the client'. **Interviewee C** gave a specific example of a knowledgeable client, who identified a



poor deal after discussing it with 'a number of local colleagues'. Many firms understandably lack both this sophistication and these contacts. Speaking from a small business perspective, **David Miles** explained that: 'it is difficult to know what you should be paying'; and that: 'the level of information out there is not that great'.

## 2.4 Conclusion

At the start of this chapter, we asked how far market forces can ensure that property agents will manage conflicts of interest in the best interests of their clients. There are **reasons to be sceptical about the corrective powers of market forces** in this area. Some clients – particularly smaller businesses – seem to show little awareness of conflicts issues. There is not enough information being put out by property agents to promote informed choices over conflicts policies. Many clients will also lack the time, knowledge, and expertise properly to scrutinise the conduct of their agent. Any deals that they reach are unlikely to be assessable by any objective yardstick.

Our conclusion is thus as follows. Some conflicts of interest, if they are not addressed properly, may manifest themselves in obvious ways. Market forces do help to deter such outcomes. But for the reasons that have been discussed in this chapter, they are much less effective against unresolved conflicts that more subtly distort the service that is provided. Such problems could well go unnoticed by clients. So even if a conflict of interest is not managed appropriately by an agent, the market may not discipline them for it. The service provided to the client in this event may well be undermined, but not perceptibly so.

## Chapter 3

### The Deterrent Effect of the Law

#### 3.1 Introduction

In this chapter we will ask how far the law promotes high standards of conduct by commercial property agents in term of their management of conflicts of interest.

Our important starting point is that the **general law does not prohibit multiple agency**. In principle, to take instructions from both landlords and tenants is permissible. Indeed no type of dual agency is always unlawful. The law instead adopts a different approach. Its three key features are as follows:

- a) It imposes certain duties on all agents, intended to ensure certain standards of performance by them. They include:
  - i. the duty to exercise reasonable care and skill in performing one's duties under the retainer; and
  - ii. the duty not to disclose or use the confidential information of any client without their consent.
- b) It sets down minimum standards before conflicts of interest can be taken on. In particular, the relevant clients must either: (i) agree in the retainer to the conflict in question; or (ii) give their 'informed consent' to it.
- c) It imposes additional liability on any agent who, having met these minimum standards, then breaches a duty to one client, with the intention of preferring the interests of the other one (as opposed to doing so carelessly).

The question is how far this approach promotes high standards of conduct. There is no doubt that it helps to deter plainly *poor* service. The law should **put agents off from committing any obvious legal wrongs**, owing to unmanaged conflicts of interest. But its role should not be overstated. The law **does not ensure that conflicts are regularly managed in an appropriate way**. In part, this is because of certain weaknesses in it. To a greater extent, however, it owes to more practical hurdles. Many clients will struggle to notice any possible wrongdoing. Even fewer of them will be able to prove a claim in court. Clients will often therefore lack the confidence that would justify them going through the challenges and pitfalls of litigation. Breaches of the law could quite easily go unpunished. And laws that are hard to enforce are a weak deterrent.

These problems are effectively inevitable ones. There are not any realistic changes to the law that would clearly solve them. So we cannot expect much more of the law. The onus of ensuring high standards must fall elsewhere.

### 3.2 Duties relevant to all agents

There are many duties which apply to agents as a whole. They seek to promote certain standards of performance. Two of them are particularly germane to this report. This is because a conflict of interest, if it is inadequately dealt with, could well lead to a breach of one or both of them. At the very least, a poorly managed conflict makes a breach of them more likely. So a desire by agents to avoid liability under these duties may encourage them to avoid or manage any conflicts.

The duties in question are the ones:

- a) to exercise reasonable care and skill in performing one's duties under the retainer; and
- b) to not disclose or use the confidential information of any client without their consent.

We will look at these two duties in turn. In each case we will set out their key features, relate them to the work of commercial property agents, and examine their usefulness.

### 3.2.1 Duty to exercise reasonable care and skill

The **duty to exercise reasonable care and skill** is a well-known one. In the professional context, it is the basis of what are often called 'professional negligence' claims. Obviously there is a huge volume of case law and legal writing on this area of law. For our purposes it is enough to identify the key features of the duty. They are as follows:

(a) The **duty arises concurrently from two sources.**

The first is the retainer between the agent and the client. The duty will be a term of their agreement. The law implies it into the retainer even if the parties did not expressly include it.<sup>19</sup>

Secondly, the same duty arises under the law of torts.<sup>20</sup> For our purposes the differences between suing in contract and under tort law are unimportant.

(b) It requires **an agent to exercise reasonable care and skill in performing their duties** under the retainer.<sup>21</sup>

The agent must act with a certain level of competence. In professional contexts, the necessary standard is that of **a reasonably competent professional in that area**. In our case, therefore, the agent needs to exercise such care and skill as a reasonable property agent would do.

All of the tasks that are required by the retainer must be performed to the needful standard. They could include gathering data, making recommendations and

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<sup>19</sup> See ss. 12–13 of the Supply of Goods and Services Act 1982.

<sup>20</sup> The 'law of torts' is essentially the law of civil wrongs. It covers things as varied as defamation, battery and inducing a breach of contract.

<sup>21</sup> *John D Wood and Co (Residential and Agricultural) Ltd v Knatchbull* [2002] EWHC 2822 (QB).

conducting negotiations. Take for example an agent's search for information. They need not scour the world in doing so, but they must take reasonable steps to find information. They should for instance search relevant online resources such as Co-Star and EGi. They should consult the records held by the firm. They will make appropriate inquiries of relevant co-workers and contacts.<sup>22</sup> They should also perform due diligence on possible matches for their client.

Another aspect of this duty is the need to keep clients informed of matters that concern them.<sup>23</sup> This could for example mean warning them of any issue(s) with a potential property.<sup>24</sup>

(c) **If the required standard is not met, it is irrelevant why** that happened.

There are many possible reasons why an agent may provide an inadequate service. The influence of a poorly managed conflict of interest is just one of them. But all that counts here is that the service fell below the needful standard. The client does not have to prove the reason why it happened.

(d) The duty of care is **owed by the firm**.

The 'firm' itself is usually a company or a partnership. In real life it is represented by its officers and employees. Poor service by any employees or officers can lead to the firm being sued.<sup>25</sup> The innocence of the other employees is irrelevant. It only takes one rogue or careless worker to land the firm in trouble.

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<sup>22</sup> It is probably no longer true that the firm 'knows' of everything that becomes known by its employees: D. Frase, R. Helm and M. Day, *A Practitioner's Guide to Conflicts of Interest in the Financial Services Industry* (Thompson Reuters, London 2012), pp. 82–84; D. Frase, 'Conflicts of Interest' (2008) 53 *Compliance Officer Bulletin* 1, 10.

<sup>23</sup> *Kelly v Cooper* [1993] A.C. 205, 213.

<sup>24</sup> *SeevCredit Lyonnais SA v Russell Jones & Walker (a firm)* [2002] EWHC 1310 (Ch), at [28].

<sup>25</sup> If the claim is in contract, this is because contract is with the firm, and the employee's actions put it in breach of contract. With a tort law claim, the actions of the employees are legally attributed to the firm.

- (e) In order to succeed in a claim for a breach of this duty, one **must show both a loss and a causal link between that loss and the agent's negligence.**

A 'loss' in this context could include missing out on an opportunity. An example of one would be losing the chance to let one's property out on better terms. In this event, the loss would be the difference between what the client did get, and what they would have got had the agent not been negligent.

When proving a link between the loss and the negligence, one must satisfy the 'but for' test. The claimant must show that, but for the defendant's negligence, the loss would not have been suffered. So, if the defendant's carelessness led to no identifiable loss, there is no claim.

- (f) A claim for a breach of this duty is **decided on the balance of probabilities.**

This is because the action is a civil rather than a criminal one. The principle applies to every element of the claim. So for example, showing a breach, a loss and a causal link are all things must only be done on the balance of probabilities.

*Practical impact of the duty to exercise reasonable care and skill*

At some level, this duty can deter agents from not managing their conflicts of interest. An agent whose own interests conflict with those of their client is more likely to provide an inadequate service to that client. The same is also true with client conflicts. The risk of a poor service being provided to one client is higher if the agent owes contrary duties to another client. (For an example from the legal profession, see the grey box, overleaf.) This is not to say that a poor service is inevitable – both clients could conceivably be happy with the outcome – but it is certainly more probable (see also pp. 46–47). The duty of care is therefore relevant to our study. Agents who wish to avoid breaches of it

have an incentive to manage or avoid any conflicts of interest. Their managers also have reasons to ensure that they do so. Otherwise the firm may pay for it later in court.

#### Conflicts of Interest leading to a breach of duty: an example

In *Hilton v Barker Booth & Eastwood* [2005] UKHL 8, the defendants were a firm of solicitors. Hilton was one of their clients. He was looking to sell a development site.

Hilton ultimately agreed to sell the site to Bromage. Bromage was also being represented by the defendant solicitors. Hilton was not told of this fact.

The firm knew that Bromage had earlier been made bankrupt. It also knew of his various convictions for fraudulent trading. Even worse, the firm had actually lent the deposit to Bromage. This was done to clothe him with respectability in the eyes of Hilton.

The firm had got itself into an extremely difficult situation.

- There was a firm-client conflict. Having given the deposit to Bromage, the firm's own interest (to proceed with the sale) was at odds with its duty to warn Hilton about Bromage's suitability as a buyer.
- There was a client conflict. The firm owed conflicting duties to Bromage and to Hilton. Under the law governing solicitors, it owed a duty to Bromage to keep quiet about both the deposit and Bromage's chequered past. On the other hand, it was clearly in the interests of Hilton to know of these matters. The firm's duty to Hilton was therefore to reveal the information to him.

Ultimately, the defendant firm decided to breach its duty to Hilton. The information was withheld from him. The sale was agreed. But problems soon surfaced. Bromage failed to pay the remaining purchase price. This caused Hilton's business to collapse. The House of Lords held that Hilton was entitled to 'generous' damages, to be set by a lower court judge.

That said, the duty of care and skill is only helpful up to a point. The main problem is that it **only deters obviously poor service**. There is **no guarantee that an unmanaged conflict will manifest itself so clearly**. If its effect is more subtle, showing a breach of this duty may be very hard indeed.

*The difficulty of showing a breach of this duty: a practical example*

This argument is best illustrated by a hypothetical example. Consider the case of a tenant representative, negotiating a lease with a landlord company. Imagine that the agent has a large undisclosed shareholding in the landlord company. A conflict of interest therefore exists. Due to the influence of this conflict, the agent acts less effectively for the tenant client than they would otherwise have done. For example, it may be that they failed to take advantage of some known weakness in the landlord's bargaining position during the negotiations over the lease. The client is unhappy with the result of them.

The client is weighing up whether or not to sue the agent for breaching their duty of care. They go to see a solicitor. They are told that, in order to make out a breach of this duty, they would have to show one of two things. Neither of them will be easy to establish.

- They could try to show a specific action that fell below a competent standard.

Showing an action that fell below the required standard is going to be tough. The client will almost certainly not know of the weakness in the landlord's position that was not exploited. They are not the expert. **Nor are they likely to monitor how the agent conducted himself**. The client will have trusted them (see pp. 26–30). In addition, there is unlikely to be a useful paper trail. Detailed records of the negotiations are unlikely to exist. Even if they did, they would almost certainly not record the agent's decision to ignore the information about the landlord. How then is the client going to prove that such a conscious decision was made?

- They could seek to show that the outcome was itself one that a competent agent would plainly not have reached.



Showing that the outcome is plainly poor is likewise going to be a tall order. **Competent work is required; a first-rate standard is not.** The courts seek to avoid being too wise after the event. Let us consider a simple example of this stance from another context. Take the task of valuing a property. In a claim against a valuer, the judge will accept that there is a 'margin of error'. It can be anywhere between five and fifteen per cent.<sup>26</sup> No claim will succeed if the figure given by the valuer comes within it.

Now apply the same logic to our example. A similar approach will also be taken. **The client will struggle to make out a breach of duty.** That could be so even though a conflict *did* affect the outcome. This could be, for example, because it only had a small impact: one that alone was not enough to lead to a plainly poor result. We can express this idea in terms of exam grades. The outcome may have simply fallen from an 'A\*' to an 'A'. Or from an 'A\*' to a 'B'. But a 'B' is *not* a plainly poor result. It would probably have to be a 'D' before a negligence claim would succeed. Precisely how 'good' the agreement is will be a very subjective issue anyway. In addition, any impact of the conflict could be obscured by the various other factors that feed into the outcome. Other parts of the negotiations on the client's behalf may have gone well. That would mitigate the effect of the unresolved conflict.

It bears emphasis that one cannot expect the duty of care to be more exacting than it already is. The duty is set at a level that balances the need to deter poor service, on the one hand, and the need not to unduly burden professionals, on the other hand. Property agents, like doctors, lawyers and other professionals, need to work without a constant fear of being sued. Judges should not pore over their every decision with a fine toothcomb. Litigation also takes such professionals, and other expert witnesses, away from their work. This should be avoided wherever possible. So while the duty to exercise reasonable care and skill is important, its role is just to mandate a generic baseline of service.

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<sup>26</sup> See *Webb Resolutions v E Surv Ltd* [2012] EWHC 3653 (TCC). As this case shows, the precise extent of the 'margin of error' will depend on the context of the case.

### *The challenges of litigation*

The state of the law is thus one inevitable hurdle to a claim by our dissatisfied client. On top of this difficulty, **there are also very practical problems**. The prospect of litigating may put off the client. Going to court drains one of both time and resources. This will not overly concern the biggest players, but it would affect small businesses. This is especially so in light of recent court reforms, as were recommended by Lord Justice Jackson. These reforms alter the rules on costs in a way that advantages defendants.<sup>27</sup>

The practical disincentives to litigation cannot be underplayed. Many smaller clients in particular would be reluctant to litigate unless their case was obviously very strong. We have just explained why it may well not be. The result is to diminish the deterrent effect of the law.

#### 3.2.2 Duty of confidence

Any client is **entitled to expect that their confidential information remains so**. The law seeks to vindicate this expectation: it places agents under a duty of confidence.<sup>28</sup> The legal basis of the duty is contested; but that debate need not detain us here.<sup>29</sup> What matters is the effect of the duty. Its key features for our purposes are as follows:

- (a) It **only applies to information that the law treats as ‘confidential’**.

Information will not be confidential if it is in the public domain (including if it is available through a subscription website). It will however be so if it is ‘inaccessible’.<sup>30</sup> It could therefore in the right circumstances include things like business plans, financial results, profit forecasts, the terms of past agreements and the status of a client’s current negotiations. The information does not have to be complex, discreditable or commercially valuable.

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<sup>27</sup> For a useful summary of the reforms, see: [https://www.ashurst.com/doc.aspx?id\\_Resource=7351](https://www.ashurst.com/doc.aspx?id_Resource=7351).

<sup>28</sup> *Coco v AN Clark (Engineers) Ltd* [1969] R.P.C. 41, 47.

<sup>29</sup> For discussion, see M.A. Jones (ed.), *Clerk and Lindsell on Torts* (Sweet & Maxwell, London 2014), para 27-04.

<sup>30</sup> *Attorney-General v Observer Ltd* [1990] 1 A.C. 109, 215 (Bingham L.J.).

(b) The **duty is owed by the firm.**

This is the same approach as is taken with the duty of care and skill. The retainer is with the firm, as opposed to any individual within it.

In order to make this idea work in practice, the actions of a firm's employees can be attributed to it. That can happen even if the firm did not authorise the act being complained of. If employees leak confidential information, the firm may be treated as having breached its duty.

A quick example may illustrate this idea. Imagine that one agent in the firm is acting for a tenant client. Another agent manages to access that client's file and uses the information to their disadvantage. These actions would put the firm in breach of duty. It would not matter that the wrong was not committed by the client's assigned agent. The actions of the rogue worker are attributed to the firm.

(c) The firm **cannot disclose or make any use of such confidential information to benefit itself or any other client.**

This feature of the duty has been made clear by the courts. A statement by Lord Millett provides a good example. As his Lordship noted, the duty:

'... is not merely a duty not to communicate the information to a third party. It is a duty not to misuse it, that is to say... *to make any use of it or to cause any use to be made of it by others otherwise than for [the client's] benefit.*<sup>31</sup>

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<sup>31</sup>*Bolkiah v KPMG* [1999] 2 A.C. 222, 235 (emphasis added).

(d) For professional advisers, **the duty is a strict one.**<sup>32</sup>

The duty is not merely one to take all reasonable steps to keep the information confidential.<sup>33</sup> It does not matter, for example, why the agent used the information for the benefit of another person. There is no need to show malice. Even subconscious wrongdoing would be enough to make the agent liable.

(e) The duty **exists both during the retainer and after** it has ended.

This means that former clients can just as much complain of a breach of this duty as can existing ones. Let us illustrate this idea with an example. Suppose that a dual agency firm had once represented a landlord of an office building. During this time the firm's employees learnt much about the landlord's business model and financial affairs. Subsequently, the dual agent is instructed by a would-be tenant. The tenant expresses an interest in hiring an office in the former landlord client's building. Knowing of its affairs, the firm's employees are aware that the landlord is in a weak bargaining position. Negotiations with the landlord commence. The firm cannot share with the new client the confidential information that it gained from the landlord. Nor can the tenant's representatives have the benefit of it during the negotiations. Any use of the information would be a breach of duty to the former client.

A firm must therefore be **careful when it is taking on any new instructions.** Otherwise there may be a danger that the confidential information of a former client will end up being used to benefit a new client. The agent should take steps to prevent this from happening.

If a former client is worried about their confidential information being leaked to a new client, the former client could take legal action. They may in particular seek an injunction to stop the firm from acting for the new client. This has happened in the

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<sup>32</sup> *Bolkiah v KPMG* [1999] 2 A.C. 222, 235.

<sup>33</sup> M.A. Jones (ed.), *Clerk and Lindsell on Torts* (Sweet & Maxwell, London 2014), para 27-13, n 103.

context of law and accountancy firms.<sup>34</sup> The leading case in which this occurred is described in the grey box below.

It may well be that the courts' approach in these cases would also be taken if the defendant firm was a property agent. If that is right, an injunction will be granted if the risk of wrongful disclosure to the new client is more than fanciful, even if it is not substantial.<sup>35</sup> The burden of proof would be on the agent.

#### The use of an injunction to protect the confidential information of a former client

Prince Jefri Bolkiah is the third and youngest brother of the Sultan of Brunei, Hassanal Bolkiah. The Prince had enjoyed a close relationship with the Sultan. He had held the role of Chairman of the Brunei Investment Agency ('BIA'), a (rather secretive) sovereign wealth fund.

During the Prince's time as Chairman of the BIA, the accountancy firm KPMG had audited it. KPMG had also acted for the Prince personally on various other occasions. In consequence, KPMG had acquired lots of confidential information relating to the Prince's financial affairs. This information concerned matters such as the nature, extent and location of the Prince's assets; the legal structure of their ownership; and the manner and the financing of their purchase.

In 1998, relations between the Sultan and the Prince soured. The Prince was removed from his position at the BIA. KPMG was appointed by officials in Brunei to look into the BIA's affairs. In particular, KPMG was asked to investigate the withdrawal of assets from the fund, the use made of them, and the persons or entities now controlling them. It was clear that this task was at least in part adverse to the interests of the Prince. The assignment was given the code name 'Project Gemma'.

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<sup>34</sup> E.g. *Bolkiah v KPMG* [1999] 2 A.C. 222.

<sup>35</sup> *Bolkiah v KPMG* [1999] 2 A.C. 222.

In *Prince Jefri Bolkiah v KPMG* [1999] 2 A.C. 222, the Prince sought an injunction to restrain KPMG from acting in Project Gemma. The Prince feared that his confidential information would be used in this matter, in breach of KPMG's duty of confidence towards him. KPMG sought to dispel these concerns by proposing an ad hoc information wall. It aimed to separate those employees who knew of the Prince's affairs from those ones who would be acting on Project Gemma. The court however decided the case in favour of the Prince. The information wall would have been acceptable only if it would have rendered as being 'fanciful' the chance of a breach of confidentiality. The risk in this case was said to be higher than that. The court therefore granted the injunction sought by Prince Jefri.

(f) **A breach of this duty may give rise to various remedies.**

Damages are one obvious remedy. If an agent has made a profit by the breach, they may also be required to hand it over to the client. An injunction may further be granted to prevent a threatened breach of duty and/or to put an end to an ongoing one.

This duty is of great significance in practice. For the purposes of our study, it raises two important points. They are:

- firstly, that an agent will need to reconcile their duty of confidentiality to each client with their duty to inform other clients of things that are material to their interests; and
- secondly, that even when such a reconciliation occurs, having client conflicts still raises the risk of breaching this duty.

We will consider these matters in turn.

### *Reconciling the duty of confidentiality with the agent's duties to other clients*

Property agents will deal with a lot of information that is confidential. They may well come into possession of information that is confidential to client 'A', but which is material to the interests of client 'B'. In principle the agent needs to give client 'B' the benefit of this information.<sup>36</sup> Their duty to client 'A', however, is to keep it secret. How can the agent square this circle? A number of strategies present themselves.<sup>37</sup> Two of them will be mentioned here. They both seek to justify the agent not having to supply to (/use for the benefit of) one client information that is confidential to another one.

- A first method is to seek each client's informed consent to any conflict of interest.

This method is fraught with difficulty.<sup>38</sup> It could for example be hard to provide enough information to a potential client, so that they can make a truly informed decision, whilst maintaining the confidentiality of the existing one. **The potential client may struggle to decide how much it is that they are sacrificing.** They may well not be told what the information even concerns. They may be unsure precisely how the agent decides what is 'confidential' and what is not. Would another agent, not being limited in the way being proposed, be better able to fight their corner? The client may be unsure.

The predicament for the agent is described by Christa Band, a partner in a multinational law firm:

'[The firm] has to provide information to enable the client to determine whether the limitation on the protection from which he would otherwise benefit is ultimately in his interests or whether he should look elsewhere for

<sup>36</sup> *Kelly v Cooper* [1993] A.C. 205, 213. See p. 34, above.

<sup>37</sup> See generally C. Band, 'Conflicts of Interests in Financial Services and Markets' (2006) 21 *Journal of International Banking Law and Regulation* 677, 686–688.

<sup>38</sup> C. Band, 'Conflicts of Interests in Financial Services and Markets' (2006) 21 *Journal of International Banking Law and Regulation* 677, 687.

another adviser who might look after his interests on a broader basis. In the financial services context, and indeed in many other professional advisory relationships... [the client] does not know what information the institution had but felt unable to give him.<sup>39</sup>

- A second method is to seek to rely on drafting that avoids the conflict to begin with. This means including a term in the retainer. It will state that the client is not to have the benefit of any information that is confidential to any other client.<sup>40</sup>

This tactic is probably less of a risk than the informed consent method. But it is not necessarily a complete answer to the difficulty. There is a chance that the term will be struck down by the Unfair Contract Terms Act 1977 for being 'unreasonable'.

#### *Client conflicts create a higher risk of breaching this duty*

We come then to our second point. Having client conflicts will heighten the risk of being sued for a breach of the duty of confidentiality. There are **three chief reasons** why that is so.

- (a) When two clients of a firm have competing interests, and confidential information is leaked, the client given the information of the other client may well have **both an opportunity and an incentive to exploit it**. This may make any breach of duty more noticeable.

If two clients are operating in totally unrelated markets, a breach of confidentiality as between them is unlikely to have any obvious effect on the service that is provided to them. A client who is looking to rent a warehouse in Halifax, for

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<sup>39</sup> C. Band, 'Conflicts of Interests in Financial Services and Markets' (2006) 21 *Journal of International Banking Law and Regulation* 677, 687.

<sup>40</sup> Sometimes such a term may be implied; but the law in this respect is very unclear: see S. Salzedo, 'Conflicts of Interest – Disclosure of Information' (2001) (<http://www.mondaq.com/x/11314/Data+Protection+Privacy/Conflicts+Of+Interest+Disclosure+Of+Information>).



example, will usually have little to gain from acquiring confidential information about a client who is wishing to lease an office in Croydon.

Matters differ in client conflict cases. Many examples of such scenarios could be given. Imagine for example a tenant client who is looking for office space in Holborn. There are numerous potentially suitable offices available, owned by different landlords. One of these landlords is being represented by the same firm as the tenant client. Confidential information about the landlord client is accidentally leaked to the tenant client. This may encourage the tenant client to bargain with the landlord client. The confidential information may for example indicate to the tenant client that the landlord client is in a weak bargaining position. This may allow the tenant client to drive a harder bargain than they may be able to do with any other landlord. The client has both the opportunity and the incentive to capitalise on the leaked information.

- (b) An information leak is in principle more likely when two agents who are acting for competing clients have to deal closely with one other.

We explore this danger in chapter 4. We will see there how even robust ethical walls cannot fully negate the risk of information leaks. Even the body language of the agents may give away matters in this regard.

- (c) When there is a client conflict, **the agent may have an incentive to favour one side** over the other.

When an agent is representing one client, and owes no conflicting duties to any other client, it should have no reason not to do the best for that client. The firm, at

least,<sup>41</sup> should therefore be motivated to try and keep confidential the information of the client.

Contrast this situation with one involving a client conflict. In such scenarios it is possible that the agent may value each client differently. One client may for example be a very lucrative customer, while the other client may not be. There could be commercial reasons in such a case for ensuring that the favoured client gets a strong deal. Of course, the agent could not go too far in this regard. They must avoid any outcome that is so skewed as to arouse the suspicions of either client. But a 'strong' deal for the preferred client is not the same thing as a palpably uneven one in their favour. A strong deal, indeed, should be enough to keep that client happy.

**The duty of confidentiality is very helpful in theory.** To some extent it gives firms an incentive to avoid or manage client conflicts, for they raise the risk of this duty being breached. It may however not be a strong deterrent in practice. It is one thing to have a suspicion of wrongdoing; proving it in court is much harder. Many examples could be given to illustrate this difficulty. Take the situation of a tenant client, whose confidential information is leaked to a landlord client of the same firm. The tenant and the landlord client begin negotiations over a lease. No competent landlord representative, having gained such information improperly, would allow the eventual agreement to be so imbalanced as to make its influence clear. They are likely to allow only for a subtle impact. Similarly, no tenant representative would agree to an obviously distorted agreement either. Neither agent will wish to be caught. An evidence trail is also unlikely to exist. So **showing a breach of duty will be hard.** This is especially so if the information was passed informally. It will be nigh on impossible if a message was conveyed by mere body language.

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<sup>41</sup> The interests of the firm's individual employees may not always be entirely the same. There could, for example, be a risk of that being the case if the client's agent was negotiating with a good friend at another firm.

### 3.3 Minimum standards before conflicts are taken on

So far, we have **considered two key duties of property agents**. They are the ones of reasonable care and confidence. We have also seen that **an agent who owes conflicting duties to different clients is more likely to breach one or both of these obligations**. The law seeks to address this problem. It does so by setting down **certain prohibitions on having conflicts of interest**.

It must be emphasised that these restrictions do not apply in every case. They are only relevant when the agent is a 'fiduciary'. Not every retainer that is entered into by an agent will make it one of these. But often it will do so. In principle, an agent will be a fiduciary if:<sup>42</sup>

- they are instructed to conduct negotiations on behalf of the client; and/or
- they are instructed to make recommendations to the client.<sup>43</sup>

(A fuller explanation of why that is so appears in the grey box overleaf.) In either of these two situations, **the firm as a whole is a 'fiduciary'**, and has a 'fiduciary relationship' with the client.<sup>44</sup> The fiduciary is not, we stress, merely the individual agent who is acting for the client. The actions of any employee – even those who are not representing the client – can lead to a breach of duty. It is the firm that is sued in this event.

In what follows in this section, our comments are directed **only at agents who are fiduciaries**. They must be read with this point in mind.

The starting point in these cases is clear. **The fiduciary's overarching duty is one to show undivided loyalty to the client**.<sup>45</sup> They must act '100%, body and soul', for them.<sup>46</sup> This entails a number of consequences. We need not deal with all of them here. What matters for present purposes

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<sup>42</sup> An agent will, therefore, not be a fiduciary if they are asked merely to produce certain information for the client, and to make no recommendations: *James v Australia and New Zealand Banking Group Ltd* (1986) 64 A.L.R. 347, 366–368.

<sup>43</sup> A fiduciary relationship will usually arise in these cases. This is because it involves 'a specialist skilled personal service to a client with the expectation that the client will rely on that advice': D. Frase, 'Conflicts of Interest' (2012) 97 *Compliance Officer Bulletin* 1, 5. *Tate v Williamson* (1866) 2 Ch. App. 55; Law Commission, *Fiduciary Duties of Investment Intermediaries* (HM Government, London 2014), paras 5.12–5.13.

<sup>44</sup> C. Band, 'Conflicts of Interests in Financial Services and Markets' (2006) 21 *Journal of International Banking Law and Regulation* 677, 686.

<sup>45</sup> *Bristol & West Building Society v Mothew* [1998] Ch. 1, 18 (Millet L.J.) ('single-minded loyalty').

<sup>46</sup> *Imageview Management Ltd v Jack* [2009] EWCA Civ 63, at [6] (Mummery L.J.).

is that **the mere fact of having a conflict of interest is generally a breach of duty**. There are only two situations in which that is not so. These are when:

- a) the client has agreed in the retainer to the conflict; or
- b) the client has given their 'informed consent' to it.

These two defences are explored in this section. They are of critical importance. They represent **the law's minimum standards before a conflict of interest is taken on** by an agent. If the agent has a conflict of interest and cannot show either of these defences, they are in breach of duty. It is irrelevant whether or not they are conscious of the problem. It would also be immaterial that the conflict had not led to a breach of any other duty. The agent's liability here is strict.

#### The concept of a 'fiduciary' under the law

A 'fiduciary' is someone who has agreed to act on another's behalf in circumstances giving rise 'to a relationship of trust and confidence': *Bristol & West Building Society v Mothew* [1998] Ch. 1, 18 (Millett L.J.). This idea of 'trust and confidence' is critical. It is not enough simply that one person 'trusts' that the other will keep to their contract. Otherwise just having an agreement would almost always be enough. 'Trust and confidence' arises instead when the client hires the agent, as an expert, to advise them or to exercise discretion on their behalf. It is this putting of faith in another's expertise that matters. It increases the scope for breaches of trust. Fiduciary duties seek to prevent these abuses from occurring.

### 3.3.1 The legal definition of a 'conflict of interest'

In order to understand this rule, one must firstly be clear about what the law treats as a 'conflict of interest' to begin with. **In strictly legal terms, conflicts come in two forms.** One must distinguish between an agent-client ('own interest') conflict, on the one hand, and a multiple client conflict ('client conflict'), on the other hand.

#### *(a) Agent-client conflict*

An **agent-client conflict** arises when the agent has a personal interest which conflicts, or which may possibly conflict, with any duty that they owe to their client.<sup>47</sup>

By '**any duty**' that is owed to the client, we refer to any of the agent's obligations arising out of that client's retainer. Most obviously, this includes the duty to show undivided loyalty to the client.

**An obvious type of 'personal interest' is a financial one.** Consider for example a stockbroker selling his own shares to his client. The stockbroker's duty to the client is to get the best terms possible for them. But his personal interest is to sell for as high a price as possible. So there is conflict of interest. It is no excuse that he did not realise that such a position is unlawful.

A '**personal interest**' can be that of the firm or one of its employees. So if an employee of the firm is a director of a company that is looking to lease some premises to a client of the firm, the client must be told of this fact. A substantial shareholding in this company would be treated similarly.

As is clear from our definition of an agent-client conflict, **the conflict can be 'actual' or 'potential'**. Our previous example involved an actual conflict. It

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<sup>47</sup> *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macq. 461, 471 (Lord Cranworth L.C.).

concerned a present clash between self-interest and duty. A 'potential conflict', by contrast, is one where there is a 'real sensible possibility' of such a conflict.<sup>48</sup>

If every affected client does not agree to proceed, the firm must decline to act any further. Otherwise any deal that is reached can be set aside by the client. Any commission that is paid must also be returned.<sup>49</sup>

One notable type of actual agent-client conflict arises when the agent **receives a commission from the other side to a deal.**<sup>50</sup> (The scope for receiving such a commission is a potential agent-client conflict.) The possibility of a double commission gives the agent an incentive to favour doing business with their other client rather than any other party. Agents must therefore gain the informed consent of each client to any such payment (or promise thereof) from another client. In this regard, a generalised disclosure will probably be enough.<sup>51</sup> If however the agent fails to make a sufficient disclosure, they must account for (i.e. pay over) the commission that was paid to them by the other client. They also cannot claim any commission from the wronged client.<sup>52</sup>

The courts have, by contrast, been **slow to accept that a wish to gain custom from another party can create an agent-client conflict.** Consider for example a dual agency firm which is representing a tenant. The firm wishes to gain listings from a landlord client for whom it is also acting. The landlord and the tenant clients are negotiating over a possible lease. One could argue that the firm's personal interest (to gain the listings) conflicts with its duty to the tenant client, so that there is an own interest conflict. In principle the courts disagree. As a starting point, they do not think that such a wish on the firm's part leads to a conflict of interest.<sup>53</sup> Their view is that the firm would still wish to do its best by the tenant client in this event. If the other side (the landlord, in our example) thought that the agent was being disloyal its other client (the tenant), this would if anything deter them from later instructing them. They would take a dim view of its actions. They may worry that, in different circumstances, the agent would be disloyal to them as well.

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<sup>48</sup> *Boardman v Phipps* [1967] 2 A.C. 46, 124 (Lord Upjohn).

<sup>49</sup> *Salomons v Pender* (1865) 3 Hurl. & C. 639.

<sup>50</sup> *Boston Deep Sea Fishing v Ansell* (1888) 39 Ch. D. 339; *Hurstanger Ltd v Wilson* [2007] EWCA Civ 299.

<sup>51</sup> See by analogy: *Wilson v Hunstanger Ltd* [2007] EWCA Civ 299, at [36] (Tuckey L.J.).

<sup>52</sup> *Boston Deep Sea Fishing v Ansell* (1888) 39 Ch D 339.

<sup>53</sup> See *Dennard v PricewaterhouseCoopers LLP* [2010] EWHC 812 (Ch), at [211]–[215].

This then is the courts' general rule. There are exceptions to it. A different view would be taken if there is a so-called 'perverse incentive'.<sup>54</sup> This would happen where:

- a) the party whose custom was being sought (the landlord, in our example) promised the agent some business in return for some action(s) that went against any of the agent's duties to one of their clients (the tenant, in our example). Actions that may be asked of the agent could include their recommending that party to the client.<sup>55</sup> Other examples include accepting a higher rent or agreeing to some other less favourable term during negotiations.
  
- b) the party whose custom was being sought made no express promise of future business to the agent, but the agent firmly expected a benefit from the other side in return for the wrongful action. (For an example of such a situation, see the grey box overleaf.)

The courts' approach here can be viewed as being a pragmatic one. It avoids agent-client conflicts from arising in very large numbers indeed. The acknowledged exceptions are unlikely to be easily shown. Unsurprisingly there are very few reported cases in this area. The reality is that litigation on this matter will be uncommon.

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<sup>54</sup> See generally *Dennard v PricewaterhouseCoopers LLP* [2010] EWHC 812 (Ch), at [217]–[220].

<sup>55</sup> *Henry Smith & Sons v Muskett* [1978] 1 E.G.L.R. 13.

How expectations of future custom can create an agent-client conflict

*Premium Real Estate Ltd v Stevens* [2009] 2 N.Z.L.R. 384 concerned a valuable residence in Auckland. The sellers' estate agent received an offer from a property speculator. His tactic was to buy properties at an under-value and then quickly to sell them on for a higher price. The estate agent frequently acted for him. It would almost certainly get the re-listing of the property if it was sold to him. But this relationship was not disclosed to the sellers.

After the sale to the property speculator was agreed, the sellers learnt of the relationship between him and the agent. They sued the estate agent. The court held that there had been a breach of the no conflict duty. The commission that had been paid by the sellers had to be returned. The agent also had to pay the client damages, these amounting to the difference between a market sale price for the property and the lower price that was actually paid. This was because the client would not otherwise have agreed to the sale.

Having thus looked at the first type of 'conflict of interest' (an agent-client conflict), we come now the second type of conflict: one between clients.

*(b) Client conflict*

**A multiple client conflict (a 'client conflict')** arises when the agent **owes duties to different clients which are in actual or potential conflict with one another.**

We stress here that **the focus is on conflicting duties rather than on conflicting interests.** This is quite understandable. What are a client's 'interests'? The term admits of too many different interpretations. The law avoids this problem. Although we talk of 'conflicts of interest', we must be very careful with how we understand that expression in this context.



A test of 'competing duties' is much clearer as to when a conflict arises. One simply identifies the duties of the agent to each client arising out of their retainers and concludes accordingly. The relevant duties for this purpose include the ones that have been described in this chapter. They therefore include the obligation of undivided loyalty.

As with agent-client conflicts, **a client conflict can be 'actual' or 'potential'**.

- **An actual client conflict** happens when the duties that are owed to the clients are at odds. Most obviously, there could be a clash between the duties of undivided loyalty that are owed by the firm to two clients.<sup>56</sup> This could happen if for example the clients are negotiating over a lease. As one judge has explained, the starting point is that an agent 'cannot act at the same time both for and against the same client'.<sup>57</sup> (We consider the defences to doing so below, on pp. 55–65.)

Potentially another example of an actual client conflict is if the firm knows of information that is material to the interests of one client, but which is confidential to another one. The duty to disclose the matter to the one client could clash with the obligation of confidentiality to the other. (We saw on pp. 44–45, however, how agents may seek to avoid this conflict from arising.)

- **A potential client conflict** occurs when there is a real sensible possibility that the duties that are owed to two clients may come into actual conflict.<sup>58</sup> An example of this would be if there is a realistic possibility that a landlord client and a tenant client of a firm could commence negotiations over a lease.

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<sup>56</sup> *Harrods Ltd v Lemon* [1931] 2 KB 157.

<sup>57</sup> *Bolkiah v KPMG* [1999] 2 A.C. 222, 234.

<sup>58</sup> *Marks and Spencer Plc v Freshfields Bruckhaus Deringer* [2004] EWHC 1337.

When there is a client conflict, the agent is in principle in breach of duty to both sides.<sup>59</sup> (The only defences to such a conflict are considered below.) Whether or not the agent appreciates this fact is irrelevant. They *must* return any commission that has been paid.<sup>60</sup>

### 3.3.2 Defences to a conflict of interest

Before an agent can act despite having a conflict of interest, the law says that they must take certain steps. **There are two options** open to them:

- (a) A more recently available option is to 'contract out' of the rule against the relevant conflict in the retainer. This route is controversial in some respects.
- (b) The more traditional method is to gain the 'informed consent' of both clients to the conflict.

Our discussion will be easier to follow if we begin with the 'contracting out' method, and then consider informed consent.

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<sup>59</sup> *Bristol & West Building Society v Mothew* [1998] Ch. 1, 19 (Millet L.J.).

<sup>60</sup> *Imageview Management Ltd v Jack* [2009] EWCA Civ 63. Any loss to the client flowing from the conflict must also be reimbursed. So if the tenant agent agreed a higher rent due to a conflicting duty to the landlord, the extra rent would be recoverable. In some cases the transaction can also be set aside.

### 3.3.2.1 Contracting out

The **basic idea of ‘contracting out’ is that the retainer excludes, in whole or in part, the duty to avoid conflicts of interest.** In other words, the exclusion could cover *every* type of conflict, or particular types of conflict only (for instance, just *potential* conflicts). As we will explain, this method is a controversial one.

In deciding whether a retainer ousts a no conflict duty, we must consider both its express and its implied terms.

- **An express term** is one stated explicitly in the agreement.
- **An implied term** is one that the law inserts into the agreement, even though the parties did not expressly include it. There are various reasons why terms can be implied in this way. It is not necessary to explore all of them here.

We will look firstly at implied terms that oust no conflict duties, and then at express ones. This order is a logical one. We can better understand why agents may use express terms once we have noted the problems with relying on implied ones.

#### *(a) Implied exclusion*

The starting point for implied exclusion is *Kelly v Cooper*.<sup>61</sup> This case confirmed that one can oust fiduciary duties (including the no conflict duty) by contract. The actual decision concerned a residential estate agent. Its facts are set out in the grey box overleaf. In sum, the court implied a term into the retainer between the client (a seller) and the estate agent. Its effect was that the agent was entitled to act for other clients who were selling competing properties. The normal duty to avoid conflicts of interest was cut down to this extent.

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<sup>61</sup> [1993] A.C. 205.

Implied exclusion: the decision in *Kelly v Cooper* [1993] A.C. 205

In this case, an estate agent had been acting for two owners of neighbouring properties in Bermuda, called Brant and Kelly. Perot, a one-time US presidential candidate, had agreed to buy Brant's property. He then agreed to purchase the one belonging to Kelly.

Kelly later found out about Perot's agreement with Brant. He sued the estate agent for not telling him of this fact. This omission had caused Kelly a financial loss. The chance to buy two such properties together was rare. If Kelly had known of the agreed sale by Brant to Perot, he could have sought a higher price from Perot.

The court held that there had been no breach of duty by the estate agent. It reasoned as follows:

- There was no actual conflict of duty to begin with. That Brant had agreed to sell to Perot was confidential information. A term was implied into Kelly's retainer that such information would not be disclosed to him.
  
- Kelly also impliedly agreed in the retainer that the estate agent could act for rival sellers.

The implied exclusion in *Kelly* could only cover potential client conflicts. There was no actual conflict on the facts (as Kelly was not entitled to know of the agreed sale to Perot).

The question is how far the principle in *Kelly* extends. Legal authors caution us against taking an expansive view of it. They suggest that *Kelly* is **a decision of only narrow scope**.<sup>62</sup> That is almost certainly correct. In order to explain why, we must ask why the court came to the decision that it did. The *Kelly* principle will only extend to cases in which similar reasons exist.

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<sup>62</sup> P. Watts (ed.), *Bowstead and Reynolds on Agency* (20<sup>th</sup> ed. Sweet & Maxwell, London 2014), paras 6-015 and 6-048. H.G. Beale (ed.), *Chitty on Contracts: Volume 2* (32<sup>nd</sup> ed. Sweet & Maxwell, London 2015) paras 31-119 and 31-125.

We suggest that there are **two chief reasons for the court's decision in *Kelly***:

(a) Firstly, **the case involved a well-known market custom**. It was one with which the client was familiar. The court referred to the clients of a residential estate agent as being 'well aware that the [agent] would be acting also for other vendors of comparable properties'.<sup>63</sup>

(b) **The practice is clearly not objectionable**. We can see this by weighing up the undeniable benefits of it and the risks that it poses to clients. So with *Kelly*, that residential estate agents are able to represent rival sellers makes their work viable in many cases. The practice also poses few consequent risks to clients. A number of reasons may be given for thinking so:

- . The situation which occurred in *Kelly* itself is uncommon. It is very rare for one person to want to buy two adjacent homes that are being marketed by the same agent.
- . The duties of an estate agent to its different clients are very largely compatible with one another. Its valuations should be unaffected. It can still pass on offers to clients when they are made, and relay counter-offers. It can put a client's case to potential buyers. None of these obligations to one client are affected by the fact of the agent having duties to other clients.
- The competition between the clients of residential estate agents is not that intense. That there are two sellers of similar properties may mean that one of them ends up waiting longer for a sale than the other one, but both sellers will probably still find a buyer. Both of them will probably also get a market price. In sum, a positive result for one client does not markedly reduce the chances of a good outcome for another one.

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<sup>63</sup> *Kelly v Cooper* [1993] A.C. 205, 215.

These grounds are important. They serve to confine the approach in *Kelly*. A client will only impliedly consent to a custom in another context if similar reasons exist. Indeed the courts have been slow to apply *Kelly* to other markets. In one case, for example, the Court of Appeal declined to apply it in the context of an agent which promoted, placed and sold furniture in the UK.<sup>64</sup> Lord Neuberger, the Master of the Rolls, cautioned specifically against any over-reliance on the *Kelly* principle of implied consent. He said that:

‘... it is highly questionable whether the reasoning in *Kelly* [...] should be extended to other cases of agency, at least in the absence of clear evidence to support such an extension.’<sup>65</sup>

There are no cases on implied consent in the commercial property context. But we suspect that the reasons in *Kelly* are unlikely to apply to *all* of the client conflicts that may occur in it. Although the custom of dual agency is a well-known one, there are more risks to clients from it. This is because the clients of dual agents may end up dealing with one another. That does not happen with the seller clients of a residential estate agent.<sup>66</sup> In addition, the role of a commercial agent is likely to be more extensive than that of a residential one. The commercial agent can play an active part in steering clients towards particular landlords/tenants. Finally, commercial agents may have a bigger part to play in negotiating on behalf of their clients than residential ones, due to the extra complexities involved.

Our view, therefore, is that no black-and-white stance would emerge from the courts. **A middle-ground position is likely to be adopted.** The courts would treat clients as consenting to some types of client conflict, but not to other ones. In particular:

- a. Implied consent **would not cover any actual conflicts.**

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<sup>64</sup> *Rossetti Marketing Ltd v Diamond Sofa Co Ltd* [2012] EWCA Civ 1021.

<sup>65</sup> *Rossetti Marketing Ltd v Diamond Sofa Co Ltd* [2012] EWCA Civ 1021, at [27].

<sup>66</sup> Or at least it does not happen in the seller's capacity as a client of the estate agent. That in their own personal capacity they may look to buy another property that is listed with the same agent is a different issue.

This view has also been expressed by leading legal authors.<sup>67</sup> It has some judicial support.<sup>68</sup> A court would almost certainly feel that specific express consent would be needed to any actual conflict.

- b. Clients **will impliedly consent to potential conflicts, but not those ones which are 'high chance' or 'high risk'**.

These exceptions make commercial property agency different from residential estate agency. The clients of residential estate agents will probably consent implicitly to *any* potential client conflict. We explained the reasons for this earlier (see pp. 57–58). The risk of harm to the client is very low.

With commercial property agents the position is different. The risks to some clients are higher. It is therefore **unlikely that the courts will extend the *Kelly* principle to all potential client conflicts** in this area. There are two types of conflict to which implied consent will probably not extend.

**A 'high chance' case** is one in which there is a high possibility of the conflict becoming an actual one. Most obviously, this would happen if two clients' specifications make them particularly suited to each other.

**A 'high risk' case** occurs when a potential conflict, if it became an actual one, would pose a high risk to the client. This could for example be because a large number of employees know the affairs of the client, so that their confidentiality will be hard to maintain in the event of an actual conflict.<sup>69</sup> Or it could be because the agent knows confidential information (for instance, about the potential for one client to become insolvent) that poses a real risk

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<sup>67</sup> P. Watts (ed.), *Bowstead and Reynolds on Agency* (20<sup>th</sup> ed. Sweet & Maxwell, London 2014), para 6-048: '... while acting for competing sellers in the same market might be an acceptable implication,[] it is unlikely that an entitlement to act for both buyer and seller (with or without a formal appointment), or indeed any two parties with opposed interests, would be acceptable.'

<sup>68</sup> *Northampton Regional Livestock Centre Co Ltd v Cowling* [2014] EWHC 30 (QB), at [179].

<sup>69</sup> It could also happen if such a large number of employees would *come to know* of the clients' affairs between the time of the retainer being taken on and the conflict becoming an actual one.

to any client who deals with them, and there is a chance that another would-be client will wish to do so. This prospective client would not then be taken to consent impliedly to this potential conflict.

Our view is therefore that implied 'contracting out' only covers *some* of the activity of commercial property agents. Their position is different in this regard to that of the residential estate agent in *Kelly*. But the limits of implied consent are unclear. It is risky for an agent to rely too heavily on it. They may feel that it is necessary instead to resort to express exclusion.

*(b) Express exclusion*

Express 'contracting out' ('ouster') occurs when a firm puts an explicit term in a retainer, excluding liability for particular types of client conflict. There is **some debate about just how far an agent can go with express ouster**. This matter is explored in the grey box.

Is express contracting out permitted?

*The case for*

The view that an express ouster is allowed has some legal logic to support it. The courts have said that any fiduciary duty (including the one to avoid conflicts):

'... if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them' (see *Ranson v Customer Systems plc* [2012] I.R.L.R. 769, at [26] (Lewison L.J.)).

This means that a fiduciary relationship (from which the no conflict duty stems) 'cannot be superimposed upon the contract in such a way as to alter [its intended operation]'. In other words, if the contract says that the rule is not to apply, the law should not impose it upon the parties. A retainer that ousts the no conflict rule should be respected.



This view finds support from the outcome in an Australian financial services case: *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* [2007] FCA 963. In that case the retainer was with Citigroup, an investment bank. The retainer sought to prevent Citigroup from being a 'fiduciary' to begin with. If this technique was successful, it would oust the no conflict duty (it being an upshot of fiduciary status). The court held that the retainer did achieve its aim. Citigroup was deemed not to be a 'fiduciary'. Therefore the no conflict duty did not apply.

#### *The case against*

Australian cases are not binding on the English courts. The authors of one leading textbook, therefore, say that the issue has not yet been settled. They note that the English case law on the matter is 'relatively thin' (see *Bowstead and Reynolds on Agency* (20<sup>th</sup> ed. Sweet & Maxwell, London 2014), para 6-056).

Other writers are even more circumspect. One leading reference work views express ouster as being impermissible. It suggests that fiduciary status (and with it the no conflict rule) is not contingent simply upon the terms of the retainer (see *Chitty on Contracts: Volume 2* (32<sup>nd</sup> ed. Sweet & Maxwell, London 2015), para 31-119).

Even if express ouster is allowed, there is **one further issue for a property agent to deal with**. It arises because a client is unlikely to agree to the agent having client conflicts unless they promise to manage the risk to confidentiality that this creates. (We saw earlier that such conflicts increase the chances of the duty of confidentiality being breached.) In consequence, a retainer may refer to an agent's barrier and ethical policies. But doing so leads to a risk. **The danger is that an information wall could be misrepresented** by the agent. Clients may look to show that the agent's policies induced them to choose that agent to start with, as they trusted them to protect their interests. Any description of these policies in the retainer must therefore be accurate. Any representations about their effectiveness must also be factual. Failing that, the real-life operation of the barrier may not reflect what the client agreed to. This will create problems for the agent. A number of legal claims could be brought against them.

- (i) The first is one in contract law for misrepresentation. A misrepresentation is false statement of fact that induces a party to enter into a contract.
- (ii) Secondly, there could be a claim for a breach of contract. This action would succeed if the agent has promised in the retainer to adhere to its stated ethical policy, and its practice differs from what is set down in it.
- (iii) Thirdly, there may be a claim for a breach of the no-conflict duty. This is because the client's consent was to a particular way of working; and the reality is different. The agent's conduct will hence go beyond the consent that was given. To the extent that it does so, the agent will put the firm in breach of the duty not to act despite a conflict of interest.

### 3.3.3 Informed consent

The second defence to having a conflict of interest is informed consent. This is the more traditional justification. It can apply at a different stage to the contracting out method.

- The contractual ouster technique is **used at the time of the entry into the retainer**. If the ouster covers the conflict in question, no informed consent will be needed should it arise later.
- Informed consent is only sought when **the conflict threatens to arise, or has arisen**. This could be at the time when the retainer is entered into. But sometimes it may be later on. For example, the client, having received recommendations, may wish to start negotiations with another client. The informed consent of both clients can then be obtained before these negotiations begin.

The onus of showing informed consent is on the agent. The client must be made fully aware of all of the material facts and circumstances of the case.<sup>70</sup> It may also be necessary to impress upon them the importance of first taking independent legal advice.<sup>71</sup>

There are a number of challenges with obtaining informed consent. They include the following:

- a) Every client is different. **The same level of disclosure will not suffice in every case.** Less sophisticated clients will need more guidance. Frase *et al*, in a leading book on conflicts of interest in the financial services field, suggest that a firm must 'satisfy itself that its customer is sufficiently experienced [and] understands the nature of the disclosure'.<sup>72</sup> They add that the 'attributes of the [client] in question... may also be important'.<sup>73</sup> But how easy is it to glean the 'experience' and 'attributes' of a client? This may be a challenge in some cases.
  
- b) The consent must be based on an understanding of how the conflict is to be managed. This means that **the client needs to grasp any information wall(s) that are being proposed.** Yet information walls are not simple concepts. They imply such things as the education and training of staff, data security and monitoring procedures. Even the culture of the firm that is using it can affect the strength of a wall. How well can a client truly understand all of these things? Insofar as they do not, how can they assess the risk of the barrier being breached? There must be doubts on these points. This is especially so when the client is not very sophisticated, or if they have not taken prior legal advice.
  
- c) The firm must be **very careful not to overstate the effectiveness of its barrier policy.** If it does so, it will mean that the disclosure that is given is inaccurate. Any consent that is gained in this event is not truly 'informed'.

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<sup>70</sup> *Life Association of Scotland v Siddal* (1861) 3 De G.F. & J. 58, 73.

<sup>71</sup> *Commonwealth Bank of Australia v Smith* (1991) 42 F.C.R. 390, 393.

<sup>72</sup> D. Frase, R. Helm and M. Day, *A Practitioner's Guide to Conflicts of Interest in the Financial Services Industry* (Thompson Reuters, London 2012), p 29.

<sup>73</sup> D. Frase, R. Helm and M. Day, *A Practitioner's Guide to Conflicts of Interest in the Financial Services Industry* (Thompson Reuters, London 2012), p 29.

Agents ought to be cautious in this regard. They may believe that their barrier policies are stronger than they actually are. This is because some breaches of the barrier may go undetected. We explored why this can happen in chapter 4.

#### 3.3.4 Assessment of these standards

We have now finished describing the two defences to having a conflict of interest. We are now able to assess the law in the round. The question is how far it promotes high standards of conduct by property agents. Our answer is that the picture is a mixed one. The law is helpful – but only up to a point.

One main advantage of the no conflict rule is that **it should focus the minds of agents**. Conflicts of interest can increase the risk of a client receiving a poorer service than they would otherwise have got. The law ought to make agents think carefully before taking them on. It tries to do so by making any conflict unlawful as a general rule.<sup>74</sup> Such a starting point **will encourage some agents to avoid certain types of conflict to begin with**. This is most likely to be the case with actual conflicts. For agents who *do* wish to proceed despite a conflict, the law encourages them to manage it. Getting the clients' informed consent is a good example of how this can be done.

Nevertheless, **the law is not a perfect solution in this area**. A number of reasons exist to support this view. We will consider them in turn.

- (a) the **(arguable) ability expressly to oust the no conflict duty by contract is regrettable** in some cases.

We noted earlier how firms can arguably stop any no conflict duty from arising to begin with. On one view, this can be achieved by expressly excluding it in the retainer. But is this desirable? To some extent one may be relaxed about the

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<sup>74</sup> P. Birks, *An Introduction to the Law of Restitution* (Clarendon Press, Oxford 1989), p 332; M. Conaglen, 'Fiduciary Regulation of Conflicts between Duties' (2009) 125 *Law Quarterly Review* 111.

possibility. Freedom of contract is an important idea in commerce. If a sophisticated client in particular is prepared to agree to such a term, why should the law stand in their way?

Yet this argument is only persuasive up to a point. Not every firm is a sophisticated player in the market. Smaller businesses can be notably different from other ones. They are only very occasional users in this market (see p. 23). They tend to have a weak bargaining hand. They often engage in little effective negotiation before they enter into agreements.<sup>75</sup> They often do not take legal advice. One survey, for example, found that 40% of businesses with five employees or fewer did not do so when taking a commercial lease.<sup>76</sup> Even if they do, moreover, this may happen only after they have agreed on the heads of terms with an agent. Such situations were discussed by **Belinda Solomon** during the interviews.

For less knowledgeable clients in particular, it would be unfortunate if express ouster came to replace informed consent. The need to gain informed consent is a valuable safeguard for clients. It reflects the importance of fiduciary duties (like the no conflict duty) to their protection. No explanation is needed at all under the contractual ouster method. In policy terms, this difference is very questionable indeed.

The lack of protection in this area is out of step with the approach taken by the law in some other contexts. Two examples of this may be given.

- The **Unfair Contract Terms Act 1977** strikes down some contract terms that seek to exclude liability for damages in tort or for breach of contract. But this Act does not seem to apply to terms that seek to exclude fiduciary duties, such as the no conflict rule. This is unfortunate. When Parliament enacted this statute, it was not thought that one *could* contractually exclude such duties.

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<sup>75</sup> A. Fletcher, A. Karatzas and A. Kreutzmann-Gallasch, *Small Businesses as Consumers: are they sufficiently well protected?* (2014) ([http://competitionpolicy.ac.uk/documents/8158338/8264594/fsb+project\\_small\\_businesses\\_as\\_consumers.pdf/f1ed4da5-14cf-4b80-a1d8-ff76a0781def](http://competitionpolicy.ac.uk/documents/8158338/8264594/fsb+project_small_businesses_as_consumers.pdf/f1ed4da5-14cf-4b80-a1d8-ff76a0781def)), para 5.8.

<sup>76</sup> N. Crosby, C. Hughes and S. Murdoch, 'Do Small Business Tenants need Protecting in Commercial Lease Negotiations?' (2005) ([core.ac.uk/download/pdf/356748.pdf](http://core.ac.uk/download/pdf/356748.pdf)), p 14.

- A second example concerns **Part II of the Landlord and Tenant Act 1954**. This statute gives important rights to business tenants to continue in occupation after their agreed leasehold term has ended. It can be contracted out of, but only by using a clear procedure *before* the tenancy is entered into. It includes the service by the landlord of a 'health warning' on the tenant, making clear the significance of the procedure, and a making of a declaration by the tenant that they have received and understood the warning. Contrast this approach with the one that is taken to the express ouster of the no conflict rule. There is no comparable warning procedure. The agent **need not make it clear to the client what ousting the no conflict duty means** for them. Yet the protection that they are foregoing could undermine their position quite markedly.

One must ask whether express contracting out should be regulated. It is not only in the context of the commercial real estate market that this matter is being debated. The financial services sector provides another example. Issues about protecting less sophisticated clients are also relevant there. Professor Joshua Getzler, for example, writes:

'The deeper question for courts, regulators and legislators is whether the risks of conflict and market abuse created by private actors such as investment banks within the financial system are too large to leave solutions to private ordering.'<sup>77</sup>

The same 'deeper question', we believe, is just as relevant in the commercial real estate sector.

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<sup>77</sup> J. Getzler, 'Excluding fiduciary duties: the problems of investment banks' (2008) 124 *Law Quarterly Review* 15, 20–21.

- (b) **The law is unclear in some important respects.** This creates scope for differing interpretations of it to emerge. The result is a danger of uneven standards, and of lenient views of the law being taken by some firms.

Open-ended laws are not always a bad thing. The law of fiduciary duties spans a huge range of contexts and sectors, and so it must be of a certain level of generality. But this strength can also be a weakness. It means that much may be left to the interpretation of those who have to promote adherence to the law in practice. Compliance officers, for example, play a key role in translating general principles into concrete policies and procedures. They are drivers of standards. Without clear laws, compliance officers may regard the varying practices of their firms as being sufficient. The law is too vague to guarantee that similar approaches will be adopted across the sector.

Three examples may be given of such legal vagueness. With each of them, the danger is that lenient interpretations may be taken of what the law actually is.

- The first example concerns express 'contracting out'. It is possible to see the law as sanctioning this technique. But there is also a contrary view. (We looked at this debate on pp. 61–62.) Some firms may be reluctant to rely on this method. Others may think that it is acceptable.
  
- The second issue is that of the limits of implied consent. Again, we offered a view on this matter earlier (see pp. 59–61). We suggested that implied consent does not cover either (i) actual client conflicts; or (ii) potential client conflicts that are either 'high chance' or 'high risk'. We do however acknowledge that this is only our best guess. Not all firms may agree with us. Different agents may take different views. A range of opinions could arise in practice. Some firms could take more generous approaches than other ones. This does nothing to guarantee high standards across the board.
  
- Our third example relates to informed consent. As we have seen, gaining it is necessary before an agent proceeds with any actual client conflict (or indeed with any 'high risk' or 'high chance' potential client conflict),

should there be no contractual ouster of the 'no conflict' rule. We explained that truly informed consent may be hard to gain. Yet what suffices for this purpose is hazy. A leading guide to conflicts of interest by Frase *et al*, focussing on the financial services sector, reflects this fact. As the learned authors observe:

'Much uncertainty still surrounds the information that must be disclosed for the disclosure to be adequate. Therefore disclosure and consent are not a wholly reliable means of avoiding conflicts.'<sup>78</sup>

Agents may hence take different views on what is enough disclosure in this regard. Some firms may simply use generalised disclosure forms. Others ones may go further than that.

This uncertainty is likely to persist going forward. A number of reported legal cases, specifically on commercial property agents, would be needed to clarify matters. This is unlikely to happen any time soon. Disputes could be settled before they reach the courts. Moreover, a court decision would not resolve the law to any degree unless it was handed down by at least the High Court, as opposed to the County Courts which deal with most disputes in England and Wales.

- (c) Clients may conceivably **agree to client conflicts when they are not in their best interests**.

There is no legal requirement that an agent should only proceed despite having a conflict of interest if it is in the best interests of all of their affected clients. It suffices instead that one of the two defences that were described above (pp. 55–

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<sup>78</sup> D. Frase, R. Helm and M. Day, *A Practitioner's Guide to Conflicts of Interest in the Financial Services Industry* (Thompson Reuters, London 2012), p 29.



65) can be shown. Both of these defences are reliant based around agreement. Whether the client consents in the contract (i.e. to express exclusion) or gives their informed consent, it is the element of concurrence that is the key. In both cases, the rationale is that the client is the best judge of their own interests. So if they agree to the conflict, the law should respect their decision.

There are doubtless some cases where this justification is acceptable. Yet it goes too far to say that it is always convincing. We must bear in mind the position of less sophisticated clients. One of the reasons that professional regulations sometimes go further than the law in addressing client conflicts is because a client may not always be able to judge their own best interests.

Having a 'best interests' requirement is a useful brake on this danger. It is notable that the RICS guidelines put it forward as best practice (see chapter 5, p. 112). Some professional regulators indeed go even further. The Handbook applicable to solicitors in England and Wales, for example, allows solicitors to have client conflicts only in very narrowly defined cases.<sup>79</sup> Again, the Handbook proceeds on the implicit assumption that the general law does not go far enough.

(d) Clients may be **reluctant to bring legal proceedings**.

We explore the reasons why clients may struggle to identify malpractice at various points in this report. Showing a breach of the no conflict duty is no different. The aggrieved client would have to be sufficiently sure of their case, willing to pursue it, and prepared to invest the time and money involved in legal proceedings. Few clients will wish to take the risk. As a result, the deterrent effect of the law is reduced.

Even more difficulty occurs if the complaint relates to an area where the law is unclear. There could for example be a dispute about whether or not a conflict of interest is sanctioned by an express term in the retainer. Or one about whether the

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<sup>79</sup> See: <http://www.sra.org.uk/solicitors/handbook/code/part2/rule3/content.page>.

consent that a client gave was truly 'informed'. Legal uncertainty tends to favour the side with the deepest pockets. Small business tenants in particular are most unlikely to have the advantage in this respect.

### 3.4 Liability for intentionally preferring one client's interests over those of another client

There is one last legal rule that we need to consider. It applies to agents who have a conflict of interest, but who have gained the clients' informed consent to it. In this event the agent must comply with the 'no inhibition principle'.<sup>80</sup> It will be breached if:

- a) The agent **breaches** a duty that is owed to one client.

This could be one of the duties described earlier, such as the one of confidentiality or the one to exercise reasonable care and skill.

- b) They did so **with the intention of preferring the interests of another client**.

This second condition is important. An agent who believes that they are acting in the best interests of their client is not in breach of the no inhibition principle. It would be irrelevant that other agents may have acted differently, or that the service that was provided was poor. As one judge has explained, an agent 'who loyally does his incompetent best for his [client]... is not guilty of a breach' of the no inhibition principle.<sup>81</sup>

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<sup>80</sup> See generally *Bristol & West Building Society v Mothew* [1998] Ch. 1, 18–19 (Millett L.J.). And see M. Conaglen, 'Fiduciary Regulation of Conflicts between Duties' (2009) 125 *Law Quarterly Review* 111.

<sup>81</sup> *Bristol & West Building Society v Mothew* [1998] Ch. 1, 18 (Millett L.J.).

This does not mean, of course, that the agent can deflect any complaint, merely by asserting that they acted in good faith. The court does not have to accept that. As a general rule, the more inexplicable the agent's conduct was, the greater the chance that they will be disbelieved if they claim to have acted in good faith. The agent's experience will be relevant in approaching this inquiry.

It may be asked *why* a client would assert a breach of this obligation. If the first condition here is a breach of some other duty, why would one not just sue for that instead? In some cases this is a valid point. But in others it will not be. The difference is that **a breach of the 'no inhibition principle' may lead to a better remedy for the client**. This can for example include the return of any commission, in addition to any damages. No commission would be repayable, by contrast, in the event only of a breach of the duty to use reasonable care or to keep information confidential.

Numerous examples could be given to illustrate this duty in practice. Take for instance an agent with two competing landlord clients. If the firm identifies a tenant that might be suitable for them both, it cannot hide the opportunity from one of them and offer it to the other. Any suggestion of good faith in this event would be rejected. Likewise, the agent could not give unduly favourable reports of a property to a tenant client in order to steer them towards a landlord client. Or a property agent, being keen to impress a particular tenant client, could not negotiate half-heartedly over a tenancy for another client, in order to leave the property available for the preferred client. In each of these cases the agent is breaching their duty to use reasonable care, with the aim of preferring the interests of another client. So even if they had a defence to there being a conflict of interest, they are still infringing the no inhibition principle.

### 3.5 The role of the law: summary and conclusions

Let us now take stock of this chapter. The issue to be explored was how far the law ensures high standards of conduct in the management of conflicts of interest by commercial property agents. A lot of ground has been covered in order to address this matter. It is hence useful at this stage to recap the key points that have been made. They are as follows:

(a) The general law **does not prohibit multiple agency**.

(b) The law **imposes a number of general duties on all agents**. We discussed in particular: (i) the duty to exercise reasonable care and skill in performing one's duties under the retainer; and (ii) the duty of confidentiality. These duties are owed by the firm to each client. They aim to promote certain levels of performance by agents. They are relevant to our study because an unmanaged conflict increases the risk of them being breached.

- **The duty of reasonable care is really useful only in terms of deterring poor service.** An unmanaged conflict of interest could manifest itself in that. However, the duty does not reasonably guarantee high quality performance. That is not its role. This fact reduces its usefulness for our purposes. **A conflict of interest could undermine the outcome for a client, yet go unpunished.** Proving the action that was influenced by the conflict may well be very hard; and the overall outcome may not be so badly affected by it as to warrant a claim by itself. In consequence, the deterrent effect of this duty is reduced. The challenges of litigation only compound this difficulty.
  
- The **duty of confidentiality is very helpful in theory**. But it could be **much less so in practice**. This is because proving a breach of the duty will be an uphill task. Clients do not monitor agents closely. Without a paper trail, and unless the breach evidently distorts the outcome for the client, they may well not spot that it has happened. Indeed it would be folly on the part of an agent to allow a breach to have an obvious effect.

(c) **Many dual agents will owe 'fiduciary duties' to their clients.** These duties arise in principle whenever the agent is instructed to make recommendations to the client and/or to negotiate on their behalf. The fiduciary duties that arise in this event are various. They are all aspects of **one overarching obligation: the one to show single-minded loyalty to the client**. Crucially, they include the duty to avoid conflicts of interest.

(d) The **duty to avoid conflicts of interest** can be broken down into **two elements**.

- The duty to avoid conflicts between one's own interest(s) and one's duties to one's client. Such a conflict can be actual or potential.
- The duty to avoid conflicts between the duties which one owes to different clients. Again, such a conflict can be actual or potential.

(e) An agent with a conflict of interest is **automatically breaching the law, unless they can show one of two defences**.

- The first defence is to rely on a **term in the retainer, ousting the duty to avoid the type of conflict in question**. It is unclear whether the law allows an agent totally to exclude the no conflict duty in this way.
- The second and more traditional defence is to show that **each affected client gave their 'informed consent'** to the conflict.

(f) There are **some weaknesses with the protection that is offered to clients by the law**. In particular:

- It would be regrettable if agents *can* contract out of the no conflict duty in the retainer, at least when they are dealing with less sophisticated clients. This technique bypasses the important safeguard of informed consent.

- The law is unclear in some key respects, which fact may lead to variable standards of conduct in practice.
- The law does not require that agents only have client conflicts if they are in the 'best interests' of all of the affected clients.
- Proving breaches of the law may be difficult for clients. This may well put them off from suing their agent, particularly given the challenges of litigation.

We therefore conclude that, while the law does offer some useful protections to clients, **it does not reasonably guarantee high standards of conduct**. It suffers from too many limitations. Indeed given that the hurdles of legal proceedings and of proving wrongdoing are always likely to remain, the law can probably never ensure that high standards of service will prevail. It is therefore only a partial solution. Quite a lot is left to market forces, internal discipline and the RICS guidance.

## Chapter 4

### The Effectiveness of Self-Management

'I don't think it's broken... [Real estate is] a profession; and you get a certain style of persons... who respect the rules of the game.'

#### **Interviewee C**

'[S]elf-policing; there's absolutely no way that that is going to work.'

#### **Belinda Solomon**

### 4.1 Introduction

Property agents place much reliance on their self-management of conflicts. Dual agency firms, for example, argue that it enables them to represent properly both landlords and tenants. It negates any risk to their clients. According to one large dual agency firm:<sup>82</sup>

'... it is not unusual for a successful, larger brokerage firm to represent both tenants and landlords. The issue is not that they operate in this way, but whether they have stringent systems in place to prevent potential [conflicts of interest] resulting from such a dual client base.'

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<sup>82</sup> See JLL, 'Conflict of Interest: Separating Myth from Reality' (<http://www.joneslanglasalle.com/SiteCollectionDocuments/tenant-representation-conflict-of-interest.pdf>).

As this quote shows, dual agents regard conflict management as the real issue. The question to be asked in this chapter is how effective their strategies can be. How far can we trust them? On this point the expert interviewees offered some diverse views. The above quotations give a flavour of these opinions.

This chapter proceeds in three stages:

- firstly, we will set out the key features of the 'information walls' that are used by property agents;
- secondly, the practical concerns with information walls are explored; and
- thirdly, we ask how common breaches of these walls may be in practice.

The conclusion that emerges from this chapter is that information walls are useful to a degree. But the scope for undetected breaches of them to occur is something that cannot be ruled out. Experience in other areas suggests that there are reasons to be concerned. Further research into this matter is plainly warranted.

#### 4.2 Information barriers: key features

Information barriers (also called 'information walls', 'ethical walls' or 'Chinese walls') are used in various spheres, including accountancy and finance. Their purpose is to prevent some flow of information which would be unlawful. In the property agency context, the mischief to be stopped is a breach of the duty of confidentiality. This duty was explained in chapter 3 (see pp. 39–43). As we also saw in chapter 3 (see pp. 45–47), violations of this duty are more likely when a firm has clients with conflicting interests. Two such clients also have an obvious incentive to capitalise on any breaches of confidentiality, in a way that disinterested clients do not have. An information wall can be used to manage these greater risks. The aim of having one is to ensure that any information that is confidential to one client does not become known to the representatives of another client (or indeed to that other client himself). They are hence an essential part of a conflict management strategy.



Information walls can be quite complex. Their precise operation will differ from firm to firm. We may however identify some of their key features in the commercial real estate sector. They are as follows:

- (a) They consist of a set of procedures for preventing the flow of information.

The matters that are dealt with by them will include restrictions on access to files, limitations on contact between staff, plans to deal with breaches, and processes for deciding whether information should be allowed to bypass the wall. In larger firms there may even be a physical division, with different teams occupying different offices, floors or even buildings.

The task of devising these procedures is one for a firm's legal (or compliance) department/officer(s). They will look to ensure that the firm's procedures and policies are legally acceptable. They will also play a role in the ongoing education of staff. Emails may for instance be sent around the firm to highlight recent developments.

- (b) Dual agents use ad hoc rather than permanent information walls as between their property agents.

In some contexts, information walls are permanently in place. In this event they are called 'institutional' walls. Such barriers are used in parts of the finance sector. Investment banks, for example, will look to permanently isolate those employees who provide advice on company takeovers from its stockbrokers.

In theory a dual agency firm could take this approach with its landlord and tenant representatives. It could have a permanent wall in place between its landlord and tenant teams. In practice, however, this approach is not favoured. Dual agency firms prefer to use ad hoc barriers. As **Interviewee A** explained, a wall is set up

when there is a conflict of interest that is specific to the case. The approach 'is led by the deal itself'.

- (c) The use of ad hoc walls between property agents is preferred because it is viewed as being more efficient.

Dual agents believe that they can have the best of both worlds. Being able to glean information from both sides is a claimed benefit of their work. **Interviewee B** described it as being 'useful to act on both sides of the equation'. **Interviewee D** spoke of 'a different perspective' being gained from dual agency. A permanent information barrier would prevent this. It would detract from the commercial reasons for being a dual agent. As **Interviewee A** said: '[i]nformation is pretty free generally' in this regard, 'because that's what makes the firms strong in a lot of ways.'

Academic writing acknowledges the costs of using a permanent wall. These expenses may even be self-defeating. As one scholar has written in the context of the finance sector:

'[Information barriers] tend to defeat the business reasons for creating multiservice firms. The cost savings, opportunities for collective thinking, and other synergies of the large firm are lost if employees in different departments of a firm are not permitted to work together and contribute to a joint effort... [If] the firm preserves its [barrier] by hiring two or more sets of analysts to serve different departments, the economic advantages of having a multiservice firm begin to disappear.'<sup>83</sup>

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<sup>83</sup> N.S. Poser. 'Conflicts of Interest within Securities Firms' (1990) 16 *Brooklyn Journal of International Law* 111, 115.

- (d) Having a good conflict-alerting system is critical to a strategy based on ad hoc information walls.

A good conflict-checking system is therefore an essential starting point for any firm using ad hoc information walls. Every new instruction must be checked against it. This must happen before any agreement is entered into. As **Interviewee B** observed, a firm 'can't even... begin to manage the process' without such a procedure.

A strong conflict-altering system in turn requires good record-keeping. A firm must have an accurate register of the interests of all of its clients and employees. The 'interests' of employees for this purpose include their shareholdings, directorships and financial investments.

If a possible conflict of interest is flagged up, but the job *does* still proceed, an information wall will be put in place for so long as it subsists.

- (e) Good management oversight is important to any effective information wall.

The policing of an information wall cannot be left merely to those workers who, for example, monitor the IT usage of agents. Line managers also play a crucial role. One aspect of their job is to spot any suspicious agreements that are put forward by their agents.

This process was described by **Interviewee E**. A lead director in the team or department will review each job before it reaches its conclusion. They will look particularly at the proposed heads of terms; that is, to a summary of the main points of principle on a deal. The director will check that they are reasonable. In this regard, any deal is judged against the internal criteria that are set by the client.

These features are hence some of the key ones of information walls in the property agency context. But different agents will vary in terms of how precisely their barriers work. Some dual agency firms provide basic details of their own approaches on their websites. One such overview, as is offered by a large full service firm, reads as follows:

'Under our information barrier policies, if a client or our real estate professionals or managers determines that an information barrier is required, a team is created to act for the client that includes no employee who has performed work for, or otherwise is exposed to the confidential information of, any other party to the transaction who is represented by [the firm]. A responsible manager informs each team member about this procedure and requires a specific acknowledgement of the duty of confidentiality. The manager has discretion to adopt certain other procedures that are designed to enhance information security, including by way of example: physical separation of the client team and their staff, securing of files and offices, and/ or establishment of a code name in place of each client's actual name. The manager monitors the teams and the situation on an ongoing basis to assess the continuing effectiveness of the information barrier and make adjustments as necessary.'<sup>84</sup>

#### 4.3 Practical concerns with information barriers

The issue is how effective such strategies are. This is obviously a very broad question. Information barriers will be more or less useful according to how they are operated and managed, the risk(s) to be addressed, and the culture of the firm that is using the wall. Yet the literature does offer various doubts about information barriers more generally.

The literature does offer a number of doubts about information barriers.

Admittedly, this writing is not specifically about the commercial real estate market. Most of it concerns the United States financial services industry. Nevertheless, it seems that the issues raised by it are of no less relevance here. Not only are the matters that are mentioned quite generic, but it is unlikely

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<sup>84</sup> CBRE, Managing Conflicts of Interest (2011) ([http://www.cbre.co.uk/uk-en/about\\_cbre/ethics/docs/CBRE%20-%20Managing%20Conflicts%20of%20Interest%20\(2012\).pdf](http://www.cbre.co.uk/uk-en/about_cbre/ethics/docs/CBRE%20-%20Managing%20Conflicts%20of%20Interest%20(2012).pdf)), p 8.

that the standards that are observed in the commercial real estate sector are *higher* than the ones that are to be found in the financial services field. As **Interviewee E** observed:

'In the wider market, what I have noticed is – and I think some of my colleagues have noticed the same thing – is that the American funders, the banks and investors, tend to take conflicts of interest far more seriously than many UK property companies and banks; although since the crisis things have probably changed a little... potential conflicts of interest are being taken more seriously.'

This comment suggests that attitudes have improved in the commercial real estate sector. It gives us no reason to think, however, that self-policing in this area will be any *better* than it is in other spheres. None of the interviewees made such a claim. **Interviewee B**, indeed, felt that surveying practices were behind the standards that are enforced on financial institutions.

The general academic concerns about self-policing are thus worth considering here. They do not fill one with confidence that information walls are reliable. The authors of one study conclude that they are 'porous and ineffective'.<sup>85</sup> According to another scholar, the evidence 'overwhelmingly indicates that they are not effective in practice.'<sup>86</sup>

In what follows we will look in turn at each of the various difficulties with information walls. As we proceed through them, we will also consider any relevant comments from the interviewees.

**(a) Some firms may lack the size to have effective information walls.**

Smaller firms may struggle to set up robust information barriers. As McVea writes in his book, *Financial Conglomerates and the Chinese Wall*, it would 'obviously be difficult for relatively small multi-functional firms to operate the same sort of

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<sup>85</sup> H.N. Seyhun, 'Insider Trading and Effectiveness of Chinese Walls in Securities Firms' (2008) 4 *Journal of Law, Economics and Policy* 369, 371.

<sup>86</sup> S. Clark, 'Insider Trading and Financial Economics: Where do we go from here?' (2010) 16 *Stanford Journal of Law, Business and Finance* 43, 82. See also A.F. Tuch, 'Financial Conglomerates and Information Barriers' (2014) 39 *Journal of Corporation Law* 563, 585.

compliance programmes as the larger conglomerates.<sup>87</sup> (He does note, however, that factors such as employee culture may be easier to control in such firms.)

Some of the interviewees' comments reflected this concern. They identified the size of a firm as being a factor that can influence the effectiveness of an information wall. **Interviewee D** felt that any firm can have an effective information wall, but added that larger firms have more options open to them. 'The larger the firm', they explained, 'the more flexibility that they have in their choice of barrier'. In a larger firm, teams can be kept on separate floors or offices. Smaller firms may not be able to do this. The extra costs involved may make them uncompetitive (**David Miles**). They may lack a compliance officer and even a compliance policy (**Interviewee B**). This is not an easy problem to address. **Interviewee B** summed up the difficulty thus:

'... in terms of the size of firms, a large firm may have people working on different floors, using a sharing data on a different hard drive, with different policies, or even separated into a different firm as well. [But with a small firm,] there could just be two people on the same desk stack in the same office, within earshot of each other. So these are very difficult things to police.'

(b) **Some persons must sit astride the wall.**

One of the challenges with information walls is that some person(s) must sit astride them.<sup>88</sup> **Adam Walford** expressed some concern about this point. The obvious question is who supervises the supervisor.

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<sup>87</sup> H. McVea, *Financial Conglomerates and the Chinese Wall: Regulating Conflicts of Interest* (Clarendon Press, Oxford 1993), p. 132.

<sup>88</sup> N.S. Poser. 'Conflicts of Interest within Securities Firms' (1990) 16 *Brooklyn Journal of International Law* 111, 115.

**(c) Information barriers are not apt to prevent the informal disclosure of information.**

This is a particularly pressing issue. In a report for the Department of Trade, a leading company lawyer, Professor Gower, once remarked that: 'I have never met a Chinese Wall that did not have a grapevine trailing over it.'<sup>89</sup> The risk of such informal leaks has probably grown since then, in light of advances in digital communications technologies.<sup>90</sup>

A good example of an informal breach of an information barrier occurred in a high-profile Australian legal case: *ASIC v Citigroup Global Markets Australia Pty Ltd*.<sup>91</sup> The dispute concerned an allegation of insider trading at Citigroup. The claim was rejected, in part because Citigroup was deemed to have sufficiently robust information barriers in place. But the wall proved to be far from flawless. The very facts of the dispute show that even strong safeguards may not prove to be enough. In the *Citigroup* case, the information was passed during a conversation between a head of equity derivatives and a trader. The relevant discussion took place during a cigarette break.

In other cases, an informal breach can occur in different ways. An Australian judge has explained that:

'... it is not realistic to place reliance on such arrangements in relation to people with opportunities for daily contact over long periods, as wordless communication can take place inadvertently and without explicit expression, by attitudes, facial expression or even by avoiding people one is accustomed to see, even by people who sincerely intend to conform to control.'<sup>92</sup>

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<sup>89</sup> L.C.B. Gower, *Review of Investor Protection: Part II* (Cmnd 9125) (HMSO, London 1985) at [4.13].

<sup>90</sup> Other authors have also expressed similar views: C.B. Onwuekwe (2001) 12 *International Company and Commercial Law Review* 172, 173.

<sup>91</sup> [2007] FCA 963.

<sup>92</sup> *D & J Constructions Pty Ltd v Head* (1987) 9 N.S.W.L.R. 118, 123 (Bryson J).

As the judge makes clear, problems can arise despite the best intentions of those persons who are involved. This is a significant point. Information barriers will struggle to address things as subtle as body language. One would need to prevent all interaction between the relevant agents. **Adam Walford** said that it would mean the firm having to operate like two different companies. This may well be almost impossible to achieve. The barrier would need to extend not only to working spaces but also to common areas such as canteens. Networking events must be covered. Even social interaction needs to be prevented. This may be difficult to do when colleagues are on friendly terms with one another, and meet socially from time to time. Moreover, even if all of these matters are dealt with, the need to conduct negotiations means that *some* contact between the relevant agents is inevitable.

Comments from the interviewees did not claim that informal breaches could never occur. **Interviewee A** referred to 'human error or human nature' as potentially leading to problems. They accepted that sometimes wrongdoing can slip through the net. **Interviewee D**, likewise, said that 'a passing conversation between participants is hard to document and pick up on'.

- (d) Information walls are **less effective if breaches of them do not manifest themselves in noticeable ways**. In the commercial real estate context, such subtle breaches may not be that hard to perpetrate.

For those who police information walls, the task of spotting some breaches of them will be a simple one. If for example one employee was seen by their manager openly discussing confidential information in front of persons who are not meant to learn of it, the transgression is obvious. The same would also be true if one agent hacked into the computer of another agent, or if a confidential file was found with an employee on the wrong side of the wall. Such obvious wrongdoing should not be a problem to identify. This fact deters agents from committing it.

It is not a stretch of the imagination, however, to assume that those who are minded to do wrong will seek to do so as covertly as possible. They will choose



their moment and their method accordingly. It would be rash for an agent to leak information in an obvious way. Sending a text message or having a word in a social setting may be better approaches to adopt. Likewise, it would be foolish for a party who is given the benefit of the information to capitalise too obviously on it. Imagine for example that, due to the carelessness of a co-worker, a landlord agent learns of a weakness in the bargaining position of a tenant who is being represented by the same firm. Using this information to justify holding out for onerous terms in one's own favour is going to be short-sighted. Even the landlord is likely to be suspicious of such a strategy. But what of a more subtle approach? What if the agreed rent was, say, two or three per cent higher than it would otherwise have been? Are managers likely to query this from the heads of terms? One could doubt that. The agreed rent will probably be within the plausible range. So many factors influence a final deal that cause and effect could be very hard to pin down. (We explored some of these variables in chapter 2, on pp. 28–29.). The manager is likely to treat the result as being a reasonable one. The breach of the wall then goes both unnoticed and unpunished. Even worse, the firm will wrongly conclude that the barrier *worked*. This belief will then only reinforce the firm's willingness to use one again in future.

Covering one's tracks is far from being an impossible task in the context of commercial property negotiations. The nature of the market can make it hard to scrutinise. **Interviewee A** described how it can be a 'more subjective thing to police' than some other capital markets. Spotting a poor deal can be 'fraught with difficulty'. **Interviewee B**, likewise, spoke of a 'grey area', when communication that leads to a deal is taken offline. As they then added:

'It's very difficult to have a complete picture. Clearly you are reliant on people to give one-hundred per cent disclosure'.

(e) **Ad hoc information walls are more prone to being breached than permanent ones.**

This view has been expressed by some of our most senior judges. In one prominent case, Lord Millett, with whom four other Law Lords agreed, made a statement of relevance to our report. His Lordship was discussing an ad hoc information wall that was being proposed by a large accountancy firm (for the background, see pp. 42–43). As he opined:

‘It is one thing, for example, to separate the insolvency, audit, taxation and forensic departments from one another and erect Chinese walls between them. Such departments often work from different offices and there may be relatively little movement of personnel between them. But it is quite another to attempt to place an information barrier between members all of whom are drawn from the same department and have been accustomed to work with each other...

In my opinion an effective Chinese wall needs to be an established part of the organisational structure of the firm, not created ad hoc’.<sup>93</sup>

This concern is of no less relevance to our inquiry. It suggests that, in order to have anything like an effective barrier, the landlord and tenant teams would have to be in totally separate areas – probably in different buildings. Indeed the difficulties do not stop there. What about the movement of employees between departments? Or between firms? How is one effectively to screen the knowledge of possible new recruits? It will be extremely hard properly to assess what is known even by one’s *existing* employees when a wall is first being considered. These employees may struggle to remember exactly what they ‘know’ at this time. With the right prompting, some forgotten fact may come to one’s mind later. Lord Millett’s doubts should therefore be taken very seriously. Ad hoc information walls require more even care than permanent ones.

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<sup>93</sup> *Bolkiah v KPMG* [1999] 2 A.C. 222, 239.

- (f) There are **no guarantees that ad hoc information walls are always being used when they should be.**

The existence of permanent walls is not a matter for discretion. They ensure a more level playing field between those firms in the sectors that use them. All of the firms must incur the same basic costs. Ideally in such cases, a regulator or an Act of Parliament will also set down minimum pre-conditions for any lawful wall.

There are no such guarantees of parity regarding ad hoc information walls. Whether or not they are used turns on the outcome of a conflict-checking system. This puts a lot of emphasis on what each individual firm treats as requiring a wall. In particular, it emphasises each firm's own view on what is a sufficient 'conflict of interest' for this purpose. For an agent to say that it manages any 'conflicts of interest' by information walls just begs the question: what *is* a 'conflict of interest' for this purpose? Presumably all agents would agree that an actual conflict would qualify. But potential conflicts are more problematic. They are not all the same. Some are more likely to become actual conflicts than others. Some will be harder to manage than others if they become actual conflicts. Some will also pose greater risks than others in this event. It is most improbable that all firms take the same views about when a barrier is needed.

Our doubts in this regard are underscored by the responses from our interviewees. As we saw earlier, some of them spoke about how even the term 'conflict of interest' is interpreted in different ways (see p. 25). To repeat for example an earlier quotation from **Interviewee B**:

'Some of the major firms do not regard a shareholding of less than 3% of the market capitalisation of the business as being a significant shareholding. I could have £100,000 shares in British Land Securities through my pension scheme, and yet put myself forward as a valuer for that business, and not feel that there was a conflict there and not feel it necessary to disclose it.'

**Clearly, Interviewee B** did not agree with this view. It would be very interesting to know where every firm draws the line with issues like this. Unfortunately they do not make such information publicly available.

This lack of transparency is not at all encouraging. It is legitimate to ask if information walls are being used often enough. There is no point in having a robust barrier procedure on paper if it is not executed when it should be. The clear risk is that some agents may take too relaxed a view in this regard. Given the costs of having anything like an effective wall, there is a danger that firms will not wish to use them too readily in potential conflict cases. Many clients are unlikely to query their agent's decision. They will probably not know any better. The potential conflict may not even be mentioned to them. Yet the absence of a barrier could lead to problems later on. Assume for example that a potential conflict later becomes an actual one. At this stage, of course, an ad hoc barrier may be proposed. But the risk is that it may be too late for it to be truly effective. By this point the client's confidential information could already have been spread amongst the firm's employees. Doubtless some attempt should be made to screen them. But any such endeavour will be a challenge. As we noted earlier, it will be difficult properly to assess the knowledge of potentially many employees.

It is therefore most important that an open debate about this issue takes place. As we will see in chapter 5, it is not one that even RICS has encouraged. Yet the present lack of transparency creates room for suspicion. One must fear that commercial motives could skew firms' decision-making here (see also pp. 126–129).

#### 4.4 The frequency of breaches in practice

For all of these reasons, authors have doubted that information walls are fully reliable. As one author concludes in the context of the financial sector, 'experience... has, time and time again, cast

substantial doubt' on them.<sup>94</sup> The conduct of persons within other types of company has also been questioned. According to a leading Cambridge academic:

' [W]hether... systems of internal control, even self-restraint, are more or less effective, it cannot really be argued that they have so far proved themselves capable of constraining abuse.'<sup>95</sup>

The potential for breaches of information barriers to occur has also been noted by the judiciary. In one case, *Nicholas Browne-Wilkinson V.C.*, the then head of the Chancery Division of the High Court, expressed his own concerns. As he said:

'Experience in this court demonstrates that the maintenance of security on either side of Chinese walls in the context of the City does not always prove to be very easy. I think it is a very difficult task.'<sup>96</sup>

Again, we note that such statements are typically directed at 'permanent' rather than at 'ad hoc' information walls. The use of the latter is in principle even riskier. The reasons for that have just been explained.

It cannot be asserted, therefore, that information walls are always reliable. There is always a risk of them being breached. But how great is this danger? Some of our experts felt that any problems exist only on the margins. **Interviewee C** suggested that a few 'bad apples... have given the broader real estate industry a bad name', but that 'for every bad story there's probably a thousand good stories'. There is, they felt, not much more that can reasonably be done. **Interviewee D** said that real estate attracts professionals 'who respect the rules of the game'. One could be 'very confident', provided that the conflict-checking and management systems in place were robust. **Interviewee A** also averred that conflict management 'is taken very seriously' by the large firms, and that generally things do not go wrong. Managers are 'fairly good' at identifying malpractice by looking at the heads of terms. An experienced director would be able to identify 'fairly easily' that something had gone wrong (**Interviewee E**).

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<sup>94</sup> W. Bunting, 'The Trouble with Investment Banking: Cluelessness, not Greed' (2011) 48 *San Diego Law Review* 993, 1061.

<sup>95</sup> B. Rider, 'Rumblings in the corporate jungle' (2015) 36 *Company Lawyer* 33, 34.

<sup>96</sup> *David Lee & Co (Lincoln) Ltd v Coward Chance* [1991] Ch. 259, 270.

Other participants expressed different views. The lawyer interviewees were particularly sceptical about information walls. **Belinda Solomon**, for instance, said that a successful barrier would require 'incredible care'. This circumspection may be due to there being a different regime for solicitors. Under the rules that are issued by the Solicitors Regulation Authority, information walls can never justify a law firm acting for two competing clients at the same time. In part, this may owe to a view that 'self-regulation by interested persons cannot be trusted.'<sup>97</sup>

A cautious note was also sounded by **Interviewee B**. As they stated:

'I think that [information barriers] are quite dangerous really, because it's all written down as a policy and everybody thinks: 'Well that's fine; it's all out in the open'... I do think that they can actually lull you into a false paradise... [With a small firm,] there could just be two people on the same desk stack in the same office, within earshot of each other. So these are very difficult things to police... I think they are quite dangerous things, are barrier policies.'

We likewise end with a cautious conclusion. On the one hand, the interviews provided no evidence of wrongdoing. We have also found no proof of institutional bias amongst managers or employees. On the other hand, we have seen nothing to dispel the ongoing doubts about information walls. The scope for subtle wrongdoing is of particular concern. Perhaps it is not a frequent occurrence. But there is clearly an important question here that needs to be addressed. In light of the many concerns with information walls, it is not enough for firms simply to assert that they protect the interests of their clients. A more mature debate is needed about this issue. Greater transparency is required on all sides.

It is the scope for subtle wrongdoing that is of concern.

In order to facilitate this much-needed discussion, we propose further investigation in this area. Clear statistical evidence will not exist, but a large number of anonymous interviews could be very helpful. They would need to involve not only clients of agency firms, managers within them and experts in the area, but also lower level employees in these firms. Such a study is in the best interests of all stakeholders. It would benefit both clients and property agents. If the doubts expressed in this chapter are baseless, property agents ought to be willing to help to prove this beyond doubt. If they are with

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<sup>97</sup> T. Kamman and R.T. Hood, 'With the Spotlight on the Financial Crisis, Regulatory Loopholes and Hedge Funds, how should Hedge Funds comply with the Insider Trading Laws?' [2009] *Columbia Business Law Review* 357, 433.

foundation, all good agents should welcome the chance to improve their practice. That would be both ethically and commercially desirable.

## Chapter 5

### The Content of the RICS Guidance: An Appraisal

#### 5.1 Introduction

In this chapter we will review RICS's regulations on client conflicts. We do so from a legal perspective. There are obvious reasons for such an analysis. Firstly, **RICS claims that the Agency Guidance reflects the law.**<sup>98</sup> Secondly, an effective code must be drafted with the law firmly in mind. A good code can, for example, clarify how members should approach areas of legal uncertainty. The courts may indeed be influenced by such guidance.<sup>99</sup> A good code can convey the law in ways that are easier for its readers, as non-lawyers, to understand. That gives confidence to those who follow a code about the legality of their conduct. Where it is felt that the law is insufficient, a good code can set higher standards. This promotes public confidence in a profession. Finally, a good code should acknowledge if any parts of it are less exacting than the law. That would need to be justified.

This chapter begins with a brief introduction to RICS and its self-regulatory role. It overviews the sources of RICS guidance that are relevant to our inquiry, noting their status. We then identify the issues that any regulations on client conflicts ought to deal with. We look at what RICS has to say about each of them. At relevant points its approach will be appraised. Any criticism is followed by a recommendation to address it. We make twenty-two suggestions in all. These proposals are all repeated at the end of the chapter.

We accept that the task of producing a robust code is a very challenging one. The RICS guidance also contains some useful provisions. Nevertheless, it **is inadequate in some important respects**. It should be significantly re-written. This is needed not only to improve the structure of the guidance – which could be better – but also because its content is at times too weak. It does **not do enough to ensure high standards**. Sometimes it even falls below what is required by the general law. These problems are also exacerbated by a lack of clarity at times. The guidance includes vague and

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<sup>98</sup> RICS, *Real Estate Agency and Brokerage Guidance* (2<sup>nd</sup> ed. RICS, London 2015), p. 2; RICS, *UK Commercial Real Estate Agency Standards* (RICS, Coventry 2011), p. 2.

<sup>99</sup> K. Oliphant (ed.), *The Law of Tort* (3<sup>rd</sup> ed. LexisNexis Butterworths, 2014), para 16.10.



occasionally incongruent definitions. All of these problems need to be addressed. **We call on RICS to make significant changes to its guidance** as part of its ongoing review.

## 5.2 Background to RICS's self-regulation model

RICS traces its roots back as far as 1792.<sup>100</sup> Today it is incorporated by Royal Charter. It accredits professionals working on the property and construction sectors. There are **some 118,000 professional members at present**. Its headquarters are on Great George Street, Parliament Square, in London. It has regional offices around the world.<sup>101</sup> As such, RICS is **a body with global influence**.

In England and Wales, **self-regulation is a key part of the organisation's role**. As RICS explains on its website:

'We are one of a number of professions operating under a self-regulation model, which means our members aren't regulated by government but are internally monitored and inspected.'<sup>102</sup>

This approach is not used with some other professions. The conduct of bankers, for example, is governed by extensive legislation. But **RICS wishes to continue with self-regulation**. A large proportion of its members do as well.<sup>103</sup> All of this gives RICS an incentive to be an effective self-regulator. It feels that so long as it remains one, there is no need for any government intervention. As it says on its webpage:

'Legislation should only be applied if a self-regulation system is not working... Effective and efficient regulation of the sector is vital to the profession's success. Whilst the government

<sup>100</sup> See: <http://www.rics.org/uk/about-rics/who-and-what/history>.

<sup>101</sup> See: <http://epicms.rics.org/uk/about-rics/where-we-are>.

<sup>102</sup> See: <http://www.rics.org/uk/about-rics/who-and-what/royal-charter-and-bye-laws>.

<sup>103</sup> See: <http://www.thejournal.co.uk/business/business-news/rics-members-vote-favour-new-4552343>, noting that 97% of the votes cast at an extraordinary general meeting in 2006 were in favour of RICS's principles-based regime.

regularly reviews the approval it bestows on professional self-regulators, we aim to continuously demonstrate that we maintain a regulatory regime that is leading at the front and fit for purpose.<sup>104</sup>

None of the interviewees who work in the sector were enthusiastic about legislation. But **if self-regulation ought to continue, it needs to meet RICS's own goals**. It must be 'effective and efficient'. The self-regulation system needs to be **transparent, proportional, accountable, consistent and targeted**. These five principles have been adopted by RICS.<sup>105</sup>

### 5.3 The sources of guidance

Our first task is to identify the relevant documents that are issued by RICS. There are three of them to be noted. They differ in terms of their reach and their status. The significance of each source will be explained.

#### i. The *Real Estate Agency Code*.

This is a **mandatory** practice statement. It is applicable to all members. The code consists of **twelve high level principles**.<sup>106</sup> It is directed at both individual agents and employers. The senior managers of firms must ensure that their internal systems and procedures support the principles. Breach of the Code can lead to disciplinary action by RICS. It is added that: 'Where members depart from the [Code], they should do so only for good reason and the client must be informed in writing of the fact of and the reasons for the departure.'<sup>107</sup>

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<sup>104</sup> See: <http://www.rics.org/uk/about-rics/who-and-what/royal-charter-and-by-laws>.

<sup>105</sup> See: <http://www.rics.org/uk/about-rics/who-and-what/royal-charter-and-by-laws>.

<sup>106</sup> For these principles, see RICS, *Real Estate Agency and Brokerage Guidance* (2<sup>nd</sup> ed. RICS, London 2015), p. 6.

<sup>107</sup> RICS, *Real Estate Agency and Brokerage Guidance* (2<sup>nd</sup> ed. RICS, London 2015), p. 1.

ii. The *Real Estate Agency and Brokerage Guidance* (2<sup>nd</sup> edition, 2015).

This document is also relevant to members worldwide. It includes a **series of recommendations**. They 'underpin[] and help[] to ensure compliance with' the *Real Estate Agency Code*.<sup>108</sup> RICS describes them as '**best practice**'.<sup>109</sup> Although members do not have to follow it, there are **reasons for adhering to the guidance**:

- There must be a 'good reason' for *not* following it.<sup>110</sup> To depart from the guidance may otherwise be a breach of the *Real Estate Agency Code*. That can lead to disciplinary action.
  
- The guidance is thought to reflect the law as it applies to members.<sup>111</sup> In consequence, disregarding it may also mean breaching the law. This can of course lead to a member being sued in the courts.
  
- A court may consider the guidance when assessing a negligence claim. Non-compliance with the guidance may be evidence of negligence, and *vice versa*. RICS believes that showing adherence to the guidance will offer at least a partial defence in such cases.

Members do therefore have some incentive to take heed of the guidance. They should certainly be familiar with it. They ought to realise if they are not following it, and have reasons for not doing so.

iii. The *UK Commercial Real Estate Agency Standards* (2011) (also known as the '*Purple Book*').

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<sup>108</sup> RICS, *Real Estate Agency and Brokerage Guidance* (2<sup>nd</sup> ed. RICS, London 2015), p. 8.

<sup>109</sup> RICS, *Real Estate Agency and Brokerage Guidance* (2<sup>nd</sup> ed. RICS, London 2015), pp. 1 and 8.

<sup>110</sup> RICS, *Real Estate Agency and Brokerage Guidance* (2<sup>nd</sup> ed. RICS, London 2015), p.1.

<sup>111</sup> RICS, *Real Estate Agency and Brokerage Guidance* (2<sup>nd</sup> ed. RICS, London 2015), p. 2.

This document builds on the *Real Estate Agency and Brokerage Guidance*. It offers more advice on 'best practice', specifically for UK members. One of the stated aims of the document is:

'... to encourage agents to aspire to the highest operating standards through the training and ongoing development of their staff.'<sup>112</sup>

Again, the **guidance is not mandatory**. Non-adherence to it is however relevant, as *per* departures from the *Real Estate Agency and Brokerage Guidance*.<sup>113</sup> It could for example be germane in a negligence lawsuit.

In what follows we have abridged the names of these three sources. This makes the chapter easier to read. Reference will be made to the **Agency Code** (the *Real Estate Agency Code*); the **Agency Guidance** (the *Real Estate Agency and Brokerage Guidance*); and the **Purple Book** (the *UK Commercial Real Estate Agency Standards*). We will use the expressions '**the RICS guidelines**', '**the RICS guidance**' or '**the guidance/guidelines**' when talking about all three sources collectively.

#### 5.4. The content of the RICS guidance

**Our discussion of the RICS guidance focusses in particular on four issues.** They are matters which must be addressed in any code on client conflicts. They are as follows:

- a) the meaning of a 'conflict of interest';

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<sup>112</sup> RICS, *UK Commercial Real Estate Agency Standards* (RICS, Coventry 2011), p 1.

<sup>113</sup> RICS, *UK Commercial Real Estate Agency Standards* (RICS, Coventry 2011), p 1.

- b) how far agents must seek to avoid them;
- c) when an agent can act despite there being one; and
- d) *how* one should conduct oneself in this event.

As we proceed through the RICS guidance, we will pause where it is appropriate to appraise it. We accept that the task of drafting such a code is not an easy one. Our goal is to offer a constructive critique. For this reason, each of our criticisms is coupled with a recommendation for improvement.

The commentary in this chapter **draws heavily on our own views**. It is not reliant on our interviewees. During the interviews we sought the views of our property sector participants about the RICS guidelines. They were not strongly critical of them. Some respondents felt that they were at least broadly right. **Interviewee E**, for example, felt that RICS was good at describing the relevant principles. They added:

'I don't think it's possible to create a code which would cover every eventuality, and that's the difficulty.'

**Interviewee D** expressed a comparable view. As they explained:

'I think there's a real balance to be struck between guidance that is too prescriptive and too loose and too principles-based, in which event there is a potential danger that clients will not have complete faith in the industry. [The RICS guidance strikes broadly] the right balance at the moment.'

As the final part of this quote indicates, the guidance is not seen as being flawless. **Some changes to it are likely to result from the current review**. As **Interviewee B** observed, 'it is recognised that [the

guidance] needs clarification'. This is particularly so in terms of 'the finer parts of compliance'. In part, they added, greater clarity could also be achieved by bringing everything together into a single source. They felt that the guidelines could be strengthened:

'... by having a single clear document on the subject of conflicts of interest, and how to deal with them, how they arise, recognising them, and managing the process; giving clear advice that if you feel concerned about a situation, how you should disclose it to both parties, and how you should get their consent to act in writing'.

We agree with **Interviewee B** on this point. The guidance is **not set out in the most logical way**. A re-structuring of it is to be recommended. **The best approach is an issue-by-issue one**. This chapter itself offers an example of how this can be done. We imagine that members would find such a structure easier to follow. That can only be a good thing when it comes to promoting high standards. Ideally also, the relevant guidance would appear in a single document, with as few distinctions as possible between UK and worldwide members.

**Recommendation 1: RICS should re-structure its guidance.** It should be set out on an issue-by-issue basis. This chapter illustrates how this can be done.

This recommendation, however, is really a side-point within the context of our discussion. Structure is one thing; substance is another. This chapter is about the content of the guidance first and foremost. What conclusions do we reach about it? First of all, we share **Interviewee B's** sense that it needs to be clarified. There are various aspects of the guidance that are unclear – and even contradictory at times. We stress that **this is a significant issue**. Some of the problems are quite fundamental. They cause difficulties which reverberate through the guidance. **A lawyer could have a field day with some of its ambiguities and inconsistencies**. Our discussion will show this to be so.

But ambiguity is not the only problem with the RICS guidance. **The issues go deeper** than that. We are less happy than our property sector interviewees in this regard. We believe that the guidance is

**too weak in some key areas.** It sets the bar too low. On occasion it even dips below what is required by the general law. All of this creates **a clear risk of high standards not being sufficiently promoted.** Our recommendations must therefore be seen as pressing ones. Throughout this chapter, we make numerous proposals as to how the guidance should be strengthened.

We turn then to the four issues that were mentioned earlier. The first of them is the meaning of a 'conflict of interest'.

#### 5.4.1 Meaning of a 'conflict of interest'

In its glossary, the **Agency Guidance** defines a conflict of interest as follows:

'Where an agent acts for clients who have competing interests, or where an agent's personal interests conflict, or could potentially conflict, with those of the client.'

The glossary in the **Purple Book** defines a conflict of interest thus:

'Where an agent acts for clients who have competing interests, or where an agent's personal interests conflict with those of their client.'

We pause here for a moment. The reason for doing so is obvious. As can be seen, the glossary definitions in the **Agency Guidance** and the **Purple Book** are different. This is surprising. Given that the latter also includes the text of the former, it is doubly strange. Indeed, this is not the only case of inconsistent glossary definitions that we identify in this chapter (see footnote 127).

Recommendation 2: RICS should ensure that it uses a consistent glossary of terms in the Purple Book and the Agency Guidance. In our next recommendation, we will deal with the correct definition of a ‘conflict of interest’.

In what follows we assume that the **Agency Guidance** definition is the intended one. The missing words in the **Purple Book** glossary look to be an oversight. The **Agency Guidance** is also the higher-level document.

We return then to the issue at hand.

In its main text, the **Agency Guidance** further defines a conflict of interest as follows:

‘A conflict of interest is anything that impedes your ability to focus on the best interests of the client. This is a matter for your judgment – not the client’s.’

In what follows we refer to this as the ‘second definition’. The meaning given in the **Agency Guidance** glossary (acting ‘for clients who have competing interests’) is treated as the ‘first definition’.

This completes our task of setting out the relevant guidance. What should one make of it? With all due respect, **RICS needs to re-draft these definitions**. We feel that they are inadequate. The first one seems to be too narrow. The second one is clearly too narrow. They are arguably irreconcilable with one another; and both of them focus on the wrong issue.



- a) **The first definition seems to be too narrow.** The law tells us that a client conflict can be *actual* or *potential*. (We explained this on pp. 53–54.) An actual client conflict occurs when any of the duties that are owed by an agent to two clients clash with one another. A potential client conflict is when there is a sensible possibility that this may happen.

RICS's glossary definition sits very uneasily with this fact. It includes actual client conflicts – here the clients have 'competing interests' – but it **does not explicitly cover potential conflicts**. The omission seems even to be *deliberate*. Compare how the **Agency Guidance** defines an agent-client conflict, on the one hand, and a client conflict, on the other hand. An agent-client conflict is specifically described in terms of interests that 'conflict' or '*could potentially* conflict'. A client conflict is not. There is no mention of *potentially competing* interests between clients. This is likely to be intentional. Why use the word 'potential' in one context but not the other, if not to draw a distinction between the two?

A quick example may show the problems that flow from this approach. Imagine that a landlord client and a tenant client have specifications that *may* lead to them negotiating over a lease. The law treats this as a potential conflict of duty case. What would RICS say? Their first definition asks whether the clients have 'competing interests'. Are the clients in this position? There is a strong argument that they are not. Their interests are only in *potential* competition unless they start bargaining with one another. Perhaps one could suggest otherwise, but only by relying on a wide notion of 'interests'. The law says plainly that potential conflicts are enough. RICS should do so as well.

- b) **The second definition is clearly too narrow.** It asks whether there is any impediment to the firm concentrating on a client's 'best interests'. This definition is too limited. There are two reasons for taking that view.

First of all, **it only covers actual client conflict cases as a general rule**. It does not apply to *all* of them. This is because it suggests that a properly managed client conflict is *not* a client conflict at all. Again, an example will illustrate this idea. Imagine that a firm is acting for both a landlord and a tenant in negotiations. Assume also that the firm has an information barrier in place. It thinks that the barrier eliminates any risks from the dual agency to either side. Is this a 'conflict of interest' case? The law would say plainly that it is. There is an actual client conflict. Under RICS's second definition, however, there is arguably not one. The firm thinks that it has managed away any problems. There is hence no 'impediment' to it serving the best

interests of its two clients.<sup>114</sup> So there is no 'conflict of interest' at all. This is a tenable reading of the second definition.<sup>115</sup> It shows why it is too narrow.

There is also another flaw with this second definition. It **fails to cover some potential conflict cases**. Again, this makes it narrower than the legal definition. Another example may show this to be so. Imagine that a tenant client has specifications that may make them suitable for a landlord client. At present, however, the tenant client is *not* negotiating with the landlord. Is there a conflict of interest here? The law is clear that there is one. The conflict is a potential one. But the second RICS definition suggests otherwise. There is *nothing yet* that impedes the agent from acting in the clients' best interests. (There are perhaps some subtle arguments to the contrary.<sup>116</sup>) Unless the two parties begin negotiating with one another, the firm may feel that it can fully perform its duties to both of them under their retainers. It can still research the market and make recommendations to each client. This is all that needs to be done *at this stage*.<sup>117</sup> So although the law treats this case as one that involves a potential conflict, it is probably not caught by RICS's second definition. Again, that definition is shown to be too limited.

- c) **The two definitions are arguably irreconcilable.** This is particularly regrettable. We can see the problem if we look again at the case of the firm which is acting for both a landlord and a tenant in negotiations, an information wall being in place. This is a client conflict under the first definition. The parties have 'competing interests'. But under the second definition, it may well not be one. To recap, the firm may think that its information barrier removes any 'impediment' to its serving the best interests of both clients. On this view the two definitions contradict one another. Such confusion is regrettable.
  
- d) **Both definitions focus on the wrong issue.** The RICS guidance speaks of clients' 'interests'. But what are a client's 'interests'? The guidelines do not tell us. This omission creates problems. It leaves decisions as to what they are up to members. Can we be sure that they will all understand the matter in the same way? There can be no guarantees in this regard.

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<sup>114</sup> Though we believe that the risks are inherent: see generally chapter 4.

<sup>115</sup> Another reading is also possible. This is that an 'impediment' is anything that, in principle (i.e. but for its management) would affect the firm's ability to focus on the client's best interests. On this view a client conflict arises, as the firm has competing duties of loyalty to each client.

<sup>116</sup> One is that any close proximity between the agents is an 'impediment', as it would risk a breach of the duty of confidentiality. Another possible 'impediment' is that the firm cannot reveal information to the tenant that is confidential to the landlord, and vice versa. We doubt that RICS had anything so subtle in mind.

<sup>117</sup> The only possible 'impediment' at this point is that the firm cannot reveal information to the tenant that is confidential to the landlord, and vice versa. We doubt that RICS had anything so subtle in mind.

By talking of ‘interests’, RICS has focussed on the wrong issue. This is because **the law defines ‘client conflicts’ in terms of conflicting duties** (whether arising under the retainer or the general law). A legally knowledgeable agent would, therefore, realise that a client’s ‘interest’ is that the agent performs their duties towards them. But again, not every firm may realise this. RICS’s definition creates an unnecessary risk. It would be better if it defined the issue in terms of conflicting duties to begin with. This would remove any scope for misunderstandings to arise.

At present, therefore, **RICS’s approach here is flawed**. It starts from the wrong premise, by referring to interests rather than duties. It seems to exclude at least some potential client conflicts. It then makes things worse by using definitions which are hard to reconcile. **The resulting problems should not be underestimated**. They reverberate through the remaining guidance. On a number of occasions in this chapter we run into difficulties, caused by these definitional issues. (For a particularly striking example, see the grey box on p. 111.) This fact is disappointing, as the problems are self-inflicted ones. A focus on duties would avoid them.

We **come then to make our proposals on this issue**. A good starting point is to look at the Solicitors Regulation Authority (‘SRA’) approach. The SRA Handbook begins by defining a ‘conflict of interest’ to include both a firm-client conflict (it calls this an ‘own interest conflict’) and a ‘client conflict’. We are of course interested in the latter. It is notable how the SRA explains it in terms of *duties* and not *interests*. A ‘client conflict’ is described as follows:

- (i) any situation where you owe separate duties to act in the best interests of two or more *clients* in relation to the same or related matters,
- (ii) and those duties conflict, or there is a significant risk that those duties may conflict.

We do not propose exactly this approach to RICS. Some of the language used by the SRA is aimed at lawyers. In particular, the ‘duty to act in the best interests’ of a client refers to the ‘duty of loyalty’. This is owed by any agent who is a fiduciary. We explained this idea in chapter 3 (see pp. 48–49). We

saw there that a property agent who makes recommendations to (and/or negotiates on behalf of) a client will be a fiduciary.

RICS is best advised to take a similar approach, but to use different terminology. Less technical language is better for RICS members as non-lawyers. How then should RICS proceed here? They could simply explain a conflict in terms of conflicting duties. This definition would then be supplemented by practical illustrations. These examples would be of cases in which an agent's duties to its clients are in actual conflict and potential conflict. An obvious actual conflict, for example, would arise if a firm is acting of behalf of both sides to a negotiation. An obvious potential conflict would be if there was a real possibility of two clients entering into negotiations with one another.

**Recommendation 3:** RICS should re-draft its definition of the term 'conflict of interest'. It should start by distinguishing between 'own interest conflicts' and 'client conflicts'. The definition of the latter should focus on the presence of competing duties to clients. Both actually and potentially competing duties should be included. Practical examples should be offered of actual and potential conflicts.

Having made these recommendations, we now turn to the second issue. This is the question of how far members must seek to avoid conflicts of interest.

#### 5.4.2 How far conflicts of interest must be avoided

Our starting point here is the **Agency Code**. It provides that:

'[Members must] do the utmost to avoid conflicts of interest...'

We turn then to the **Agency Guidance**. It states that:

'You must make every attempt to avoid any conflict of interest that might not be in the best interest of a seller or a buyer\*\* for whom you are acting.'<sup>118</sup>

**\*\* Note** that the terms 'seller' and 'buyer' are defined as including landlords and tenants in the **Agency Guidance** glossary.

We pause here. The use of the word 'must' in this sentence is notable. It indicates **RICS's view that this is a legal requirement**. The statement is not only describing 'best practice'. Is that right? Technically it cannot be. An agent must take all 'reasonable steps' to avoid the conflict that is mentioned, as to not do so would be negligent. A client can sue an agent who does not exercise reasonable care (see pp. 33–35). But 'all reasonable steps' is probably not the same thing as 'every step'. The latter can only be best practice.

Recommendation 4: RICS should change the opening words of this statement to read either:

- a. 'You must make every reasonable attempt'; or
- b. 'You should make every attempt'.

Having made this point, we now continue with our summary of the RICS guidance in this area.

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<sup>118</sup> We might change this to read: '... any conflict of interest that would not be, or might not be, in the best interest...'. But the meaning is tolerably clear regardless.

The **Purple Book** deals specifically with the case of an agent who is acting for both a buyer and a seller in negotiations. It provides that:

'As a general rule you should not act for the buyer and seller in a negotiation. However, there may be circumstances that it is in both clients' best interests for your firm to continue to act for them.'

This completes the task of setting out the relevant guidance. The gist of it is tolerably clear. **Every attempt must<sup>119</sup> be taken to avoid any client conflict, if that conflict is not, or would not be, in the best interests of every affected client.**<sup>120</sup>

For the reasons already discussed (see pp. 100–104), **we cannot be sure that any of this guidance applies to *potential client conflicts***. That debate will not be rehearsed again here. In practice, it makes little difference here even if potential conflicts are excluded. (The reasons for this appear in the next footnote<sup>121</sup>.) **Let us pretend that potential conflicts are included**. How then do firms comply with the RICS guidelines on this issue? There is a lack of detail in this regard. We think that **RICS needs to offer more extensive guidance**. The following overview illustrates how this could be done.

As a starting point, firms should have **things in place adequately to identify actual and potential conflicts**. There are two aspects to this idea. Firstly, a robust conflict-checking system is needed. It must be consulted before any new (or revised) retainer is accepted. Secondly, the firm must engage in ongoing training and education of its staff. The firm's policy on conflicts of interest must be made clear to them all. There must also be suitable disciplinary sanctions if it is breached.

Let us assume that a firm has such systems in place. It is considering a proposed new retainer. An actual or a potential conflict is flagged. What the firm should do is to apply the 'best interests' test. How should it go about this task? A different approach will be needed according to the precise situation at hand. There are two alternatives to be mentioned.

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<sup>119</sup> We will not repeat here why the proper verb to use is 'should'.

<sup>120</sup> The Agency Code does not include a 'best interests' caveat. Clearly, however, it should be interpreted in light of the other sources.

<sup>121</sup> To summarise, if 'conflict of interest' meant only actual conflicts, this would remove the first bullet point under 'ii' on p. 108 but leave everything else that is said unaffected.

- i. The simpler situation is one in which **an actual client conflict will arise immediately** if a new retainer is accepted.<sup>122</sup> An obvious example can be given of this. Assume that an agent is representing a landlord of an office. The agent is approached by a firm which is looking specifically to lease that office. The firm must then decide whether it would be in the best interests of both the landlord and the tenant to be represented by them.<sup>123</sup> If it is not, or it might not be, the **Agency Guidance** kicks in. The agent must make 'every attempt' to stop the actual client conflict from happening. Assumedly this means that they must turn down the new instruction.
  
- ii. More difficult are cases in which **the new/altered retainer creates a potential client conflict**. Various examples may be given of such a scenario. One could occur, for instance, because a proposed new tenant client is interested in the type of properties that are listed by a landlord client. The conflict is only potential to begin with. An actual conflict may never arise, but it could do so. In this situation, the agent must satisfy itself on two points before proceeding:<sup>124</sup>
  - Firstly, that **while the potential conflict is ongoing, it would be in the best interests of both clients to act for them**. If the answer here is 'no', the Agency Guidance statement applies. The firm should make every attempt to stop the conflict from arising. Assumedly this means that they must decline the instruction.

An example of when a firm should answer 'no' to this question can be given. Imagine that the two clients were competitors in their own market, and that there was a clear risk of confidential information passing from one side to the other. The close competitors for this purpose could be two landlords, two tenants or indeed a landlord and a tenant. The risk may arise, for instance, because the agents for each client would be working in close proximity to each other.

- Secondly, if the conflict should later become an actual one, **would acting for both sides in this event be in the 'best interests' of them both?** If the answer

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<sup>122</sup> The term 'new retainer' here includes a change to the terms of an *existing* retainer.

<sup>123</sup> In the UK, agents are encouraged to involve clients in this assessment. The *Purple Book* (p. 12) makes this point. It provides that: 'Any review of conflicts of interest should be made jointly with your client'.

<sup>124</sup> Again, UK members are encouraged to involve clients in this assessment. See the previous footnote.

here is 'no', the Agency Guidance statement applies. The firm should make 'every attempt' to stop the conflict from arising. What does that mean? Presumably the agent must make clear the difficulty to the client *before taking on the retainer*. It would have to explain why the actual conflict would not be in the client's best interests, should it happen. If the retainer was taken on nevertheless, the agent must actively discourage the clients from getting into the actual conflict situation.

In both scenarios the agent's decision should be kept under review. The position may alter. The agent must then act according to the new circumstances. The most awkward situation would be if an ongoing actual conflict was originally in the best interests of both clients, but then ceases to be so. The agent is then in a difficult position. As we will see when looking at issue three, the **Agency Guidance** says that the agent should then cease to act for all of the clients involved.<sup>125</sup>

As is clear from this discussion, the 'best interests' consideration is a very important one in terms of the second issue. It is also germane to the next matter that is to be considered: when an agent can act, despite there being a conflict of interest.

#### 5.4.3 When an agent can act despite there being a client conflict

The third issue is when **an agent can act despite there being a conflict of interest**. As we will explain, the RICS guidance does not squarely answer this question. Some scrutiny of what it does say is necessary. We may summarise our reading of the guidelines as follows:

(1) One can owe *potentially* conflicting duties if they are in the best interests of both clients. It is less clear whether one can have potentially conflicting duties that are *not* in the best interests of all sides.<sup>126</sup>

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<sup>125</sup> It states that: 'Conflicts of interest should be avoided but where this is impossible you should cease your activities for all clients involved.'

<sup>126</sup> Though members must ask whether, if the conflict did become *actual*, it would be in the best interests of both clients to act. See p. 108, above.



(2) There are **two 'best practice' requirements before an agent can take on *actually conflicting duties*** to different clients. They are as follows:

- a) that it is in the **'best interests' of both clients** for the agent to act despite the actual conflict; and
- b) that the agent **takes all of the specified 'protective steps'** (as we style them) before proceeding.\*

\*Some of the 'protective steps' are treated as being legally required. But some of them are not. Carrying out all of them is therefore only suggested by RICS to be best practice.

We will explain each of these points in turn.

#### *(1) Potentially conflicting duties*

If a potential conflict is in the interests of both clients, it is allowed. This is plain on any reading of the guidelines. But they are vague on the issue of an agent having potentially conflicting duties that are *not* in the best interests of both parties. The only statement of even possible relevance appears in the **Purple Book**. There it is said that:

'Conflicts of interest should be avoided but where this is impossible you should cease your activities for all clients involved.'

Perhaps this statement is germane to our inquiry. To get to this conclusion, however, involves quite complex reasoning. (Our thinking appears in the grey box, below.)

### Interpreting the RICS guidance: a complex task

The stages could be summarised as follows:

1. RICS defines a 'conflict of interest' in two ways (see pp. 100–101). These are 'clients with competing interests' (first definition); and 'some impediment to acting in the clients' best interests' (second definition). We need to work out which of these senses was intended here.
2. Only the second meaning allows us to make any sense of this sentence. If we use the first meaning (the clients have 'competing interests'), the statement is plainly wrong. It would be saying that no firm should *ever* act for a landlord and a tenant in negotiations (as these clients have 'competing interests'). That is evidently *not* RICS's view: see p. 112, below.
3. The second definition ('some impediment to acting in the clients' best interests') makes more sense. We therefore apply it here. The result is that the statement tells us as follows: if there is any impediment on acting in the clients' best interests, the firm should cease to act for both clients.
4. We would then need to argue that a potential conflict can be such an 'impediment'.

On this issue, **there is a lack of clarity in the RICS guidance**. We imagine that RICS would not wish firms to have potential conflicts that are not in the best interests of their clients. But the point should be made explicit. The matter should not be left open to interpretation.

Recommendation 5: RICS should state unambiguously that an agent should not act in any potential client conflict situation unless it is in the best interests of all of the affected clients.

*(2) Two best practice requirements before having an actual client conflict*

We come on now to actual client conflicts. The position here is plainer. The RICS guidelines offer two 'best practice' conditions before an agent should accept an actual client conflict. They are as follows:

- a) that it is in the **'best interests' of both clients** for the agent to act despite the conflict; and
- b) that the agent **takes all of the specified 'protective steps'** (as we style them) before proceeding.

We infer the first of these conditions from the **Purple Book** guidance, as was quoted above. To set it out again:

'As a general rule you should not act for the buyer and seller in a negotiation. However, there may be circumstances that it is in both clients' best interests for your firm to continue to act for them.'

Assumedly, this guidance also applies if the 'seller' and the 'buyer' are a landlord and a tenant (though the **Purple Book** definitions of the terms 'seller' and 'sale' really ought to make this clearer).<sup>127</sup> So from this statement we deduce our first condition.

We turn then to the **second requirement**. This is the one **to take sufficient 'protective steps' before proceeding with the actual client conflict**. The expression 'protective steps' does not appear in the RICS guidelines. We will however use it as shorthand for the other requirements that are mentioned. Most of them are described in the **Purple Book**. They are set out in the course of a discussion about when a member can act for both a 'buyer' and a 'seller' in negotiations. The **Purple Book** explains as follows:

'You should... only proceed when you are absolutely satisfied by that (*sic*) both clients are aware of any potential commercial implications of this.

[Y]ou should consider whether this is appropriate in the context of principles-based ethics and rules. You should also ensure that both clients take appropriate professional advice. The limits and constraints on confidentiality of information must also be predetermined. Both clients should give written formal 'informed consent'.

The information barriers must be in place before work commences, and both clients must agree the measures to be taken if unmanageable conflicts do arise, for example, which client will remain with the firm in such case. An appropriate information barrier would be where teams work in distinctly separate environments, including different office spaces, with different secretaries, graduates and senior management supervision.

In practice, these alternative arrangements and information barriers are only appropriate for the very largest firms, with highly formalised structures and systems within their organisational arrangements that are already determined and implemented prior to a matter arising. They most likely also have a saturated market share with experienced clients on both sides.'

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<sup>127</sup> Contrast the glossary definition on p. 4 of the *Purple Book* with the one on p. 3 of the *Agency Code*.

The use of the verbs 'should' and 'must' in this excerpt is worthy of note. RICS thereby distinguishes between what it sees as being *legal requirements*, on the one hand, and as being *best practice*, on the other hand. For example, to ensure that the clients are aware of the 'commercial implications' of the conflict is best practice only.

The legal requirements indicated here are three in number. They are: (i) predetermined limits and constraints on confidentiality of information; (ii) an information barrier that is in place before the relevant work commences; and (iii) prior agreement as to what will happen if an unmanageable conflict arises.

Finally, the **Agency Guidance** also includes some relevant advice in terms of protective steps:

'In the interests of best practice you should disclose all interests but in all cases you should consult your client, take the client's instructions and keep a full note of the discussion and instructions in the file.'

This statement completes our look at RICS's approach to the third issue.

### *The third issue: a critical appraisal of the RICS guidelines*

What then is one to make of RICS's guidance on the third issue? On paper it may look to be quite robust. But to some extent this is an illusion. There are **numerous reasons to be concerned about it**. Some of them are quite fundamental. Because of them, there is **a clear risk that high standards may not be maintained**. They are as follows:

- a) the guidance says nothing about 'contracting out';

- b) the *Purple Book* does not accurately reflect the protective steps that are required by the law;
- c) some of the protective steps need to be clarified;
- d) there are no protective steps required in *any* potential client conflict cases;
- e) the guidance on informed consent could be legally misleading; and
- f) the 'best interests' requirement may well not offer enough protection to clients in practice.

We will look at each of these matters in turn.

**(a) The guidance says nothing about 'contracting out'.** We looked at contracting out in chapter 3 (see pp. 56–63). To recap, an agent can include a term in their retainer, excluding the rule against acting in any client conflict situations. It is arguable that such terms are lawful. It is also possible that they may be used in practice.

The strategy of **express contracting out is contentious**. We explained why that is so in chapter 3 (see pp. 61–62). A brief reminder will suffice here. But for such contracting out, by law the firm would need to get 'informed consent' for any actual client conflicts, as well as for some potential client conflicts (see pp. 56–61). The **contracting out method bypasses the legal need for informed consent**. That is troubling. The requirement is a useful protection for clients. For smaller and less sophisticated firms in particular, it is especially valuable.

It is unclear how contracting out fits in with the RICS guidance. There is however a risk that it could be thought to justify departures from it. Why is that so? As will be recalled, the 'best interests' and 'all protective steps' requirements are only *best practice*. One can depart from them if one has a 'good

reason' for doing so. A member could view express 'contracting out' as being just such a reason – at least with some clients. After all, this tactic has met with judicial favour; and RICS does not specifically say anything to discourage it.

**RICS should not tolerate express contracting out.**<sup>128</sup> It should not abide the risk of its members thinking that it is acceptable. That would be inconsistent with the aim of promoting high standards. The guidance needs to be re-written in consequence.

Recommendation 6: RICS should clearly state that no express term in a retainer can justify either:

- c. a departure from the 'best interests' requirement; or
- d. a failure to take *any* of the protective steps (including that of getting 'informed consent').

In making this proposal, we err on the side of caution. One could argue for an exception to it for large and sophisticated clients. We prefer a different approach. Such an exception would cause uncertainty about what a 'large and sophisticated' firm is. Indeed, the practical need for the caveat is not great. The protective steps are already flexible enough towards large and sophisticated clients. For example, their consent will more readily be treated as being 'informed'.

**(b) The Purple Book does not accurately reflect the steps that are required by the law.** Let us explain why that is so. We will look in turn at each of the things that are identified as legal requirements by RICS.

- a. *Predetermined limits and constraints on confidentiality of information.* The **legal basis for this requirement is dubious.** We considered the relevant duties of agents in chapter 3. We saw

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<sup>128</sup> *Implied* contracting out is not similarly objectionable, as the courts will rarely rely on it (see pp. 56–61).

that an agent has to ensure that any confidential information remains so. Only the client can consent to relax this obligation. A chief purpose of information walls is to promote compliance with it. As we also saw in chapter 3 (pp. 44–45), a client will usually agree to not having the benefit of any other client’s confidential information.

The idea of a client agreeing to *constraints* on the confidentiality of information runs counter to all of this. It gives the impression of clients somehow waiving their right to confidentiality, even if only in part. Why would this be necessary? We are not told. Nor does any reason emerge in legal writing. Of course, when they are giving their informed consent to a client conflict, a client must appreciate the risk of an information wall failing; but that is another issue. Their consent is to the conflict, not to any breach of confidentiality that happens during it. No client needs to waive their right to complain of the latter. There is no *legal* requirement to do so.

Recommendation 7: this ‘requirement’ is not a legal one. If RICS has some valid point in mind, it should be made clearer what it is. Otherwise the ‘requirement’ should be removed.

- b. *An information barrier that is in place before the relevant work commences.* There is no doubt that this is an appropriate protective step. To not use a wall would jeopardise the position of the affected clients to significant extent. Breaches of the duty of confidentiality would be all but inevitable in this event. So RICS is right to encourage the use of a barrier in as strong a way as is possible. That said, there has been no categorical statement by the courts that it is a *legal* requirement.

Recommendation 8: in order to be strictly accurate, RICS needs to use the word ‘should’ with this requirement. It is not a legal one. RICS ought however to express the desirability of a barrier in the strongest possible terms, and to link this encouragement to the duty of confidentiality.



On the issue of information walls, we would also make one further point. Our concern here is about **the link between conflict management and informed consent**. At present this connection is not being made. As was explained in chapter 3 (p. 64), a client can only give their informed consent if they understand the proposed management of the client conflict. If this management includes an information wall, they must also understand it. Such comprehension requires a grasp of the risks that are involved with a barrier as well.

Recommendation 9: the RICS guidelines should be clear that **any proposed information barrier, including the risks of a breach of it, must be understood by the client**.

- c. *Prior agreement as to what will happen if an unmanageable conflict arises*. Again this is a most practically desirable suggestion. There is however no judicial decision that requires it explicitly, as regrettable as that may seem to be.

Recommendation 10: in order to be strictly accurate, RICS should use the verb 'should' when referring to this protective step.

**(c)** Some of the **protective steps need to be clarified**. They are open to quite different interpretations. This is not desirable if high standards are to be promoted. We propose that RICS clarifies the following steps in particular:

- a) *Absolute satisfaction that both clients are aware of any potential commercial implications*.

This requirement is not really a stand-alone one. It is best viewed as being an aspect of getting informed consent. In other words, a client's consent will only be informed if they understand the commercial implications of the conflict and its proposed management. It

would be better if RICS consolidated this requirement into a more thoroughgoing discussion of informed consent.

- b) *Consideration of whether proceeding is appropriate in the context of principles-based ethics and rules.*

Again, the role of this protective step is debateable. What are the 'ethics' and 'rules' that are being referred to? We are not told. Are they the ones in the RICS guidance? That is hard to imagine, as it would mean that RICS is merely instructing its members to think about its own guidance. That they do so should be taken for granted. Another possibility is that it refers to the 'ethics' and 'rules' of a member's own firm. But that would make this 'protective step' just as otiose. RICS need not tell its members to look at their own policies. One cannot help but wonder, therefore, whether this requirement adds anything at all. If RICS did intend some useful purpose, it should be more explicit as to what it is. Otherwise the requirement should be removed.

- c) *Ensuring that both clients take appropriate professional advice.*

This is doubtless a well-intentioned requirement. It should be stated explicitly, however, that the advice that is taken should be *independent*. It should not be provided by anyone who is employed by the firm (such as an in-house lawyer). To some readers this will be implicit in the idea that the advice has to be 'appropriate'; but other agents may take a different view. The point should not be left open to interpretation. That creates the risk of misinterpretation.

A further issue is how the firm satisfies itself of the fact of the client having been advised. This matter is not touched upon in the guidance. It ought to be said that written confirmation of the advice should be provided to the agent.

- d) *The limits and constraints on confidentiality must be predetermined.*

The lack of clarity with this requirement was discussed earlier, on p. 116–117.

Recommendation 11: RICS should re-draft some of the protective steps in order to make them clearer. The following steps in particular should be clarified:

- absolute satisfaction that both clients are aware of any potential commercial implications of the client conflict;
- consideration of whether proceeding despite the conflict is appropriate in the context of principles-based ethics and rules; and
- predetermined limits and constraints on confidentiality.

Recommendation 12: Fuller advice should be offered on how to gain 'informed consent'.

**(d)** At present, **no 'protective steps' are required in cases involving only a potential client conflict.** Taking all of these steps is only best practice in *actual* client conflict cases. This is too binary an approach. There are both practical and legal reasons for thinking so. To begin with **the practical logic** behind this view, the stages of our reasoning are as follows:

- a) Setting up an information wall only when a potential conflict develops into an actual one may sometimes be too late. By this time the representatives on each side may already have picked up the sort of information that a barrier is designed to prevent the flow of. This could happen for all sorts of reasons. It could, for example, be due to things being overheard or seen. It could even be because of prior social interactions between employees.

- b) Nevertheless, this risk has to be viewed in its context. It would be unrealistic to say that protective steps should be taken in every potential conflict case. This would impose excessive costs on agents. A balance must be struck between protecting clients and not overly burdening agents.
  
- c) So what we need to focus on are those cases in which the balance is in favour of protecting clients. RICS should encourage its members to take protective steps in these cases.

We suggest that there are **two types of potential conflict situation in which protective steps should be recommended** by RICS. These we may call 'high chance' and 'high risk' cases. We first came across these labels in chapter 3 (p. 60).

i. **A 'high chance' case** is one in which there is a high possibility of the conflict becoming an actual one. Most obviously, such a case would occur if a firm believes on the basis of its market research that two of its clients (such as a landlord and a tenant) are likely to commence negotiations with one another.

ii. **A 'high risk' case** occurs when a potential conflict, if it became an actual one, would pose a high risk to a client. This could be, for example, because a large number of employees would then need to be moved onto each side of the wall. In this event there is an obvious case for setting up a wall even whilst the conflict is only potential, irrespective of whether or not the case is also a 'high chance' one.

**Both of these categories are, of course, somewhat open-ended.** In practice agents would need to enjoy some discretion in applying them. But that is not a reason for not using them. **In principle they are a good idea.**

There are also **legal reasons for using these categories**. As we saw in chapter 3, clients impliedly consent to some types of potential conflict when they are instructing a property agent. But the limits of this consent are unclear. It is likely that it only extends to conflicts that are not 'high risk' or 'high chance'. This is important. It means that **agents need to get informed consent before acting in any 'high risk' and 'high chance' cases**. The prospect that this is indeed the law should prompt RICS to act. At the very least it should put forward some protective steps as being 'best practice' in such cases. The need to gain informed consent in such cases should also be stated to be a legal requirement.

The precise steps that should be recommended may depend on the type of conflict in question. The full range of steps should be suggested for cases involving 'high chance' cases, as well as 'high risk' cases like the one described on p. 121. But some 'high risk' cases will probably require fewer steps to be taken. This is because the precautions that should be taken in such situations must depend on the risk at hand. Consider for example a case in which the agent knows confidential information about client 'A' (for instance, about the potential for them to become insolvent) that poses a real risk to any client who deals with them, and there is a chance (albeit not a 'high chance') that client 'B' will wish to do so. What protective steps should be required vis-a-vis client 'B' in such a case? An information wall is probably not one of them. This is because the main 'risk' to client 'B' is not that their confidential information will be leaked to client 'A', but that they may deal with client 'A' at all. Getting the informed consent of 'client B' will therefore be enough.

Recommendation 13: RICS should recommend that 'protective steps' be taken whenever a potential client conflict is either 'high chance' or 'high risk'. In 'high risk' cases, the precise steps to be taken will depend on what the 'risk' to be mitigated actually is.

Recommendation 14: Given the likelihood that informed consent is legally required in these cases, the guidance should err on the side of caution. RICS ought to use the verb 'must' to describe this requirement.

**(e) The guidance on informed consent could be legally misleading.** The **Purple Book** states that: 'Both clients should give written formal 'informed consent'.' Note the use here of the word 'should'. In strictness, the inclusion of this verb is right in the context of the sentence. There is no legal

requirement that informed consent be given *in writing*. It can be merely oral. So the statement is technically correct. But it could also mislead. **By failing to mention a more general need for informed consent, the impression could be given that it is merely 'best practice'**. Unless the conflict is covered by 'contracting out', informed consent is legally required in any actual client conflict case, as well as in any 'high risk' and/or 'high chance' potential client conflict cases. An agent would be liable for not obtaining it.

The risk of an agent being misled is further increased because the **Purple Book** uses the word 'must' to describe three of the other protective steps. (These steps were noted on pp. 113–114.) This fact suggests that an authoritative line is being drawn between the legal and non-legal requirements.

Recommendation 15: we recommend that RICS clarifies this point. It should be made plain that **obtaining informed consent is a legal requirement in actual client conflict and 'high risk' and 'high chance' potential client conflict cases**. (This is subject only to 'contracting out'.) Any references to the consent being given *in writing* can be treated as being 'best practice'.

One final point should be made about informed consent. We would also like to see it made plain that full disclosure is essential for it. This should not merely be left implicit. The guidance for UK agents in the **Purple Book** does not refer to disclosure at all.

Recommendation 16: the RICS guidelines should **make it clear that full disclosure of all material information is integral to gaining 'informed consent'**.

**(f)** In practice, the **'best interests' notion** may well fail to offer enough protection to clients. This is a particularly pressing concern. It relates to both the third issue and the second one. This is because

the 'best interests' idea comes up in RICS's guidance on both of them. We will consider this problem in some detail.

In order to put our concerns into their context, a brief recap is helpful. Let us remind ourselves where the 'best interests' idea fits in. There are two key points to be made here. Firstly, if acting in a client conflict situation is not (or would not be) in the best interests of all of the affected clients, the agent must make every attempt to avoid the conflict. These steps would include actively steering the clients away from it. Secondly, one of the pre-conditions for acting in a client conflict situation is that it is in both clients' 'best interests'. (The other condition is of course the taking of 'protective steps'.)

Why are we so concerned about how RICS has used this idea? There are **two overarching problems** here. They are quite closely linked to one another:

- Firstly, the idea of 'best interests' is left **particularly vague**. This leaves **a lot of discretion to agents** when they are applying it. It also makes it hard clearly to identify any breaches of the guidance.
  
- Secondly, **firms could take undue advantage of this vagueness**. They may well prefer to construe the term 'best interests' in a way that is favourable to them. Such interpretations may undermine the requirement in practice.

Let us firstly explain why we believe that the **RICS approach leaves a lot of discretion to firms**. Three reasons may be given in this regard.

- i. **RICS offers to members no list of things to think about when they are considering what a client's 'best interests' are**. It does not identify any factors that may undermine the client's position. (There is for example no discussion of the inherent risks of client conflicts.) By the same token, it offers no reasons that might *favour* a decision to act despite a client conflict. On both counts this is unfortunate. RICS could help to ensure

that any justifications that are relied on by agents are principled ones. It could offer some examples of appropriate reasons.

- ii. **RICS fails to clarify the role of a client's wishes** in determining their 'best interests'. Its guidance goes no further than to say that:

'A conflict of interest is anything that impedes your ability to focus on the best interests of the client. *This is a matter for your judgment* – not the client's.'

This statement should be carefully understood. The question of what are a client's 'best interests' is a separate one from whether there is an impediment to acting in them. This statement only makes the client's wishes irrelevant to the *impediment* issue. But before one can determine whether there is such an 'impediment', one must first ask what the client's 'best interests' are to begin with. The RICS guidelines do not make clients' wishes irrelevant to this inquiry. They say nothing at all of note about them.

This lack of guidance is significant. Doubtless one's wishes and one's best interests are in principle distinct. All members can be expected to realise that. But agents are left to form their own views about how overlapping the two ideas are. This could lead to quite varying interpretations emerging. Some agents, for example, may see wishes as being of only small relevance to best interests, at least for all but the most sophisticated clients. They may focus instead on whether there are any *other* reasons for proceeding despite a client conflict. These firms may well be cautious about getting involved in any actual client conflict situation. Other members, by contrast, could have a different outlook. They may view a client's wishes as being potent in determining their interests. The agent may feel that, as long as the conflict and its proposed management have been explained to the client, they can determine their own interests. The agent should not need to second guess their decision. If the client wishes to proceed, the requirement is virtually always met. On this latter view, the 'best interests' condition is diminished in practice.



- iii. The guidance never says that true 'best interest' cases will be rare. It would probably be unrealistic to take this approach to 'high chance' potential conflicts,<sup>129</sup> but it could have been adopted with both actual conflicts and 'high risk' potential ones. Doing so would send out a strong signal. It would focus agents' minds on the problems that need to be faced in these cases. As it is, however, RICS's language is more relaxed. At best, the **Purple Book** refers to there being 'a general rule that you should not act for the buyer and seller in a negotiation'. This statement is **far from being a strong deterrent**. A 'general rule' could be one that applies in little over half of all cases. It could imply that a 'best interests' test is still quite frequently met. In the mind of an agent, the **Purple Book** statement may merely reflect the idea that a good number of clients would choose another agent rather than a conflicted one. If the client *does* wish to proceed with a conflicted agent, they hence view their own interests in a way that goes against the 'general rule'. Their consent brings the case within the exception to it.

For all of these reasons, firms are given a lot of leeway in approaching the 'best interests' condition. We lack any objective standards against which their decisions can be measured. The feeling is given of a light-touch approach. Good faith decisions can be trusted. As long as the client consents, an agent may feel that this requirement is met. RICS would only interfere with a decision that was manifestly wrong.

Is this the right approach? Should the guidance leave so much discretion to agents? There must be concerns on this score. We come now to the second overarching problem.

Our second point is that **firms may well prefer to interpret a 'best interests' requirement in a way that is unduly favourable to them**. It is one thing that firms *could* view the requirement generously. What we are talking about here are **grounds to suspect that they may do so**. Our discussion here draws on past experience in the legal services field. The debate in that context is more developed than the one in the property sector is. The points raised there are also sufficiently generic to apply to property agents.

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<sup>129</sup> These conflicts may be quite common. If large firms in particular could only have 'high chance' potential conflicts in exceptional cases, some clients may sometimes struggle to find *any* agent who could represent them.

Our look at the legal sector begins with some lessons from the past. They offer a useful starting point for our discussion. Professor Joan Loughrey, an expert in the regulation of the legal profession on conflicts of interest, explains:

'Law firms may respond that most lawyers can be trusted to comply with the rules and act in good faith. This is a common argument: professionals often propose that their professionalism allows them to deal appropriately with conflicts, *but history indicates otherwise*.<sup>130</sup>

There have been **prominent legal cases since the millennium which support Loughrey's view**. In two such disputes the courts have disapproved of the approach of law firms to client conflicts.<sup>131</sup> One of these cases involved the multinational law firm, Freshfields Bruckhaus Deringer LLP. The firm relied on an information barrier to keep confidential the information of one client, Marks and Spencer plc, when it wished to act for a competing client. The question was whether this proposed wall negated any real risk of wrongful disclosure. A High Court judge answered this question in the negative. Freshfields did not back down. So confident was it about the proposed information wall that it sought to take its case to the Court of Appeal. This is of course a difficult and costly business, not to be undertaken lightly. Freshfields nevertheless pushed on. Its decision was an unwise one. Two Lord Justices of Appeal unanimously refused them even *permission* to appeal. The firm's arguments had 'no prospect' of success.<sup>132</sup>

One reason why Freshfields may have pursued its case so vigorously was a financial one. If the proposed information wall had been acceptable, Freshfields could have enjoyed the custom of both Marks and Spencer plc and the other proposed client. This would obviously have been a lucrative outcome. Undoubtedly, **the prospect of financial gain is a reason to worry about firms viewing their case in a favourable light**. Again, experience in the legal sector shows this to be so. As far back as 2002, Professor Janine Griffiths-Baker wrote her monograph, *Serving Two Masters: Conflicts of Interest in the Modern Law Firm*.<sup>133</sup> Her research drew on extensive interviews with City lawyers and their clients. She found that **some lawyers would disregard rules where strict compliance with them was at odds with their own firm's commercial interests**.<sup>134</sup> This is obviously troubling.

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<sup>130</sup> J. Loughrey, 'Large Law Firms, Sophisticated Clients, and the Regulation of Conflicts of Interest in England and Wales' (2011) 14 *Legal Ethics* 215, 236 (footnotes omitted; and emphasis added).

<sup>131</sup> *Marks and Spencer plc v Freshfields Bruckhaus Deringer* [2004] EWCA Civ 741, [2005] P.N.L.R. 4; *Hilton v Barker Booth & Eastwood* [2005] UKHL 8, [2005] 1 W.L.R. 567.

<sup>132</sup> *Marks and Spencer plc v Freshfields Bruckhaus Deringer* [2004] EWCA Civ 741, [2005] P.N.L.R. 4, at [36] (Kay L.J.).

<sup>133</sup> (Hart Publishing, Oxford 2002).

<sup>134</sup> J. Griffiths-Baker, *Serving Two Masters: Conflicts of Interest in the Modern Law Firm* (Hart Publishing, Oxford 2002), pp. 124 and 153.

If financial incentives can lead to rules being ignored, they could even more easily promote self-serving interpretations of them. This problem has also arisen in the legal sector. Referring to evidence published in 2010, Professor Loughrey notes that:

[L]awyers often cite client needs and commercial justifications as providing ostensibly 'objective' rationales for behaving unethically and pursuing self-interest, *and this is a particular risk in the context of conflicts.*<sup>135</sup>

So profit motivations are a reason to be concerned. **Commercial real estate firms exist to generate profits.** They can clearly benefit from getting a commission from both sides to a deal. They have an incentive to take as favourable a view as is possible about their ability to fairly represent both sides. **Is there anything in RICS's 'best interests' test to hinder them? One must doubt that.** After all, large dual agency firms can be wholly dismissive of concerns about how they manage conflicts of interest.<sup>136</sup> One of them even claims that it is *better* at it than any single agency firm.<sup>137</sup> What deterrent is RICS's 'best interests' test going to be in the face of such self-confidence? All that the firm needs to do is to interpret the test in a way that RICS itself does not clearly rule out. So it will readily believe that it is acting ethically. If profit motivations can spur law firms to disregard clear rules and put dubious interpretations on vaguer ones, **it is hard to believe that larger dual agency firms would worry too much about RICS's 'best interests' condition.** The lure of profit may be too hard to resist. As Professor Barry Rider, an expert in legal and regulatory risk, has recently written: 'Self-regulation and restraint have never been particularly credible inhibitions on greed.'<sup>138</sup>

In saying this, we do not even have to accuse firms of any *conscious* impropriety. Here we come to our final reason to be concerned. It brings us to issues of psychology. Research on the psychology of market actors is much in vogue today. It tells us important things that are of relevance to our study. As Professor Loughrey explains:

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<sup>135</sup> (Footnote omitted; and emphasis added). The reference is to K. Hall, 'Why Good Intentions Are Often Not Enough: The Potential for Ethical Blindness in Legal Decision-Making' in K. Tranter *et al* (eds.) *Reaffirming Legal Ethics: Taking Stock and New Ideas* (Routledge, London 2010).

<sup>136</sup> See JLL, 'Conflict of Interest: Separating Myth from Reality' (<http://www.joneslanglasalle.com/SiteCollectionDocuments/tenant-representation-conflict-of-interest.pdf>).

<sup>137</sup> JLL, 'Conflict of Interest: Separating Myth from Reality' (<http://www.joneslanglasalle.com/SiteCollectionDocuments/tenant-representation-conflict-of-interest.pdf>), p. 2.

<sup>138</sup> B. Rider, 'Rumblings in the corporate jungle' (2015) 36 *Company Lawyer* 33, 34.

[The professionalism defence] does not address the problem that where recognising a conflict runs contrary to lawyers' interests, cognitive bias and rationalisation may blind them to problems that would be apparent to an impartial observer.<sup>139</sup>

Even good faith judgements may hence go awry. **One can worry about favourable interpretations being taken of a 'best interests' requirement *without* having to allege any *intentional impropriety*.** We emphasise this point very strongly. Research into human psychology shows it to be true. What is more, cognitive biases play an even greater role in decision-making when the criteria to be applied are open-ended. Professor Loughrey writes:

'It has been argued that when firms are set externally formed regulatory goals, but given a discretion regarding how to achieve these, they may act in ways that, while achieving the appearance of compliance, minimise disruption to existing practices, promote the firms' objectives and undermine the efficacy of the external goals. This is most likely to occur where the regulatory objectives... conflict with... the firm's self interest.'<sup>140</sup>

This is a very telling point. Every one of the ingredients that are mentioned by Loughrey is in place here. We have an externally formed (i.e. by RICS) and open-ended goal (serving 'best interests'), a lack of clear guidance that hence leaves much to one's own discretion, and financial self-interest on the part of member firms. Are property agents any less likely to take advantage of this situation than some law firms would be? There are no reasons to think so.

There is therefore **a clear risk that the 'best interests' condition is not a great hurdle in practice.** Firms may rely heavily on their clients' own wishes in showing their best interests. As long as clients agree to the conflict management techniques being proposed to them, the firm may treat the 'best interests' requirement as met. Doing so plays to the firm's own self-belief. Being convinced of the quality of its own service, why would a firm doubt that it can serve a client's 'best interests'? The largest firms are likely to be particularly self-assured in this regard. They may be quite relaxed about the adequacy of their risk management policies. If anything, RICS encourages them to behave in this fashion. As we have seen, the **Purple Book** states that information barriers are in practice only appropriate 'for the very largest firms'.

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<sup>139</sup> J. Loughrey, 'Large Law Firms, Sophisticated Clients, and the Regulation of Conflicts of Interest in England and Wales' (2011) 14 *Legal Ethics* 215, 236 (footnote omitted).

<sup>140</sup> J. Loughrey, 'Accountability and the Regulation of the Large Law Firm Lawyer' (2014) 77 *Modern Law Review* 732, 742.

Recommendations 17–20: the RICS guidelines on ‘best interests’ need to be substantially tightened up. Further research is needed in order to be absolutely sure about how best to proceed. But as a minimum, we propose as follows:

- a) The guidance should specifically mention the *risks* of acting in client conflict situations, which risks agents should consider. It should be made clear that these dangers are inherent ones.
- b) RICS should be explicit about what sorts of reasons may actually justify having a client conflict.
- c) It should be stated that it is ‘very rare’ for it to be in a client’s best interests to use an agent, when doing so creates an actual conflict or a ‘high risk’ potential conflict. There should not merely be a ‘general rule’ against such conflicts. Given the inherent risks that are involved with having client conflicts, moreover, members should have to justify *why* the client should not simply instruct another agent.
- d) It should be stated that, only when they are dealing with the very largest and most sophisticated clients, can an agent rely simply on a client’s wishes to determine their best interests.

One final point should also be made about the ‘best interests’ requirement. As we noted at the start of this chapter, the RICS guidance can be departed from when there is a ‘good reason’ for doing so. Would this exception ever apply here? Could there ever be a case in which the ‘best interests’ requirement was not met, but in which there is still a ‘good reason’ to have a client conflict? We think that there is not. We suspect that RICS members would agree as well. So we think that RICS should make that plain.

Recommendation 21: RICS should make it clear that there are never any ‘good reasons’ for *not* following the ‘best interests’ requirement.

This concludes the look at our concerns about RICS's approach to the second and third questions. There is now just one more issue to consider. How should agents conduct themselves, if they are in a *justifiable* client-client scenario? Such a situation could, for example, be an actual client conflict, the circumstances being such that the 'best interests' and 'protective steps' requirements *are* met.

#### 4.4.4 When one may act despite a client conflict, how one should act

Our starting point is the **Agency Code**. It states that, when a conflict of interest does arise, a member must 'deal with [it] openly, fairly and promptly'.

The **Agency Guidance** goes further. It states that:

'In the event of multiple agency for one of the parties, you must pay equal respect to your clients' interests and also work in this situation with the highest possible degree of transparency.'

The **Agency Guidance** glossary defines 'multiple agency' as arising when one has 'competing contractual relationships simultaneously with several [clients]'.<sup>141</sup>

This idea is reinforced elsewhere. The **Agency Guidance** states for example that members should:

'... use [their] best endeavours to achieve the best possible outcome for [their] client, within the limitations of the market conditions and the observation of ethical codes.'

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<sup>141</sup> *Agency Guidance*, p 3.

Of relevance also is the idea of 'discrimination'. The **Agency Code** tells members that they must **not 'discriminate unfairly in any dealings'**. This rule is then expanded upon in the **Agency Guidance**. It states that an example of discrimination would be 'favour[ing] any party because they are likely to instruct you on other property matters, or use services offered by you or your related parties'.<sup>142</sup> Such 'discrimination' could arise with regard to the terms on which a property is offered. It could occur by a refusal to sell or lease a property. It can also happen through one's 'treatment of persons in need of property for occupation'.<sup>143</sup> The **Agency Guidance** portrays this as being a legal requirement, and not merely as best practice.<sup>144</sup>

We think that RICS has struck the right tone here. The guidance on this point also seems to capture the key aspects of the law, as were explained in chapter 3 (see pp. 71–72). The point about 'discrimination', for example, tallies with the 'no inhibition principle'. It is therefore especially to be welcomed.

Nevertheless, we would suggest a slight addition to the guidance. We welcome the fact that it requires agents to work with the highest possible degree of transparency in these situations. In this respect, however, more could be said about **what should happen if something goes wrong**. By something 'going wrong', we refer to an event that undermines the agent's ability to continue to pay equal respects to the interests of every client. This could for example be a breach of an information wall. RICS may wish to add that, in such an event, the agent should, consistently with any duties of confidentiality that they owe.

- fully explain what has gone wrong (including the reasons for it) to *all* of the clients;
- set out what they propose to do about the problem; and
- seek their instructions.

Take the example of confidential information that has bypassed an information wall. Both the side that is disadvantaged and the side that is 'advantaged' should be told of this fact. The party who is 'advantaged' may be just as displeased as the other one. They may think that the incident gives them

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<sup>142</sup> *Agency Guidance*, p 10.

<sup>143</sup> *Agency Guidance*, p 10.

<sup>144</sup> This is clear from the use of the word 'must' in the Guidance.

cause to worry about their own confidentiality going forward. They equally deserve to be told of the problem.

The same **would also apply when the information wall separated more than two parties**. Take for example a landlord negotiating with two rival tenants, 'A' and 'B'. A wall exists between each client. Imagine that some confidential information of tenant 'A' was leaked to the landlord. This makes it more difficult for the firm to pay equal respect to the interests of tenant 'A' and the landlord. But incidentally, it also undermines the firm's ability to have equal regard to the interests of tenant 'A' vis-a-vis tenant 'B'. So tenant 'B' should also be informed of the breach. Of course, this disclosure could not be of the precise information that was leaked. Tenant 'B' should however be told as much as is possible, without compromising tenant A's confidentiality. Tenant 'B' also has a right to know of the problem. They may also wish to re-assess whether they are confident that their own confidential information will remain secure.

This proposal would be **consistent with the aim of promoting the 'highest possible' degree of transparency**, which RICS rightly supports. We have seen repeatedly during this report that subtle wrongdoing may be hard for clients to spot themselves. RICS members should therefore be explicitly encouraged to be open about any problems that do occur.

Recommendation 22: RICS should deal specifically with what should be done if something happens that undermines the agent's ability to continue to pay equal respects to the interests of every client. In particular, and consistently with any duties of confidentiality, the agent should give all of the affected clients a full explanation of what has happened (and why), as well as of what the agent intends to do about it. Full instructions should then be obtained from each of the clients about how to proceed.

#### 4.5 Conclusion

During one of the interviews, **Interviewee B** stated their view to be as follows:



'I think it would be beneficial if there was a common set of policies across the marketplace, rather than it just being left to the compliance department of, certainly large firms, and certainly then within small firms who don't have a compliance department.'

How well does the guidance that has been looked at in this chapter serve the 'function' that is identified in this quotation? RICS itself seems to believe that it could promote it more effectively. As we have already observed, it is currently reassessing its guidelines on conflicts of interest. **This review is most welcome.** We also note the interest that RICS itself has taken in our study. This is evidence of its commitment to high standards.

On the basis of our discussions with our expert interviewees, however, **we fear that the review may not lead to changes which go far enough.** The problems run deeper than a lack of clarity in places. The discussion in this chapter underscores our reasons for believing so. It has shown that **the RICS guidance is inadequate in some important respects.** It needs to do more to promote high standards. Quite significant changes are necessary in order to achieve this aim. Our twenty-two recommendations in this regard are repeated below. We encourage RICS to give close thought to each of them.

#### 4.6 Summary of recommendations

*Recommendation 1:* RICS should re-structure its guidance. It should be set out on an issue-by-issue basis.

*Recommendation 2:* RICS should ensure that it uses a consistent glossary of terms in the *Purple Book* and the *Agency Guidance*.

*Recommendation 3:* RICS should re-draft its definition of the term 'conflict of interest'. It should start by distinguishing between 'own interest conflicts' and 'client conflicts'. The definition of the latter should focus on the presence of competing duties to clients. Both actually and potentially competing duties should be included. Practical examples should be offered of actual and potential conflicts.

*Recommendation 4:* RICS should change the opening words of the statement on p 10 of the *Agency Code*. At present it reads: 'You must make every attempt to avoid any conflict of interest that might not be in the best interest of a seller or a buyer for whom you are acting'. This statement needs to be altered, so that it begins either:

- a) 'You must make every reasonable attempt...'; or
- b) 'You should make every attempt...'

*Recommendation 5:* RICS should state unambiguously that an agent should not act in any potential client conflict situation unless it is in the best interests of all of the affected clients.

*Recommendation 6:* RICS should clearly state that no express term in a retainer can justify either:

- a) a departure from the 'best interests' requirement; or
- b) a failure to take *any* of the protective steps (including that of getting 'informed consent').

*Recommendation 7:* the 'requirement' of predetermined 'limits and constraints on confidentiality of information' (*Purple Book*, p 14) is not a legal one. If RICS has some valid point in mind, it should be made clearer what it is. Otherwise the 'requirement' should be removed.

*Recommendation 8:* in order to be strictly accurate, RICS needs to use the word 'should' for the requirement of 'an information barrier that it is in place before the relevant work commences' (*Purple Book*, p 14). This is not a legal requirement. RICS ought however to express the desirability of a barrier in the strongest possible terms, and link this encouragement to the duty of confidentiality.

*Recommendation 9:* the RICS guidelines should be clear that any proposed information barrier (mentioned on p 14 of the *Purple Book*), including the risks of a breach of it, must be understood by the client.

*Recommendation 10:* as regards the requirement (*Purple Book*, p 14) that both clients must agree to 'the measures to be taken if unmanageable conflicts do arise', RICS should use the verb 'should' rather than 'must'.

*Recommendation 11:* RICS should re-draft the protective steps on p 14 of the *Purple Book*, in order to make them clearer. The following steps in particular should be clarified:

- absolute satisfaction that both clients are aware of any potential commercial implications of the client conflict;
- consideration of whether proceeding despite the conflict is appropriate in the context of principles-based ethics and rules; and
- predetermined limits and constraints on confidentiality.

*Recommendation 12:* Fuller advice should be offered on how to gain 'informed consent'.

*Recommendation 13:* RICS should recommend that 'protective steps' be taken whenever a potential client conflict is either 'high chance' or 'high risk'. In 'high risk' cases, the precise steps to be taken will depend on what the 'risk' to be mitigated actually is.

*Recommendation 14:* Given the likelihood that informed consent is legally required in cases of 'high chance' and 'high risk' potential client conflicts, RICS ought to portray it as a legal requirement by using the word 'must'.

*Recommendation 15:* RICS needs to clarify its guidance on informed consent (see pp. 122–123). It should be made plain that obtaining informed consent is a legal requirement in actual client conflict and 'high risk' and 'high chance' potential client conflict cases. (This is subject only to 'contracting out'.) Any references to the consent being given *in writing* can be treated as being 'best practice'.

*Recommendation 16:* the RICS guidelines should make it clear that full disclosure of all material information is integral to gaining 'informed consent'.

*Recommendations 17–20:* the RICS guidelines on ‘best interests’ need to be substantially tightened up. Further research is needed in order to be absolutely sure about how best to proceed. But as a minimum, we propose as follows:

- a) The guidance should specifically mention the *risks* of acting in client conflict situations, which risks agents should consider. It should be made clear that these dangers are inherent ones.
- b) RICS should be explicit about what sorts of reasons may actually justify having a client conflict.
- c) It should be stated that it is ‘very rare’ for it to be in a client’s best interests to use an agent, when doing so creates an actual conflict or a ‘high risk’ potential conflict. There should not merely be a ‘general rule’ against such conflicts. Given the inherent risks of client conflicts, moreover, members should have to justify *why* the client should not simply instruct another agent.
- d) It should be stated that, only when they are dealing with the very largest and most sophisticated clients, can an agent rely simply on a client’s wishes to determine their best interests.

*Recommendation 21:* RICS should make it clear that there are never any ‘good reasons’ for *not* following the ‘best interests’ requirement.

*Recommendation 22:* RICS should deal specifically with what should be done if something happens that undermines the agent’s ability to continue to pay equal respects to the interests of every client. In particular, and consistently with any duties of confidentiality, the agent should give all of the affected clients a full explanation of what has happened (and why), as well as of what the agent intends to do about it. Full instructions should then be obtained from each of the clients about how to proceed.

## Chapter 6

### The RICS Guidance in Practice

#### 6.1 Introduction

In the previous chapter, we reviewed the actual content of the RICS guidance. In this final chapter we will look at some of the practical issues that influence its effectiveness in practice. Three matters will be discussed in particular. They are:

- a) public awareness and understanding of the guidelines (section 6.1);
- b) the non-compulsory nature of RICS membership (section 6.2); and
- c) the enforcement of the RICS guidance (section 6.3).

In terms of the first of these issues, we conclude that **RICS is not doing enough to help the public to understand its guidance**. Its website is not adequate for this purpose. Its guidelines should also be freely available for the public to read. On the second issue, we note that a lot of agents are not subject to the RICS guidance (or any other comparable code). This creates a risk of lower standards of conduct. It also undermines what RICS is trying to achieve with its own guidance. As regards the third matter we offer no specific recommendations. The evidence that we have obtained has been insufficient to warrant our making any proposals with confidence. We do however suggest that further study into the enforcement of the RICS guidance would be desirable.

## 6.2 Public awareness

The first issue to consider is public awareness of the RICS guidance. **Interviewee D** spoke about this matter. It was, they said, '**absolutely vital**' to the impact of any code that there is **consumer recognition of it**. Clients need to know what questions to ask. We also note that RICS has worked with both consumer and government bodies, as well as the press, to increase awareness of its guidance. **Interviewee D** said, however, that understanding of it amongst consumers still needs to be increased.

The significance of client understanding is also reflected elsewhere. One of the stated goals of the **Purple Book** is said to be:

'... to ensure that clients have a clear understanding of the scope and quality of service they can expect from commercial agents, and to help to improve standards in the sector by raising public and professional awareness.'

The introduction to the **Agency Guidance** underscores this point. It makes the following observation:

'Experience has shown that many of the complaints levelled against agents are the result of unrealistic or inappropriate expectations of the service to be provided, or a misunderstanding of the relationship and duties of care owed to the parties of a transaction. By setting out clearly what those duties are and the scope of the services being offered, it is hoped that this will increase awareness of what constitutes best practice in this area.'

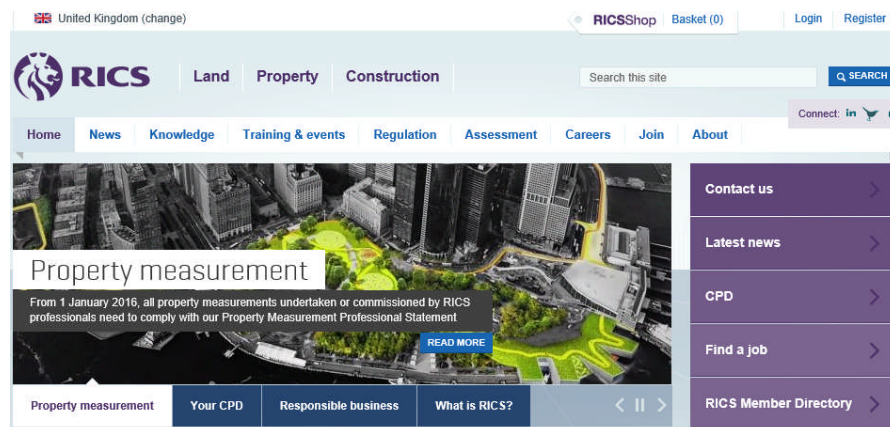
We have no reason to doubt the truth of this opening claim. There are many reasons why a client may misunderstand the role of their agent. But **we query the extent to which RICS itself is addressing this problem**. One wonders whether it is doing enough. This is not an issue about the wording of its guidance. The point is one about access to it. Two key points need to be made:

a) **The Agency Guidance and the Purple Book are not are publicly available.** Only RICS members can freely download copies of them. Anyone else would have to buy a copies of them from RICS’s online shop.

b) **The RICS website is not very client friendly.**

These factors contribute to the very problem of which this quote complains. They ought to be addressed promptly.

An example may illustrate these problems. Imagine the case of a client of a RICS member. They are unhappy with the service that has been provided to them. Should they be so? The quote above tells us that it may be a misunderstanding on the client’s part. Perhaps the client realises that this could be the case. Naturally, they may be reluctant to ask their agent to begin with. So they visit the RICS webpage. They are then presented with the following at the top of the screen:



Where on the page should they click? There is no 'Consumers' or 'Clients' section to be seen. Some trial and error is likely to be needed. If for example the client, wondering what RICS can do for them, chooses to click on 'About', they are basically told that RICS regulates and promotes the profession. The standards against which they do so are not made obvious.

But imagine that our client is not easily deterred. Let us assume that they select 'Regulation', whether immediately or after some trial and error. A new 'Complaints' tab emerges. Clicking on that produces an overview of how to complain. Our client, however, does not know whether they have a real grievance to start with. So they keep looking. Yet they may struggle. It does not seem to be intuitive, for instance, that a 'Professional guidance' tab appears in the 'Knowledge' section; it could just as easily appear under 'Regulation'. Yet let us assume that the client does access the 'Professional guidance' tab. They are then presented with a large section. It is clearly designed for those persons who actually understand the work of RICS members. There are links to things such as the 'Red Book' and the 'Black Book'. The client will probably have no idea at all what document to look for. They are likely to be even more flummoxed by this opening statement:

'Our standards and guidance cover all areas of surveying practice and embody best practice. They fall into the following categories: professional statements, practice statements, codes of practice, guidance notes and information papers.'<sup>145</sup>

At this point the client may lose heart. Is the subject-matter of their complaint dealt with in a practice statement, a guidance note or an information paper? Does it even relate to 'surveying practice' to begin with? They are unlikely to know. Perhaps they will suspect that they are in the wrong place, and start looking elsewhere. Perhaps they will persist with this section. Yet they are unlikely to be any the wiser if they scroll down the page. Here there begins a list of no fewer than 191 guidance documents. The first of these is titled 'Acceleration'. (The client will be forgiven for thinking that they are going nowhere.) Even a website search for the 'Purple Book' will yield no useful results, *unless* the term is searched for in quotation marks.<sup>146</sup>

But let us assume that the client is very determined. They eventually come across the main pages for the three sources that were described in the previous chapter. They are not allowed to view them.

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<sup>145</sup> See: <http://www.rics.org/uk/knowledge/professional-guidance> (emphasis removed).

<sup>146</sup> Compare: <http://www.rics.org/uk/search-results/?sq=purple+book&so=Relevance>, on the one hand, with <http://www.rics.org/uk/search-results/?sq=%22purple+book%22&so=Relevance>, on the other hand.



The website tells them that: 'This content is only available to RICS professionals'.<sup>147</sup> Copies of the *Purple Book* are being offered in the online shop for £97.50.<sup>148</sup> Perhaps if they are keen, the client may find consultation drafts of some RICS guidance on the internet. Yet their status will be unclear to the client. The RICS webpage does not help them. They may begin to wonder how interested RICS is in promoting client understanding.

The RICS approach contrasts unfavourably with that of the **Solicitors Regulation Authority ('SRA')**, which regulates solicitors in England and Wales. In particular, **two features** of the SRA approach are particularly commendable:

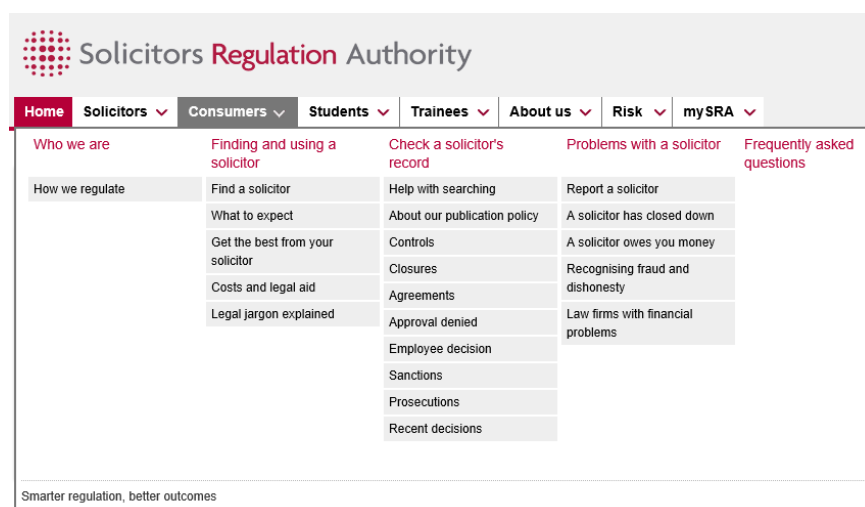
- i. The **SRA Handbook is freely available on the SRA website**.<sup>149</sup> One can download it, in whole or in part, in PDF format. Alternatively, **it can be browsed online**. When a word that is used in the rules is defined in the glossary, one can view its definition by clicking on it. The relevant details then appear in a small pop-up box. The whole handbook can be also easily searched.
  
- ii. The **SRA webpage is also more user-friendly for clients**. Most obviously, **it has a 'Consumers' section**. This is helpful in making clients feel like they are a priority. If one hovers one's cursor over the 'Consumers' tab, a helpful drop-down window appears. (A screenshot of this window can be seen overleaf.) There is even a video about making complaints.

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<sup>147</sup> See e.g.: <http://www.rics.org/uk/knowledge/professional-guidance/guidance-notes/commercial-real-estate-agency-standards-uk>.

<sup>148</sup> See: <http://www.rics.org/uk/shop/RICS-UK-Commercial-Real-Estate-Agency-Standards-18962.aspx>. The Agency Guidance costs £20: see <http://www.rics.org/uk/shop/Real-Estate-Agency-and-Brokerage-Guidance-19970.aspx>.

<sup>149</sup> <https://www.sra.org.uk/solicitors/handbook/welcome.page>.



**Both of these features should be adopted by RICS.** There is no obvious reason why the RICS guidance is viewable only by members. Nothing in the sections that we have read is confidential. In addition, RICS should also seriously consider whether its own website aids client understanding. We believe that it could be better. The current web design compares unfavourably with that of the SRA website. It ought to be improved.

### 6.3 Agents who are not affected by the RICS code

Another issue that troubles us is the reach of the RICS code. It seems that **the majority of advisers in the sector are RICS members.** Yet this still means that a good number of commercial property agents are *not* signed up to the RICS guidance.

That is not to say, of course, that commercial property agents can thereby avoid all regulatory oversight. In particular:

- a) All commercial estate agents **must belong to an independent redress scheme**.<sup>150</sup> There are three such approved schemes: The Property Ombudsman Scheme ('TPOS'); the Ombudsman Services Property ('OSP'); and the Property Redress Scheme ('PRS'). The third of these schemes seems to be less focussed on commercial property agents.<sup>151</sup> Of the other two, **TPOS is the more established one**. It is also the only scheme that includes a code of practice for commercial property agents.
- b) Many commercial property agents will be members of either the **National Association of Estate Agents (NAEA)** or the **Institution of Commercial & Business Agents (ICBA)**. These bodies are both **divisions of the National Federation of Property Professionals (NFOPP)**, and their members are hence subject to the **NFOPP's code of conduct**.

Even if an agent is signed up to the codes issued by both TPOS and the NFOPP, however, they will **not be regulated by a code that is anywhere near as thorough as the RICS one**. (That is so despite the current flaws in the RICS guidance, as were described in chapter 5.) The TPOS *Code of Practice for Commercial & Business Agents*, for example, has only this to say specifically about client conflicts:

'You must make every attempt to avoid any conflict of interest which might not be in the best interest of the client.'<sup>152</sup>

This statement, of course, is almost identical to one in RICS's *Agency Guidance* document (see p. 106). It is a well-intentioned idea. Everything that we said about it in chapter 5, however, applies equally here. In essence, the 'best interests' condition is simply too vague to be a real deterrent. **The use of the statement in the TPOS Code, indeed, is even less likely to make any difference**. At least the RICS guidance suggested that this requirement would not be met as a 'general rule' (see p. 107). The TPOS Code *fails* to do so. Even worse, it does not define the term 'conflict of interest' to start with. The Code, therefore, barely advances matters beyond the general law.

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<sup>150</sup> See the Consumers, Estate Agents and Redress Act 2007; and The Consumers, Estate Agents and Redress Act 2007 (Commencement No. 4) Order 2008.

<sup>151</sup> For a list of the work covered by this scheme, see: <https://www.theprs.co.uk/propertyagent/who-can-join>.

<sup>152</sup> See TPOS, *Code of Practice for Commercial & Business Agents* (Current as of October 2015) ([http://www.nfopp-regulation.co.uk/media/1043570/tpos-code-of-practice-commercial-and-business-agents\\_01\\_10\\_2015.pdf](http://www.nfopp-regulation.co.uk/media/1043570/tpos-code-of-practice-commercial-and-business-agents_01_10_2015.pdf)), rule 8c.

The *NFOPP Conduct and Membership Rules*, for their part, say **nothing explicit at all about client conflicts**. At best, the document contains some generic rules against things like ‘unprofessional practice’ and ‘practice that is unfair to members of the public’.<sup>153</sup> Statements like this are however too woolly to make much difference in practice.

All of this is concerning. It means that **a good number of agents are governed only by codes that go little or no further than the general law**. Given that the general law does not sufficiently promote high standards of conduct at present (see chapter 3), neither can any of the codes that apply to these agents do so. **We urge TPOS and the NFOPP to give serious thought to their guidance on conflicts of interest**. As an *absolute minimum*, we would like to see both codes revised, so that they include:

- a legally accurate definition of a ‘conflict of interest’ (see pp. 104–105); and
- a more robustly drafted ‘best interests’ requirement (see p. 130).

In support of our view that the NFOPP and TPOS codes need to be tightened up, we would also make two further points:

- (a) The **other sources of discipline for non RICS member firms will almost certainly remain insufficient**.

**It is not enough to wait and hope that the law and/or market forces will improve**. The problems with market forces, such as a lack of expertise and knowledge on the part of clients, are long-established ones. It is extremely hard to address them to any large extent. It is entirely rational that smaller businesses, for example, do not closely monitor their agents. The difficulty that this creates is a classic example of the ‘principal-agent problem’. This is something which has been debated since at least the 1970s. No perfect solution to it has ever been found.

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<sup>153</sup> NFOPP, *Code and Membership Rules* (2016) (<http://www.nfopp-regulation.co.uk/rules>), para 12.1.1.

The **law is similarly limited in its potential to offer better protection for clients**. There are various reasons for this. We have touched upon them at different points in chapter 3. One of them is the difficulty of proving legal wrongs in court. This reduces the deterrent effect of the law. Another reason is that it requires a number of reported court cases clearly to move the law in a new direction. It can take years for such a process to finish. **The general law of agency, indeed, is lagging behind the times already**. It is still struggling with the rise of large conglomerates in the twentieth century. Legal authorship on some of the issues that this has thrown up is striking for the lack of cases on which it can rely.

In addition, **some of the problems that we identified with the law are never likely to be addressed by the judiciary at all**. It is for example very difficult to see the courts ushering in a 'best interests' requirement (as appears in the RICS guidance) before an agent takes on any conflict of interest. The courts would be unable sufficiently to fine tune such a requirement to the hugely disparate situations in which it would have to apply.

It is **clear by implication that RICS shares our concerns on this point**. If the other sources of discipline were enough, there would be no case for even having a code on conflicts of interest which does anything more than summarise the law. But RICS goes further. It offers 'best practice' suggestions. From this fact, we may infer that RICS does not think that the law and market forces are enough on their own.

- (b) Even if non-member firms treat the RICS guidelines as a voluntary code, this may well not make much difference. It is unlikely that such a voluntary code will be effective.

It may be true that the RICS guidance has some influence on non-members. **Interviewee D** said that RICS codes are held up as 'best practice' by them. By advertising their compliance with the code, they may also gain a competitive edge with small business consumers (**David Miles**). Indeed particularly if a code is a well-respected one, compliance can be good PR for firms (**Interviewee E**).

For non-members, however, the guidance can only enjoy the same status as a voluntary code. One must doubt how effective one of these can be. A number of our interviewees voiced their concerns about them. From a small business perspective, **David Miles** said that they can be ‘a little bit pointless’ due to their non-enforceability. **Sara Parker** added:

‘They sometimes can lack teeth, and that can cause concern for whichever side of it feels like they need to have a better mechanism for redress.’

Our interviewees in the property sector also voiced their doubts about purely voluntary codes:

‘[M]arket practitioners may choose to avoid them, and they do.’

**Interviewee B**

‘[Voluntary codes] are largely, ineffective, if not always... They are perhaps good for reminding the industry of how it ought to behave, but I think those in the industry who take professional ethics and compliance seriously are already behaving in a ethical manner, and those that aren’t are not going to be changed by a voluntary code.’

**Interviewee E**

‘I think that they’re good until they fail.’

**Interviewee C**

Our lawyer interviewees also expressed their concerns. **Amanda McNeil** noted that some codes in the commercial property sphere have been taken more seriously than other ones. **Adam Walford** felt that a code can be more effective if

either there is a threat of government intervention failing it or everyone has signed up to it. Neither of these features are reflected in the present context. Finally, **Belinda Solomon** said that voluntary codes do not work in this sector. 'The evidence I have seen', she explained, 'is that [agents] have different priorities.'

The need for all commercial property agents to be governed by an effective code is **only likely to increase going forward**. As society, technology and working practices evolve, codes can be much better positioned to adapt to new developments than the judges are to update the general law. As **Sara Parker** observed, a code 'allows you to take a more nuanced view of any individual case'. It can also be 'much more responsive'. At the moment, however, the TPOS and NFOPP codes are far too generic.

Of course, the fact that the TPOS and NFOPP Codes are weak, and that not every commercial property agent chooses to be a member of RICS, is not the fault of RICS itself. But these facts do **diminish the importance of what RICS is trying to do with its own guidance**. That some agents are governed by weaker codes undermines any sense of a shared culture of adherence to the highest standards. It may also allow non RICS members to reduce their costs. This could give them a potential competitive advantage. In turn, that may encourage RICS members themselves to interpret their own guidelines loosely, so as to level the playing field.

#### 6.4 Enforcement of the RICS code

The final issue to be discussed is the enforcement procedure for the RICS guidelines. How does it work? A brief summary of it may be offered here. The starting point is that all RICS regulated firms must have a complaints handling process. A client who is dissatisfied should in the first instance have recourse to it. If despite having been through this process the client is still unhappy, they may complain to RICS.

Our interviews and our academic research turned up little useful information about how easy it is to succeed in a complaint to RICS. **Interviewee B** did observe, however, that RICS ‘only gets involved if there has been a very clear breach of its rules’. RICS is ‘not necessarily there’, said **Interviewee E**, ‘to police the industry’. Indeed our property sector interviewees showed little enthusiasm for a more proactive approach by RICS. As **Interviewee E** said:

‘I don’t think most surveyors and most firms would want the RICS to be turned into the compliance police. They already do that to some extent anyway.’

**Interviewee D** was largely happy with the current approach. **Interviewee B** also pointed out that, if RICS did take a more proactive approach in this area, it may be unclear what it would be seeking out. This is a fair point. A hypothetical ‘inspector’ in a commercial property firm does not have anything obvious to consider, other than the firm’s written policies. At best, they may be able to spot any glaring ways in which a firm’s practice differs from its policy. But obvious transgressions of the RICS guidance would not take place in clear sight of the ‘inspector’ anyway. We also accept that making RICS more proactive would involve extra expenses. These costs would have to be met from somewhere.

This study, therefore, makes **no specific recommendations about the current enforcement of the RICS guidance**. But this is an area respecting which further study is desirable. It would for instance be useful to look at the experiences of those who have used the complaints handling processes within member firms, as well as those who have brought complaints to RICS. Doing so may turn up useful evidence about the current approach to enforcement.

The case for scrutinising the process of enforcement is only likely to increase going forward. We have already seen how the RICS guidelines go beyond anything that is issued by any other organisation in this sector. RICS is also likely to further tighten up its approach as a result of its present review of the guidance. We have made our own recommendations as to what should be done in this regard (see chapter 5). If these changes are made, however, they would only increase the prestige of adherence to the RICS guidance. Advertising one’s compliance with it will become an even greater mark of quality service. It could be something that attracts custom. In that event, RICS cannot abide anything like routine breaches of the guidance being committed by any of its members. **The more RICS membership becomes a badge of distinction, the more important it is that the RICS guidance is robustly enforced.**



## 6.5 Conclusion

In this chapter, we have reviewed some of the practical issues relating to the enforcement of the RICS guidelines. To recap the recommendations that have been made in it:

- a) RICS should make its guidelines freely available to the public, in the same way as the Solicitors Regulation Authority does. This would help to promote clients' understanding of what they can fairly expect when they are instructing a RICS member agent.
- b) RICS should revamp its website, in order to give much clearer and more accessible advice to clients about how to complain about a RICS member. The website should also have a specific 'Clients' section.
- c) The NFOPP and TPOS codes should be strengthened, to bring them at least somewhat more into line with the standards of the RICS guidance. The weaknesses in the NFOPP and TPOS codes undermine what RICS is trying to achieve with its own guidance.

All of these changes would help to improve standards of conduct in this area. They are consistent with RICS's aim of promoting best practice. We strongly believe that they should all be made.

## Conclusion

This study, the first of its kind in England and Wales, has looked at conflicts of interest in the commercial real estate sector, and how they are managed and regulated. Our focus has been on conflicts of interest arising out of the fact that agents have multiple clients. We have also looked specifically at the position in England and Wales. The research questions which we have sought to address were as follows:

- a) How far do market forces ensure that commercial property agents will maintain high standards of conduct in dealing with conflicts of interest?
- b) To what extent does the law that governs commercial property agents promote high standards of conduct in managing conflicts of interest?
- c) How far can clients trust the self-management of conflicts by firms, particularly by ad hoc information walls?
- d) How far does the content of the guidance issued by the Royal Institution of Chartered Surveyors ('RICS') promote high standards of conduct in dealing with conflicts of interest?
- e) How effective is the enforcement of the RICS guidance in practice?

We considered each of these issues in a specific chapter. Our conclusions on each of them may be summarised as follows:

**(a) Market forces are of limited effectiveness in this area.**

Market forces are unlikely to deter wrongdoing of a covert variety. Conflicts that undermine clients in subtle ways may well go unnoticed and unpunished. There are various reasons for this. They include:

- the limited awareness of many clients (particularly small business clients) about conflicts issues;
- the lack of information that is made readily available by commercial property agents about their conflict management policies, which makes it harder for clients to make informed choices about them;
- the difficulties that many clients, being unfamiliar with the sector, will have in properly scrutinising the conduct of their agents; and
- the lack of any clear objective yardstick against which clients may readily assess the outcomes of their agents' work.

**(b) The law offers some useful safeguards to clients, but it does not go far enough; and its deterrent effect is reduced by the difficulties of spotting and litigating legal wrongs.**

The law places agents under a number of important duties. They include the ones to exercise reasonable care in executing their retainers and to keep client confidentiality. Proving breaches of these duties may however be particularly difficult.

In principle, the law also often makes agents liable for having either actually or potentially conflicting duties towards different clients. For example, a firm which is

representing both sides to a negotiation will have an actual conflict of interest. An agent who is acting for two clients who may well open up negotiations with one another has a potential conflict of interest on their hands. The only defences to such conflicts are either to contract out of the rule against them in the retainer, or else to get the informed consent of each client to them.

Even the 'no conflict' rule does not, however, do enough to ensure that high standards are met in practice. The reasons for this include:

- the potential for contracting out of the duty entirely;
- legal uncertainty on some important points concerning it, which could lead to agents interpreting the law in ways that favour lower standards of conduct;
- the absence of any legal requirement that agents only owe conflicting duties to their clients if that is in the 'best interests' of them all; and
- the difficulties that clients face in seeking to prove breaches of this rule in court.

**(c) There are clear risks with relying on the self-management of conflicts by property agents by means of information walls.**

Various authors have concluded that information walls are unreliable. Their reasons for thinking so seem to be no less relevant to the barriers that are used by commercial real estate firms. The commonly noted concerns about information walls include the following ones:

- some firms are not large enough to have effective information walls;
- inevitably some persons must sit astride the wall;
- information walls are not good at preventing the informal disclosure of information; and
- *ad hoc* information walls (the type that are used by commercial real estate firms to separate their property agents) are particularly prone to being breached.

Specifically in the commercial property agency context, there are also further grounds for circumspection. This is because information walls are not permanently in place. They are set up as between agents only when a firm thinks that they are needed. But what does it mean for a wall to be 'needed'? There is a lack of open debate on this point. The practices of individual firms are likely to differ. Some agents may take a lax view of when a barrier is required. Many clients are unlikely to know any better. At present, therefore, there is a clear risk of low standards in this matter.

We do not make any specific finding about *how common* breaches of information walls are in practice. Our property sector interviewees indicated that they would be very rare. But it is also clear that breaches of these walls could be very hard to detect. A more detailed study is necessary to investigate this issue fully.

**(d) The RICS guidance on client conflicts is inadequate in some crucial respects. It needs to be substantially re-written.**

The RICS guidance purports to set out both the law and 'best practice'. We respectfully doubt whether it fully does either of these things. The problems with the guidelines go further than merely their vagueness in parts. We would be disappointed if the current review by RICS led to nothing more than a bit of clarification here and there.

The guidance needs to be tightened up. We have set out twenty-two recommendations about how this should be done. These proposals are all repeated at the end of chapter 5. To pick just a few examples:

- RICS needs to offer a much clearer and more legally accurate explanation of the term 'conflict of interest';
- the guidance fails to say anything about the contentious issue of 'contracting out' of the no conflict rule;
- RICS fails to distinguish between different types of 'potential client conflict', some of which require much more management than others; and
- the 'best interests' requirement in the guidelines, though well-intentioned, could well not be much of a hurdle in practice, and so needs to be explained in more restrictive terms.

We strongly encourage RICS to make all of the changes that are suggested in this report. At present there is a real risk that its guidance is not encouraging high enough standards.

(e) **More could be done to promote the enforcement in practice of the RICS guidance.**

Public awareness of the RICS guidelines is important to their effectiveness. RICS even claims that client misunderstandings are the reason for *many* of the complaints that are levelled against agents. But we believe that RICS is not doing enough to help clients in this regard. Changes should be made to address this problem. In particular:

- RICS should make its guidelines freely available to the public, in the same way as the Solicitors Regulation Authority does. This would help to promote clients' understanding of what they can fairly expect when they are instructing a RICS member agent.
  
- RICS should revamp its website, in order to give much clearer and more accessible advice to clients about how to complain about a RICS member.

In addition, a not insignificant number of agents are not regulated at all by RICS. At best they will be subjected to the codes issued by The Property Ombudsman Scheme ('TPOS') and the National Federation of Property Professionals ('NFOPP'). These codes are nowhere near strong enough at present. The weaknesses in them undermine any sense of a shared culture of adherence to the highest standards. The lower costs of complying with them may also encourage RICS members to interpret their own rules more loosely, so as to reduce any sense of competitive disadvantage.

It is time for action to be taken. At the very least, RICS needs to strengthen its guidance in this area, and do more to help clients. The TPOS and NFOPP codes likewise need to be tightened up. But even this may not be enough. A thread running throughout this report has been that **some acts of wrongdoing may go undetected and unpunished**, whether by market forces, the law, managers or

RICS itself. We do not say that this is happening often; but we are clear that it **could be happening**. There is no corrective force that plainly negates this risk.

**An open and honest discussion about conflicts of interest in the commercial property sector is clearly needed.** Too often any concerns are rejected out of hand, on the basis of reasons which do not withstand scrutiny. One cannot, for example, rely merely on arguments about market forces, or assert that information walls eliminate any risks to clients. **This report should put an end to such dismissive approaches.** Our hope is that a more mature debate will now take place. The various deficiencies in the RICS guidance, which property agents hold up as being 'best practice', show just how far there is to go in this regard.

But it is not only an honest discussion that needs to occur. It should also be a fully informed one. To that end, **further investigation in this area is needed.** A study should be conducted that involves interviews, not only with agency firms, managers within them and experts in the area, but also with lower level employees in these firms. These interviews will need to be anonymous. Only a large-scale study will ever get to the bottom of the matter. It would of course need the co-operation of the large dual agency firms; but then it is in their best interests to help. If our concerns are baseless, they should be happy to prove that beyond doubt. If they are justified, the managers in these firms should welcome the chance to reflect on any difficulties, and to make changes accordingly. We hope that all stakeholders will therefore come together in the interests of promoting best practice.