

A 'Reprehensible' Example of Conflict of Interest?

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Abstract

In its charge of murder against Ahmed Hablas, the Crown relied on a statement of Hablas, in which he admitted to the killing, but on the basis of self-defence. This statement was arranged by a solicitor, Alan Swanwick, who had pre-existing links to the Chaouk family. Ali Chaouk was suspected by the police of being the shooter. Swanwick denied, to police and in court, that he had a conflict of interest in acting for both Hablas and Ali Chaouk. The existence and nature of any such conflict was ventilated at some length in the voir dire and at trial. An analysis of the relevant sections of the Victorian and Australian codes of conduct for solicitors, viewed through the particulars of this case, indicate some shortcomings of the treatment of conflict of interest in these codes. Some suggestions for improvement are made, including extending the definition of a conflict of interest to include perceived conflicts and making the test for conflict an objective, rather than subjective, one.

Introduction

Ethical Considerations in Criminal Matters

In Victoria, criminal lawyers seek rulings from their professional body, the Law Institute of Victoria ("LIV") on ethical matters relatively infrequently. Based on published rulings of the Ethics Committee of the LIV between 1995 and 2015, only fourteen rulings were related to criminal law, out of a total of about 590, ie just over 2%.² By comparison, approximately 13% of LIV membership are members of the Criminal Law Section.³ Of these fourteen rulings, seven involved conflict of interest. Where the Committee found a conflict existed (or may have existed) it appears from the published rulings that, despite the conflict, there was relatively little at stake and that the remedy was simple, namely to relinquish the client to another solicitor.

For criminal defence lawyers, common ethical considerations often involve (1) changes in client instructions, particularly confessions of guilt, (2) advice given before police interviews, and (3) whether to advise the Court when the prosecution fails to allege relevant prior convictions.⁴ Although Parker and Evans do discuss the possibility of conflict of interest in a criminal law setting,⁵ most of the discussion in their book appears to relate more directly to commercial law firms, to their 'ability to earn fees from multiple clients' and to notions of 'business efficacy'.⁶

¹ The author is a criminal defence solicitor and was the instructing solicitor in the trial of Ahmed Hablas, *The Queen v. Ahmed Hablas*, Supreme Court of Victoria, 12 September, 2011.

² Ethics Committee, Law Institute of Victoria, <<http://www.liv.asn.au/For-Lawyers/Ethics/Ethics-Committee-Rulings>> accessed 3 June, 2013 and email from Gemma Hazmi, LIV (Personal Communication, 20 June, 2016).

³ Statement by Gemma Hazmi, LIV (Personal Communication, 29 June, 2016). It should be noted that the LIV Ethics Committee meets only monthly and thus any rulings that are required during the course of trials are handled more expeditiously in other ways. Rulings during trials would, however, be unlikely to involve conflict of interest.

⁴ See for example John McLoughlin (Senior Public Defender) and Julia Munster (Public Defender), Victoria Legal Aid, *Ethics and Defending*, presented at a LegalWise seminar, 30 November 2013

<<http://legalwiseseminars.tv/details/jsp/session.jsp?sessionId=1311V17B>> accessed 10 July, 2014.

⁵ Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (2nd edn Cambridge University Press, Cambridge, 2014) 253.

⁶ Parker and Evans (n 5) 256.

In short, conflict of interest appears to be a more significant ethical problem for civil and commercial lawyers.⁷ A brief review of other local Ethics textbooks supports these general observations.⁸

Overview of Professional Conduct Rules and Conflict of Interest

The LIV's Professional Conduct Rules⁹ ("LIV Rules") addressed issues of conflict of interest, in particular regarding situations of more than one client, also referred to as concurrent representation.¹⁰ Clause 8.2 seems clear:

8.2 A practitioner must avoid conflict of interest between two or more clients of the practitioner.

However, the LIV Rules did not specify or define conflict of interest in this situation. Moreover, the LIV Rules then expressly allowed for concurrent representation under certain conditions, namely when (1) both parties are aware of, and understand, the implications of such concurrent representation and when (2) they both consent to it:

8.3 A practitioner who, or whose firm intends to act for a party, to any matter where the practitioner is also intending to accept instructions to act for another party to the matter must be satisfied, before accepting an engagement to act, that each party is aware that the practitioner is intending to act for the others and consents to the practitioner so acting in the knowledge that the practitioner:

- (a) may, thereby, be prevented from –
 - (i) disclosing to each party all information relevant to the matter within the practitioner's knowledge; or
 - (ii) giving advice to one party which is contrary to the interests of another; and
- (b) will cease to act for all parties if the practitioner would, otherwise, be obliged to act in a manner contrary to the interests of one or more of them.

It should be noted that the LIV Rules were less restrictive in this regard than those which applied in NSW, Queensland and other states, namely the Australian Solicitors' Conduct Rules ("ASC Rules")¹¹. The corresponding clauses in the ASC Rules differed in important ways, in particular that they explicitly mention the interests of the client, the possibility of actual or potential conflict and the need for informed consent:

⁷ 'But perhaps nowhere is the conflict-of-interest tangle more extensive or stubborn, the inherent structures of duplicity and the temptations and tensions they provoke more prevalent or persistent, than in the private practice of law' in Susan P Shapiro, *Tangled Loyalties; Conflict of Interest in Legal Practice* (University of Michigan Press, Ann Arbor, 2002) 14.

⁸ Gino Dal Pont, *Lawyers' Professional Responsibility* (5th edn Thomson Reuters, Australia, 2012) [18.105 – 18.120]; Geoff Monahan and David Hipsley, *Essential Professional Conduct: Legal Ethics* (2nd edn Routledge and Cavendish, Oxford 2007) 36.

⁹ These were the rules that were in force at the time of the murder and the subsequent trial, as described below. These rules were superseded in Victoria in May, 2015 by the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015, <http://www.legislation.nsw.gov.au/regulations/2015-244.pdf> accessed 19 June, 2016.

¹⁰ LIV Professional Conduct and Practice Rules 2005, <<http://www.lsb.vic.gov.au/documents/LSBLIVRules2005.pdf>> accessed 14 June, 2014.

¹¹ Australian Solicitors' Conduct Rules, June, 2011, <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/AustralianSolicitorsConductRules.pdf>> accessed 14 June, 2014. It should be noted that the ASC Rules are essentially identical to the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (above n9) which are now in force

11.2 If a solicitor or a law practice seeks to act for two or more clients in the same or related matters where the clients' interests are adverse and there is a conflict or potential conflict of the duties to act in the best interests of each client, the solicitor or law practice must not act, except where permitted by Rule 11.3.

11.3 Where a solicitor or law practice seeks to act in the circumstances specified in Rule 11.2, the solicitor may, subject always to each solicitor discharging their duty to act in the best interests of their client, only act if each client:

11.3.1 is aware that the solicitor or law practice is also acting for another client; and

11.3.2 has given informed consent to the solicitor or law practice so acting.

There are some significant inadequacies with the ASC Rules despite this more restrictive approach. The use of "client consent as the 'cure-all' for potential conflict in joint representation" is criticised by Parker and Evans, in particular due to information asymmetry between client and lawyer, even for "so-called 'sophisticated clients'".¹² Parker and Evans also draw attention to other ethical problems in representation, such as in potential breaches of fiduciary obligations, where independent legal advice must be obtained before a client can consent to a conflict of interest.¹³

Conflict of Interest in a Murder Trial

In a recent murder trial in Victoria, the issue of conflict of interest for solicitor who acted for two suspects from the early stages of the investigation had very serious implications for the two men and for the administration of justice¹⁴. The trial judge, Justice Betty King, found the situation 'very troubling'¹⁵ and 'very unsatisfactory in terms of actual justice being achieved'.¹⁶

The accused man, Ahmed Hablas, was charged with the murder of Mohammed Haddara. The Crown case was based totally on admissions by Hablas, the first of which was a statement given voluntarily to the police within 24 hours of the shooting.

The statement was prepared with the assistance of a solicitor, Alan Swanwick, whose involvement had been arranged by a member of the Chaouk family on behalf of Ali Chaouk who, it seemed clear, was present near the shooting at the relevant time.

Despite the admissions of Hablas, which relied on self-defence, the police did not charge him with murder until 53 weeks after the shooting. It is apparent that the police believed that the real shooter was Ali Chaouk. At trial, the jury returned a 'not guilty' verdict to both murder and defensive homicide charges after less than three hours deliberation.

This paper commences with an outline of the history of the shooting and of the role of the solicitor. Then extracts from the trial transcript, covering the initial voir dire and the subsequent jury trial, are reviewed. These extracts are used to illustrate the complexities raised by the apparent conflict and to demonstrate how the judge and counsel attempted to avoid semantic or definitional difficulties with the legal concept of conflict of interest that may have confused or mislead the jury. Finally, this article concludes with some suggestions for improvements to the solicitors' code of conduct.

¹² Parker and Evans (n 5) 253-254.

¹³ Parker and Evans (n 5) 254.

¹⁴ *The Queen v. Ahmed Hablas*, Supreme Court of Victoria, 12 September, 2011.

¹⁵ *Hablas* (n 14) 9.

¹⁶ *Hablas* (n 14) 10.

History of the matter

The Shooting

It appears that there had been ill-will between the Haddara family and the Chaouk family for a period before the shooting. This incident was prompted by the concern of Mohammed Haddara (and his cousin, Ghazi Haddara) about an incident in which Ali Chaouk and also, perhaps, Hablas had threatened a friend of the Haddara family.

There were two versions of the incident available at trial, one according to the statement and evidence of Ghazi Haddara and another according to Hablas's statement. There is agreement between these accounts on the initial aspects, essentially that on the evening of 20 June, 2009 Hablas was kidnapped by the Haddaras, forced into a car and then assaulted by Mohammed Haddara in the car.

According to Ghazi Haddara, Mohammed Haddara left the car ready for a one-on-one fight with Ali Chaouk. Ghazi Haddara was then to take Hablas away (to be assaulted it appears). However, Hablas managed to stop the car and escape. The last that Ghazi Haddara saw of Hablas was him fleeing on foot.

This account differs to that of Hablas, where, according to his statement, a gun was produced in the car by Mohammed Haddara. Hablas managed to get out of the car but he was then chased and caught by Mohammed Haddara. A fight ensued and in the course of the struggle, Mohammed Haddara was fatally shot. Hablas then stated he returned by foot to Ali Chaouk's house, disposing of the pistol on the way. Early the next morning, Hablas went with Ali Chaouk to the house of a friend of Chaouk's. It was at this house that Hablas spoke to a lawyer, Alan Swanwick, and prepared the statement.

Swanwick's involvement in the making of the statement and thereafter

It is useful to provide a brief outline of the involvement of Swanwick, the lawyer in this matter, before examining how his evidence was given, and received, in Court.

Swanwick's involvement resulted from a request of a member of the Chaouk family. On the night of the shooting, Swanwick first went to the Chaouk family house in Brooklyn (a western suburb of Melbourne), and then drove to a house in Doveton (a suburb in Melbourne's outer east). Ali Chaouk and Hablas were already at this house. Over the course of the day, Swanwick took a statement from Hablas. Ali Chaouk remained in the house for most of this time. Swanwick also took a much shorter, and exculpatory, statement from Ali Chaouk.

Later in the day, Swanwick arranged for Hablas to go to St Kilda Road Police Station, accompanied him there and was present during Hablas's interview with police. The next day, Swanwick similarly arranged for Ali Chaouk to have an interview with the police. Swanwick was also present during this interview.

Swanwick subsequently acted for Ali Chaouk in other matters. He also arranged statements from Ali Chaouk's wife and mother-in-law which provided alibis for Ali Chaouk at the time of the shooting of Haddara. Swanwick used Hablas's statement in other matters before the Magistrates Court, essentially repeating the admissions. It should be noted that Hablas also repeated his admissions to the killing (in self-defence) to the police and to two under-cover operatives while in custody.

At a later stage, Hablas told Swanwick that the initial statement was not true (although without naming the shooter) but Swanwick did not act on these new instructions. Perhaps not surprisingly, Hablas subsequently changed lawyers: first to Ron Tait, whose major involvement was in a bail application, and then to Robert Stary Lawyers¹⁷, who were his solicitors up to, and including, trial.

The Supreme Court Trial

The Voir Dire

The entire Supreme Court proceedings took fifteen days, of which seven days were devoted to an extensive voir dire and other pre-trial issues. The voir dire, whose purpose was to have the confessional statement of Hablas ruled inadmissible, heard evidence from Hablas, Ali Chaouk and Swanwick. It also drew on evidence given in other proceedings.

It was clear from the outset that both the judge, King J, and the prosecutor, Gavin Silbert QC, were very aware of the difficulty posed by the challenge to the admissibility of Hablas' statement. If it were to be ruled inadmissible, Hablas would be acquitted and, as a result, there would be no prospect that Ali Chaouk would be convicted of murder:

HER HONOUR: I mean, the problem we have is that if Mr Hablas' statement is ruled out in relation to this, he will be acquitted of the murder and if Mr Ali Chaouk is called -sorry, is charged - - -
MR SILBERT: He will be acquitted of the murder as well.
HER HONOUR: He will be acquitted of the murder on the basis that Mr Hablas has made a confession to the killing.
MR SILBERT: Absolutely.
HER HONOUR: Now, that's not the interests of justice.
MR SILBERT: No, it's not.
HER HONOUR: That is a conspiracy to pervert the course of justice.
MR SILBERT: Absolutely.
HER HONOUR: And I have to say I don't intend - I don't think it's right that this court be a party to it.¹⁸

This difficulty, noted by both the judge and prosecutor, could have ramifications beyond this matter and set an unfortunate precedent whereby conflicts of interest could be deliberately established in an attempt to avoid conviction.

During Swanwick's voir dire testimony, the issue of whether or not he had acted for both Hablas and members of the Chaouk family was of primary importance. King J took an active role:

HER HONOUR: Did you act for the Chaouk family generally Mr Swanwick?---No. No, I didn't.
...
When did you first act for Mr Ali Chaouk?---The first time that I took any step which could have been regarded as acting on his behalf was probably a couple of days after the 21st of June when I arranged for Mr Ali Chaouk to attend to be interviewed and I attended with him throughout that interview process.¹⁹

However, shortly thereafter, Swanwick admitted that he was 'acting for Matwali [Chaouk – Ali Chaouk's brother] at the time'²⁰. Despite some probing questioning from Her Honour, Swanwick

¹⁷ The author is a criminal defence solicitor at Robert Stary Lawyers, see n1.

¹⁸ *Hablas* (n 14) 10.

¹⁹ *Hablas* (n 14) 26.

²⁰ *Hablas* (n 14) 28.

maintained that he was acting 'only for Mr Hablas and not for Mr Chaouk'²¹. Later, when Her Honour asked him 'Why would you not tell the police forthwith that your client had falsely told them that he was the shooter?'²², Swanwick could not provide answers that satisfied Her Honour, who said "Do not yell at me, Mr Swanwick, I will not put up with it."²³

The issue of whether Swanwick was acting for Hablas alone was addressed in cross examination by defence counsel, Julian McMahon, who established that by the next day²⁴, Swanwick was acting for Ali Chaouk:

MR McMAHON: So you were acting for Ali Chaouk at that record of interview, yes or no?---Strictly speaking the answer to that would be yes.²⁵

Defence counsel also noted that several weeks later Swanwick had recorded in an email "As you know, we act for two people who are involved in a murder inquiry which you are conducting"²⁶. Swanwick tried to make a distinction between the ways in which he was acting for Ali Chaouk and Hablas, but not to the satisfaction of Her Honour.²⁷

Swanwick's evidence from other proceedings was introduced where, in an email to the police (dated 14 July, 2009), he stated:

You have made it clear to the undersigned that you do not believe Mr Hablas's account of events and you believe Mr Chaouk was directly involved in the shooting either together with Hablas or by himself. You've advanced no reason why you hold that view. Nonetheless based merely on the fact that you happen to suspect that Ali Chaouk is involved you have suggested that this firm has a conflict of interest in dealing with both men. I have told you and now reiterate that you are wrong and there is no conflict. Unless and until it appears on the basis of proper material that now two client's need separate representation, we are entitled to represent both of them"²⁸

Clearly, at this stage Swanwick was attempting to justify his approach to the issue of conflict that had been first raised in Hablas's police interview. As Swanwick recalled:

the police had made it clear that they certainly, they certainly wanted to talk to Ali about his role in the shooting, whether they actually went so far as to say that he was a suspect. Yes, I think they probably did.²⁹

Her Honour then proceeded to remind Swanwick that, on the night of Hablas's interview, it was clear that the police did not believe that Hablas was the shooter:

HER HONOUR: Well, I will just remind you of a file note of yours. "At some stage quite early in the process at the Homicide Squad on 21 June 2009 it became apparent to me the police didn't believe that Hablas had shot Haddara despite the content of his statement. I do not recall the precise comments

²¹ *Hablas* (n 14) 32.

²² *Hablas* (n 14) 33.

²³ *Hablas* (n 14) 34.

²⁴ The next day rather than 'probably a couple of days after' as Swanwick had told the judge, *Hablas* (n 14) 26.

²⁵ *Hablas* (n 14) 38.

²⁶ *Hablas* (n 14) 40.

²⁷ Her Honour examined Swanwick on this point extensively, covering almost two pages of transcript (*Hablas* (n 14) 40-42). Some indication of her views can perhaps be gained from her questions to Swanwick, such as "you understand what acting as a solicitor means?" and "Mr Swanwick, how long have you been a lawyer?" (*Hablas* (n 14) 41).

²⁸ *Hablas* (n 14) 42.

²⁹ *Hablas* (n 14) 45.

which were made to me or what particular detective, but as the evening progressed it became evident that the police believed that Ali Chaouk was the shooter and that Hablas was taking the fall to protect Ali Chaouk"? --- Having been reminded that's what I recorded about that night that seems to establish that's when it was.³⁰

Defence counsel put to Swanwick that he had been assisting Ali Chaouk, during the course of his police interview, to establish an alibi:

Mr McMAHON: During the record of interview of Ali Chaouk for quite a few pages in that record of interview you questioned Mr Chaouk in the presence of the police and assisted him to outline in considerable detail his alibi for the time of the killing of Mohammed Haddara. Do you agree with that? --- I've got no idea.³¹

Defence counsel noted that Swanwick had said that he had 'ferried' Ali Chaouk's wife and mother-in-law to the police station to be interviewed and suggested that this would effectively provide alibis for Ali Chaouk³². Counsel then elicited from Swanwick the significance of such alibis:

Mr McMAHON: Shoring up Ali's alibi?---Providing whatever information they had about his whereabouts on the night of the shooting.³³

...

MR McMAHON: So with that knowledge you then must be aware that the apparent alibi of Ali Chaouk is a matter of some real significance.

MR McMAHON: You must have been aware of that?---In the matter of some? Real significance. It may be false, it may be untrue? ---Well, yes, it was a matter of some significance, yes.³⁴

With regard to his evidence at this stage, Her Honour was clear in her views, eg "Mr Swanwick, your judgment I think is really in peril at this point?"³⁵

It is perhaps instructive to note the reason that Swanwick gave for his decision to cease acting for Hablas:

MR McMAHON: At what stage did you cease acting for Mr Hablas?---Shortly after he was arrested it became apparent that he would need legal aid.

...

MR McMAHON: Right. Now, I thought you indicated you were in the process of handing the matter over at that time?---Well, I was attempting to explain that shortly after Mr Hablas was charged with murder I ceased, MW Law ceased to be the solicitor of record for Mr Hablas, because we were not on the Legal Aid Indictable Offences Panel. ... and it was not all that long after the bail application that I ceased to act, MW Law ceased to act in any capacity. I think it was somewhere around November 2010, because that was the stage at which it became apparent that there were disagreements with Mr Hablas and his family in relation to whether there would be any payment made on the account and if so by whom, and I was instructed to cease acting.³⁶

In short, it seems clear that lack of private funding from Hablas or his family was a major, if not the principal, reason that Swanwick ceased to act. This seems sensible on one level, since he should not have been expected to represent Hablas without remuneration. However, this response also suggests that there was a potential conflict at another level, namely between Hablas's legal interests

³⁰ *Hablas* (n 14) 48.

³¹ *Hablas* (n 14) 46.

³² *Hablas* (n 14) 75, 85, 148-151.

³³ *Hablas* (n 14) 85.

³⁴ *Hablas* (n 14) 87.

³⁵ *Hablas* (n 14) 89.

³⁶ *Hablas* (n 14) 34-35.

and Swanwick's commercial interests. Swanwick was clearly reluctant to cease acting for Hablas in the early stages of his involvement and the prospect of the considerable fees that could be generated through the legal processes up to, and including, a Supreme Court trial may have been a factor in his reluctance. In this regard, however, it appears that Swanwick did not take any steps to formalise the engagement with Hablas; there was no written client agreement with Hablas.³⁷

In the remainder of the voir dire, there was extended questioning by defence counsel and Her Honour and, as a result, many facts³⁸ came to light which appear to indicate that there were numerous problems with Swanwick's contention that he was not conflicted.

At the end of the voir dire, Her Honour was scathing in her views of Swanwick:

HER HONOUR: I should indicate to you, Mr Swanwick, that I am singularly unimpressed with your attitude and your behaviour as a solicitor and I am going to contemplate reporting you to the organisation that deals with solicitors. I think your behaviour has been reprehensible?---Might I ask which behaviour
Well, so much of it I'll have to list it, but I just thought I should warn you. Okay. Thank you. You are excused?---Do I have the opportunity to respond to that comment?
At this point no?---No
No, you're done, thank you?---Thank you for the courtesy afforded to an officer - - -
Thank you Mr Swanwick. Just leave.³⁹

Before the Jury

Two important elements of the defence case were to raise doubts both about the credibility of Hablas's statement and also about its preparation. Accordingly, Swanwick's role was the subject of cross examination and his credit was at issue. Under questioning, Swanwick admitted that he had received an adverse ruling from the Bar's Ethics Committee:

MR McMAHON: How long have you been a solicitor?---First time or second time?
First time?---I was a solicitor for five years before going to the Bar.
When? When?---From 1985 through 1989.
Then you went to the Bar?---Yes.
And you stopped being a barrister when?---About 2003 from recollection.
Did you get into any trouble with the Bar before you stopped?---I beg your pardon?
Did you get into any trouble with the Bar before you stopped being a barrister?---What do you mean by that?
HER HONOUR: What do you mean by that?
MR McMAHON: Did you get findings against you by the Ethics Committee?---I'm sorry?

³⁷ *Hablas* (n 14) 761.

³⁸ For example that (i) Swanwick was aware that Ali Chaouk was near the scene of the shooting at the relevant time (66), (ii) he provided advice to an associate of Ali Chaouk's (Cosmo Candido) whose statement regarding the possession of a car that could have been at the shooting did more to assist Ali Chaouk than it helped Hablas (84), (iii) he already was acting for Matwali (Ali Chaouk's brother) regarding a matter of attempted murder (90), (iv) he had not discussed what had happened to the Chaouk family home on the night of the shooting (it had been 'attacked' by members of the Haddara family (90-91)), (v) neither he nor his firm ever signed up Hablas as a client (108), (vi) there were indications that Swanwick's process of taking the statement were flawed (113-122), (viii) he may have underestimated the role of Ali Chaouk in its preparation (134) and (viii) Swanwick may have been aware of news reports linking Hablas and Ali Chaouk to the killing before the statements were finalised (142-3). Note that the numbers in parentheses refer to pages in *Hablas* (n 14).

³⁹ *Hablas* (n 14) 167-8.

Do you have any findings against you by the Ethics Committee?---Yes, I did.⁴⁰

Defence counsel then pursued the matter of conflict of interest and, specifically whether Swanwick, and other members of his law firm, was also acting for the Chaouk family:

MR McMAHON: Were you in a conflict of interest on this day⁴¹?---No, but it's the first time I seriously thought about the possibility that a conflict of interest might emerge.

...

MR McMAHON: You were the family Chaouk solicitor, the Chaouk family solicitor at that time, weren't you?---I was one of at least a couple of solicitors who were acting for the Chaouks at different matters at that stage.

What was the name of your firm?---MW Law.

Was that firm the family firm for the Chaouk family?---I don't know what you mean by "the family firm".

They took their business to you?---We acted for different members of the Chaouk family in different matters.⁴²

In this regard, the questions asked by the police of Swanwick at the commencement of their interview with Hablas are noteworthy, indicating that others were concerned by the possibility of a conflict arising because Swanwick seemed to be acting for both Hablas and Ali Chaouk :

DSC GRAY:"Yep, okay, now just quickly, Mr Swanwick, you are a lawyer acting for Mr Hablas?" --- "That's correct."

DSC GRAY "Okay, now I, I just need to clarify Mr- sorry, Mr Chaouk, Ali Chaouk is also a person of interest to this investigation who will be spoken to at a later stage, I just want to clarify that there is no conflict of interest in regards to your being here on behalf of Mr Hablas knowing that we will also be speaking to Mr Chaouk at a later date."---"I, I don't presently perceive that there is any conflict of interest.I'm acting for Mr Hablas.⁴³ To the extent to which any conflict appears in the future I will make sure that I am acting solely for Mr Hablas."⁴⁴

The issue of conflict of interest was inescapable at that point in the police interview of Hablas. Moreover, at that stage, Swanwick also believed that the police suspected that Ali Chaouk was the shooter⁴⁵. Defence counsel put the existence of this conflict to Swanwick, who provided a response:

MR McMAHON:And you were in a conflict at that time because you were acting for two people, both of whom was suspected of being involved in the killing?---I'm sorry, I don't anticipate in that situation I was in conflict. Now you can tell me I'm right or wrong and we can have a difference of opinion about it, but I don't believe that put me in a situation of conflict because there was nothing which was known to me and nothing which the police had advanced to me which led me to believe at that stage that anything which had been said to me by Ahmed Hablas was untrue. And the fact that police are following their line of enquiry does not put me in a situation of conflict in my belief.⁴⁶

At this point in the cross examination, Her Honour sent the jury out and raised her concern about the appropriate way to treat the issue of conflict of interest. She stated:

⁴⁰ *Hablas* (n 14) 742.

⁴¹ Here, defence counsel is referring to a time after the shooting, perhaps a month or two later.

⁴² *Hablas* (n 14) 746-747.

⁴³ It should be noted that by this time, Swanwick had also taken a statement (an exculpatory one) from Ali Chaouk, *Hablas* (n 14) 725.

⁴⁴ *Hablas* (n 14) 825.

⁴⁵ *Hablas* (n 14) 750.

⁴⁶ *Hablas* (n 14) 750-751.

HER HONOUR: Mr McMahon, this is a really interesting ethical situation as to whether or not this is a conflict of interest and I'm not sure that you really should be putting it to the jury in this way.⁴⁷

There followed a spirited exchange between Her Honour and defence counsel:

HER HONOUR: He⁴⁸ was arrested and unarrested at the conclusion of the interview. That means he's not a suspect at that time ... There's a real concern about the fairness to this witness. You're putting as a fact that because police suspect someone that means he's got a conflict. I have never understood the law⁴⁹ to be that.

MR McMAHON: At the end of the record of interview on page 256 the police say to my client, "You are believed to have committed the offence of murder." So he's a suspect at the end of the record of interview.

HER HONOUR: Then why is he not charged?

MR McMAHON: I don't say this flippantly or rudely, but it's not relevant to what I'm doing.⁵⁰

The exchange then continued about the nature of any conflict, in particular about foreseeability and the role of client instructions:

MR McMAHON: A lawyer shouldn't act for two people where there is a foreseeable conflict of interest or an actual conflict of interest.

HER HONOUR: At that time there is no conflict of interest on his instructions. Is that not right? And there is no foreseeable conflict of interest on his instructions at that time. Is that also not right?

MR McMAHON: No, I disagree with that, Your Honour. He's got two people on tape both suspected of the shooting.

HER HONOUR: No. You can suspect 300 people.

MR McMAHON: It's a foreseeable conflict of interest.

HER HONOUR: It is not a foreseeable conflict of interest acting upon his instructions and that's the point. He is bound to act upon his instructions.⁵¹

This difference between defence counsel and Her Honour was not satisfactorily resolved after further discussion, and counsel conceded the point.⁵² Nevertheless, Her Honour indicated that she was content that counsel could continue the cross-examination of those aspects of Swanwick's behaviour that could indicate conflict, provided that he did not refer to such behaviour as conflict of interest, 'I've got no problem about you putting anything to him, just not calling it the conflict of interest.'⁵³

In the remainder of his cross examination, defence counsel raised a number of small, almost circumstantial, issues that nevertheless were directed at Swanwick's role and the inference that he was acting in Ali Chaouk's interests.⁵⁴

⁴⁷ *Hablas* (n 14) 752.

⁴⁸ The "He" in this passage refers to Hablas.

⁴⁹ Presumably Her Honour meant 'the rules of professional conduct' or 'the ethical requirements of a lawyer' rather than 'the law' here.

⁵⁰ *Hablas* (n 14) 752-753.

⁵¹ *Hablas* (n 14) 753-754.

⁵² Mr McMAHON: Well, I'm not going to continue arguing against Your Honour, see *Hablas* (n 14)754 .

⁵³ *Hablas* (n 14) 755.

⁵⁴ These covered whether (i) Swanwick, or his firm, had ever entered into any formal client agreement with Hablas (they had not), (ii) Swanwick had led Hablas in the preparation of the statement (this was denied), (iii) there was any explanation that Swanwick could offer for apparently acting for both Hablas and Ali Chaouk (here, Swanwick reasserted his earlier answer, namely that he "considered that getting Mr Chaouk to attend the record of interview was a significant step in my representation of Mr Hablas" (798)), and (iv) Swanwick would deny that he and the law firm that employed him, MW Law, acted on behalf of different members of

In his closing remarks to the jury, the prosecutor emphasised that the admissions made in Hablas's statement were crucial and he highlighted the importance of Swanwick's role and of his evidence:

Mr SILBERT: Now, again, your assessment of the reliability of that confession – and the Crown case is that it was a true confession – depends very much on your assessment on the credit of Mr Swanwick. Probably the critical witness in this trial, Mr Swanwick.⁵⁵

The jury acquitted Hablas after a very short deliberation. On this basis, it can perhaps be inferred that the jury considered that Swanwick was not a witness of truth and that he had been conflicted, at least in layman's terms.

Discussion

The Ethical Issues

The exchange above, in the absence of the jury, between Her Honour and defence counsel about 'this ... really interesting ethical situation'⁵⁶ raises a number of important issues concerning:

1. Whether or not Swanwick had a conflict of interest
2. The role of client's instructions in any consideration of such a conflict
3. The foreseeability of any conflict

Did Swanwick have a Conflict of Interest?

For these purposes, the discussion will be confined to any conflict arising from Swanwick's role in acting for Hablas as well as for Ali Chaouk and other members of the Chaouk family.⁵⁷ It should be noted that a conflict of interest does not necessarily, or automatically, arise when a lawyer acts for two or more co-accused, for example when a single lawyer or firm represents members of large groups of people charged for similar acts, such as in civil disobedience demonstrations. Rather, it is an issue of whether there was, in the terms of clause 8.2 of the LIV Rules, 'a conflict of interest between two or more clients of the practitioner.'

In this case, it seems reasonable to conclude that both Hablas and Ali Chaouk were clients of Swanwick. It is not clear that both were clients on the day that the statement was made⁵⁸ but Swanwick conceded that he was acting for Ali Chaouk on the following day.⁵⁹ On this basis, the questions that need resolution are (1) whether there was an actual or foreseeable conflict between the interests of Hablas and Ali Chaouk and, if so, (2) whether (in the terms of clause 8.3 of the LIV Rules) each man consented to Swanwick acting for the other as well. There was no evidence suggesting that Hablas had given, or been asked to give, consent to Swanwick to act for both Hablas and Ali Chaouk. Given his youth and his lack of sophistication, it may be considered doubtful

the Chaouk family (Swanwick did not deny this) (761-803). Note that the numbers in parentheses refer to pages in *Hablas* (n 14)

⁵⁴ *Hablas* (n 14) 167-8.

⁵⁵ *Hablas* (n 14) 1048-1049.

⁵⁶ *Hablas* (n 14) 752.

⁵⁷ The possibility of an additional source of conflict, namely between Swanwick's commercial interests and the interests of Hablas has been briefly discussed above in the section headed *Voir Dire*.

⁵⁸ Although it is clear, at a minimum, that other members of the Chaouk family were clients of MW Law, the firm for whom Swanwick worked.

⁵⁹ *Hablas* (n 14) 38.

whether Hablas was capable of giving consent, whether informed, explicit or inferred. The difficulty of Hablas providing consent in the circumstances is illustrated by the following extract from the cross examination of Swanwick in the voir dire:

Mr McMAHON: How could he tell you that it was Ali when he knows that you're Ali Chaouk's solicitor?---Well, I guess that's up to him. All I could do - - -

Mr McMAHON: Sorry, you guess that's up to him. You're acting for a 20 year old man and a Chaouk from a notorious extremely violent family and you say you guess it's up to him to tell you that Ali Chaouk is the killer when you'll just go off and tell Ali Chaouk. How is it up to him? You're the one in the position of irreconcilable conflict.⁶⁰

Accordingly, the answer to the second of these questions would appear to be that there was no consent. As a result, the critical question is the first one, ie whether there was an actual or foreseeable conflict. Swanwick's position was clear, namely that he was relying on the instructions of Hablas:

SWANWICK: Now you can tell me I'm right or wrong and we can have a difference of opinion about it, but I don't believe that put me in a situation of conflict because there was nothing which was known to me and nothing which the police had advanced to me which led me to believe at that stage that anything which had been said to me by Ahmed Hablas was untrue.⁶¹

This position of Swanwick has internal consistency, since it is reliant on his subjective views, informed by the client's instructions. It is thus important to understand the relevance of instructions in these circumstances.

What is the role of client's instructions?

Although Her Honour referred to the importance of the client's instructions in her discussions with defence counsel, the relevance of this issue is not clear and warrants some elaboration.

There are few references to the role of instructions in assessing conflict of interest, in the way referred to by Her Honour, in solicitors' professional conduct rules. There is nothing of relevance in the LIV Professional Conduct Rules. In the ASC Rules, clause 8.1 states 'A solicitor must follow a client's lawful, proper and competent instructions.' This is unexceptional and of little utility in circumstances such as these. A more useful approach is that provided by Ysiah Ross, who writes:

Lawyers are agents of their clients and are under contractual obligations to them. Therefore they are required to do what their clients instruct them to do within the terms of the contract ... Thus, lawyers do not have to take instructions that require unethical or illegal behaviour. Lawyers will also on occasions have to go behind clients' instructions. Clients may be lying when giving instructions and lawyers have the duty to tell the client that instructions do not make sense or are inconsistent with the known facts⁶²

If this approach were to be applied to this case, it would raise a number of issues such as:

1. Was there a valid contract between Hablas and Swanwick?

⁶⁰ *Hablas* (n 14) 166.

⁶¹ *Hablas* (n 14) 750.

⁶² Ysiah Ross, *Ethics in Law; Lawyers' Responsibility and Accountability in Australia*, (6th edn LexisNexis Butterworth, Australia 2014) [9.29].

2. Did Hablas's instructions require unethical behaviour?
3. Should Swanwick have gone "behind" Hablas's instructions?
4. Were Hablas's instructions nonsensical or inconsistent with Swanwick's knowledge of the facts?

It is useful to consider the likely or possible answers to these questions from an objective observer, such as the reader of this article or perhaps the trial judge, rather than from the understandably subjective perspective of Swanwick. The situation facing Hablas and Swanwick was complicated and consideration of these four questions would suggest that following clients' instructions is not such a simple response to the potential for conflict as Her Honour's remarks might indicate. In all the circumstances, it is submitted that Her Honour's statement, "(h)e is bound to act upon his instructions,"⁶³ is perhaps too definitive.

What are the Relevant Categories of Conflict of Interest?

There are several categories of conflict, including actual, foreseeable, potential and perceived.

The LIV Rules do not explicitly refer to the terms 'actual' or 'potential' conflict of interest. Rather, clause 8.1B allows a solicitor to act for more than one party:

- (i) where no material conflict of interest has arisen, and
- (ii) where the practitioner is permitted to act ... in other circumstances where the practitioner reasonably believes that the likelihood of a material conflict arising is unlikely

The ASC Rules do make a distinction in clause 11.2 between 'a conflict or potential conflict' but without the additional qualifications of the LIV Rules, namely the materiality of the conflict and the reasonable belief that it is unlikely that any such material conflict will arise.

When discussing Swanwick's behaviour in the trial, Her Honour and defence counsel both used the term 'foreseeable' which is perhaps synonymous with 'likely' or 'potential' as a category of conflict of interest. They did not, however, address the second aspect of clause 8.1B of the LIV Rules, namely whether Swanwick's belief was reasonable. As discussed above, there are grounds for doubting the reasonableness of his belief. It should perhaps be added that the materiality of the conflict does not seem to be contentious.

It is noteworthy that, in the context of a whether a solicitor has, or may have, a conflict of interest when acting for two parties, there are two categories, namely an actual conflict and a potential conflict. However, in other contexts, there is another category, namely a *perceived* conflict of interest. This is particularly so in the public sector,⁶⁴ for example:

A **perceived or apparent conflict of interest** can exist where it could be perceived, or appears, that a public official's private interests could improperly influence the performance of their duties – whether or not this is in fact the case⁶⁵

⁶³ *Hablas* (n 14) 754.

⁶⁴ Other examples include (1) The Australian National Audit Office, *Conflicts of Personal Interest and Conflicts of Role*, The ANAO 2003 Better Practice Guide *Public Sector Governance*, Vol 2, Guidance Paper No. 6, and (2) The Australian Government Solicitor, *Conflicts of interest for tenders, funding programs and other government initiatives*, Australian Government Solicitor Factsheet, February 2015, http://ags.gov.au/publications/fact-sheets/Fact_sheet_No_26.pdf accessed 19 June, 2016.

⁶⁵ The Independent Commission Against Corruption and the Crime and Misconduct Commission, *Managing Conflicts of Interest in the Public Sector – Guidelines*, November 2004, http://www.integrity.qld.gov.au/assets/document/catalogue/icac_info_sheets/Managing_conflicts_of_interest_in_the_public_sector_toolkit.pdf accessed 14 June, 2014.

An important feature of perceived conflict is that it is an objective consideration. In the words of the Victorian Ombudsman “the test ... should be the likely perception of a ‘reasonable person.’”⁶⁶ The Ombudsman went further; he noted that the distinctions between the different categories of conflict caused confusion and suggested that the test was whether a reasonable observer could conclude that a conflict may exist:

The [Code of Conduct for Victorian Public Sector Employees] makes distinctions between ‘actual’, ‘potential’ or ‘perceived’ conflict of interest. This is important because a recurring theme in my enquiry was the confusion caused when agencies or individuals attempted to discriminate between ‘real’ and ‘apparent’ or ‘perceived’ conflicts of interest. I consider that the existence of a conflict of interest should be based on whether a reasonable observer can conclude that a conflict may exist.⁶⁷

Although developed in a different, non-legal context, this is a much more stringent test than that of the LIV and ASC Rules where there is no objective consideration. As clause 8.3 of the LIV Rules indicates, it is the view of the legal practitioner which matters; only he or she is regarded as being in a position to assess the potential for conflict. On this basis, Swanwick relied on his subjective beliefs and was able to disregard the explicit perceptions of other, reasonable observers such as the police investigators who expressed their concerns about the existence of a potential conflict.

There is no clear reason why the test for conflict of interest that applies to lawyers should be less stringent than that for public servants and others. Rather, it is submitted that the mere potential for a conflict of interest should be sufficient for the lawyer to cease to act for both parties, since in the words of Justice Cummins of the Victoria Supreme Court, “the phrase ‘potential conflict of interest’ is tautologous.”⁶⁸

Concluding Remarks

The trial judge, King J, was very considered in her approach. As is clear from her questioning of Swanwick in the voir dire, Her Honour had great misgivings about Swanwick’s role and conduct and about the fairness of the proceedings more broadly. Nevertheless, these misgivings were not communicated to the jury and she took steps to restrict the cross-examination. Her Honour was concerned about the use of the term ‘conflict of interest’ and its potential to confuse the jury. She thus directed that defence counsel should cease to use the term and should confine his cross-examination to Swanwick’s conduct accordingly. In this way, she presumably reasoned that the jury would focus on the substantive issues relating to Swanwick’s involvement in the taking of Hablas’s statement and whether this statement was reliable.

Based on (1) the short time for its deliberation and on (2) the prosecutor’s statement in closing that Swanwick was the critical witness, it would appear that the jury identified the many problems with Swanwick’s conduct and the consequences which followed. The jury members may not have been able to define conflict of interest, but like Justice Potter Stewart said in a similar context with regard to obscenity, “I know it when I see it.”⁶⁹

⁶⁶ Ombudsman Victoria, *Conflict of Interest in the Public Sector*, March, 2008, 14, <https://www.ombudsman.vic.gov.au/getattachment/f6ba8398-2e7b-41f6-bbfd-bed87f0bcfac> accessed 14 June, 2014.

⁶⁷ Ombudsman Victoria, (n 66) 16.

⁶⁸ Justice P.D. Cummins, *An Ethical Profession; Dealing with Ethical Dilemmas* (Speech delivered at a Law Institute of Victoria Continuing Legal Education seminar, Melbourne, 28 February, 2002)

⁶⁹ With regard to the term ‘hard-core pornography’, Justice Potter Stewart said in his concurring opinion in *Jacobellis v. Ohio* 378 U.S. 184 (1964), “I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”

The circumstances of this case were unusual and situations such as that facing Swanwick and Hablas do not fall readily into the standard frameworks for conflicts of interest and for legal ethics. Nevertheless, this case highlights some significant inadequacies of the current rules of conduct for solicitors. Accordingly, it would appear that consideration should be given to changing the ASC Rules, in particular, to extending the definition of a conflict of interest to include perceived conflicts and to make the test an objective, rather than subjective, one. This case also reinforces the point of Evan and Parker that was referred to earlier, namely the difficulties of using 'client consent as the 'cure-all' for potential conflict in joint representation',⁷⁰ in particular for young clients such as Hablas. A more formal approach, in particular a presumption that independent advice be necessary to allow concurrent representation, should be considered. Such independent advice need not be expensive since, in Victoria at least, it can be provided through the LIV.

Several years later, in 2016, police charged Ali Chaouk with the murder of Mohammed Haddara. This was on the basis of new evidence, some of which was based on accounts of events shortly after the shooting by two witnesses. Swanwick has not been disciplined for his role in this matter, even though Her Honour thought his conduct, 'reprehensible'.⁷¹ It is possible that Her Honour did report Swanwick to the relevant professional body, in this case the Legal Services Commissioner of Victoria, as she had contemplated⁷² but there is no record that she did, nor any indication of any action by the Commissioner.

⁷⁰ Parker and Evans (n 5) 253-254.

⁷¹ *Hablas* (n 14) 167.

⁷² *Hablas* (n 14) 166.