The Court of Appeal for Bermuda

CIVIL APPEAL Nos. 2 and 6 of 2019

B E T W E E N:

WF (INTERVENER)

Intending Appellant

MAHESH SANNAPAREDDY

1st Applicant

BERMUDA HEALTHCARE SERVICES

2nd Applicant

BROWN DARRELL CLINIC LIMITED

3rd Applicant

- v -

THE COMMISSIONER OF POLICE

1st Respondent

-and-

THE SENIOR MAGISTRATE FOR BERMUDA

2nd Respondent

Before: **Clarke, President**
Kay, JA
Smellie, JA

Appearances: Mark Pettingill and Victoria Greening, Chancery Legal Ltd., for the Intending Appellant;
Delroy Duncan, Trott & Duncan Ltd., for the 1st – 3rd Applicant
Mark Diel and Dantae Williams, Marshall Diel & Myers Ltd., for the Respondent

Date of Hearing: **Tuesday, 11 June 2019**
Date of Judgment: **Friday, 21 June 2019**

JUDGMENT

CLARKE P:

1. The question in these proceedings is whether Chancery Legal Limited ("CL") should be restrained from acting for the Intervener on account of what is said to be a conflict of interest between their director and one of their employees and/or because their continuing to act would be in breach of the Barristers Code of Professional Conduct 1981 ("the Code of Conduct").

2. The learned judge, in a careful and detailed judgment, gave a summary of the applicable test in terms which I gratefully adopt:

> "4 *The Code of Conduct provides, inter alia, that a barrister cannot act for an opponent of a client or of a former client in any case in which his knowledge of the affairs of such client or former client may give him an unfair advantage (Rule 24).*
>
> *5 The common law test and statement of principles on the duty to protect confidential information is found in the judgment of Lord Millett in the leading House of Lords decision of* ***Bolkiah v. KPMG*** *[1999] 2 AC 222*:
>
> > *"It is incumbent on a plaintiff who seeks to restrain his former solicitor from acting in a matter for another client to establish (i) that the solicitor is in possession of information which is confidential to him and to the disclosure of which he has not consented and (ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own. Although the burden of proof is on the plaintiff, it is not a heavy one. The former may be readily inferred; the latter will often be obvious*" (p. 235 D)
>
> "*It is in any case difficult to discern any justification in principle for a rule which exposes a former client without his consent to any avoidable risk, however slight, that information which he has imparted in confidence during the course of a fiduciary relationship may come into the possession of a third party and be used to his*

> *disadvantage. Where in addition the information in question is not only confidential but also privileged, the case for a strict approach is unanswerable. Anything less fails to give effect to the policy on which legal professional privilege is based. It is of overriding importance for the proper administration of justice that a client should be able to have complete confidence that what he tells his lawyer will remain secret. This is a matter of perception as well as substance. …Many different tests have been proposed in the authorities … I prefer simply to say that the court should intervene unless it is satisfied that there is no risk of disclosure". (p 236F-237A)*

3. The judge also referred to the case in the Supreme Court of Canada – *MacDonald Estate v Martin* [1990] 3 SCR 235, where a somewhat similar test was enunciated. In that case the Court said:

> "*Once it is shown by the client there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfied the court that no information was imparted which could be relevant. The degree of satisfaction must withstand the scrutiny of the reasonably informed member of the public. This will be a difficult burden to discharge."* (p. 1236, D) (Emphasis added)

4. The history of events in this case is of some complication. I set out below what appear to me the most relevant events.

5. The Bermuda Police Service ("BPS") have for some time been carrying out an investigation ("**the Criminal Investigation**") into the medical activities of (i) Dr Mahesh Sannapareddy, the 1st Applicant/Claimant ("Dr Reddy"); (ii) Bermuda Healthcare Services Ltd ("BHCS"), the 2nd Applicant/Claimant; and (iii) Brown Darrell Clinic Limited ("BDC"), the 3rd Applicant/Claimant. The investigation concerns the Bermuda Healthcare Clinic ("the BHC Clinic") and the Brown Darrell

Clinic ("the BD Clinic"). The individuals concerned are Dr Reddy, who has oversight of the clinics, and the beneficial owners of the clinics, namely Dr Ewart Frederick Brown ("Dr Brown), the former Premier, and Wanda Gayle Henty-Brown ("Wanda Brown"), Dr Brown's wife.

6. What the BPS suspects to have happened is that unnecessary diagnostic services have been ordered for patients, and charged to them and their insurers, for the financial gain of those involved. The BPS believes that Dr Reddy and others have committed indictable offences namely fraud, corruption and money laundering.

7. Mr John Briggs ("Mr Briggs") is a Senior Investigator working with the BPS. He has over 40 years policing experience and direct knowledge of the Criminal Investigation, with which he has been engaged, as Deputy Senior Investigating Officer, since February 2013. In 2013 the then Director of Public Prosecutions, Rory Field QC, appointed Garret Byrne, a Senior Crown Counsel, to be the designated lawyer attached to the Criminal Investigation. In his Fourth Affidavit he records that in 2013 the investigation team reported to a group consisting of the Commissioner of Police, the DPP, the Deputy Governor and the UK Overseas Territory Law Enforcement Advisor. This group wanted the investigation team and the DPP lawyers to work jointly through the investigation phase. As a result, the current investigation team was redesignated the "Joint Investigation and Prosecution Team" ("JIPT").

2017

8. On **2** and **10 February 2017** the Senior Magistrate issued two Special Procedure Warrants ("SPWs") authorising the BPS to search the BHC and BD clinics. These warrants were executed on Saturday **11th February 2017**. On the same day the Applicants, represented by Trott & Duncan Ltd ("TD") sought leave to issue the present judicial review proceedings.

9. We were told by Mr Duncan that the SPWs were in two parts. One part concerned the patients' files. The other concerned confidential information other than those files, such as bank accounts.

10. On **11 February 2017** Hellman J made an order that the BPS should cease executing searches at the two clinics pending a review by the Supreme Court of all confidential patient records referred to in the SPWs and/or seized by the BPS to ensure, inter alia, that patient confidentiality was protected. By a later order of the same date, varying the earlier order, Hellman J ordered the return of the files seized to the clinics by 8 a.m. on Monday 13 February. The order allowed the BPS to copy the seized material but prevented them from reviewing its content.

11. On **13 February 2017** the Applicants filed an amended application for leave to pursue judicial review. There was a court hearing before Hellman J to determine directions on the execution of the SPWs. The court made an order prohibiting the BPS from reviewing and/or utilising the seized material for the purpose of their investigation pending the outcome of the application for leave to apply for judicial review or further order. The order permitted the copying of any uncopied material subject to various conditions.

12. On **16 February 2017** CL wrote to the Commissioner of Police on behalf of a lady (not the Intervener) who was a patient at both of the clinics. The letter highlighted the fact that the very exposure of the client's identity would be a breach of her confidentiality and a violation of her right to privacy; and referred to the anxiety and distress that the BPS had caused her as a result of the seizure of her personal medical information without her consent. The letter asserted that she had a right to know, and that she demanded to know, the legal authority that the BPS had to seize those records and what had been done with them. The letter posed six questions, the first of which was:

> *"1 Under what legal authority did the BPS rely on to seize and take possession of our client's private medical records> Please provide the actual wording contained in the warrants…."*

The letter ended by saying that CL was exploring the potential breach of their client's medical confidentiality, the invasion of her privacy, and the negligent infliction of economic distress that the actions of the BPS had caused her. The signatory of the letter was Shawn Crockwell, MP, who sadly died on 10th June 2017.

13. On **1 March 2017** Marshall, Diel & Myers ("MDM") replied on behalf of the Commissioner. Their letter confirmed that the BPS had seized the client's medical files as a result of a search warrant granted by the Senior Magistrate. It assured the client that she was not the subject of the ongoing police investigation, and confirmed that her file was subject to a protocol which the BPS had put in place to protect any concerns as to maintaining her confidentiality. The letter said that the contents of her file had not been reviewed by the BPS and her file had been sealed pending further order of the Supreme Court.

14. Thereafter the matter appears to have gone into abeyance for some time, so far as CL and any client of theirs were concerned.

15. On **14 March 2017** there was a public meeting at the Cathedral Hall in Hamilton attended by over 100 patients of the BD clinic who voiced their concern about the seizure of their medical files.

16. On **13 April 2017** the Applicants filed the final version of their application for leave to apply for judicial review.

17. On **15 June 2017** Hellman J gave the Applicants leave to apply for judicial review on the basis of the final version of their application.

2018

18. By a summons dated **11 June 2018** ("the Access Summons") MDM sought access for the BPS to the files seized. The Second Affidavit of Mr Briggs, filed in support, indicated that the BPS sought to agree a protocol, filed with the summons, to keep the identity of the patients hidden through the use of a numbering key.

19. WF is an intervener in the judicial review proceedings who is a patient at the BD clinic, and whose files were seized. She represents a number of patients whose files were, also, seized. On **13 September 2018** she swore an affidavit in which she declared her preparedness to be a patient of record in a legal action to intervene on behalf of a large group of patients.

20. On **26 September 2018** CL filed a summons seeking leave for WF to intervene. In her affidavit in support, sworn on **25 September 2018**, she said that she was supported by a number of other patients whose information had been unlawfully seized by the police and who wished to have the court make a declaration as to the lawfulness of the seizure, viewing and retention of their personal medical information.

21. On **4 October 2018** a hearing took place attended by Counsel for the Applicants and for the BPS. What happened on that occasion is recorded by Subair Williams J in her ruling of 1 March 2019 ("the Ruling"):

> "*35. Mr. Duncan advised the Court that he was engaged in ongoing without-prejudice discussions with Mr. Diel in furtherance of reaching an agreement on a protocol under the protocol access summons. Mr. Duncan suggested that this would negate the need for the Court to hear the substantive judicial review application. Mr. Duncan submitted: that once the Court heard and resolved the intervener summons 'it would shape and give the contours to how we will deal with the protocol application. Either the protocol application is going to be dealt with by the First Respondent and the Applicants or*

> *it will be dealt with between the First Respondent and the Applicants and the Intervener. So that's really the direction we are going. I can say now that unless there is a very serious event that takes place in our discussions, it is unlikely that we are going to need time for a JR application… but again we have to see where the patients fit into that and it would be wrong for us to actually come down firmly on that until that issue has been resolved…*'

22. The judicial review application was effectively adjourned (by adjourning *sine die* a summons by the Applicants for further time to file and serve a hearing bundle and skeleton arguments in support of their judicial review application) and the Intervener was ordered to serve on the BPS a list containing the names of those she purported to represent.

23. On **11 October 2018** CL provided MDM with a list of 152 names (two of whom were deceased) that WF purported to represent. The list includes Dr Brown. All the names on the list were patients whose files were seized by the BPS under the SPWs. The list was exhibited to an affidavit of WF of 16 November 2018 as a list of patients who had expressed their "*concern and outrage that the medical files were seized and detained by the BPS*".

24. On **2 November 2018** there was a case management hearing before Subair Williams J. Mr Duncan advised the Court that he and Mr Diel were in the early stages of producing an agreed protocol as sought under the Access Summons. He advised the Court that the protocol would obviate the need for the substantive judicial review proceedings; see paragraph [39] of the Ruling. He explained that the Applicants were keen to see the patients intervene so that the patients could offer some input and direction on the protocol proposed. That would enable the Applicants to secure the patients' consent to the Applicants' discontinuing the proceedings. Some discussion took place as to exactly what was meant by Mr Pettingill stating that WF was a representative. Mr Pettingill said that he was taking instructions from WF only and the judge remarked that WF should be joined in her

own right. It was agreed that the appropriate approach was for signed statements to be provided for the patients concerned confirming their position in relation to the protocol.

25. Between **6 and 15 November 2018** CL filed with the Court signed statements by the 150-152[1] patients under a heading "*Brown Darrell Patients' Support of (WF) Intervener Application"*. Each signed statement read:

> "*I, undersigned, as a patient of Bermuda Health Care Services, who believe that my medical files were removed without our consent from the premises of BHCS, do hereby attach my signature attesting to my outrage and indignation.*
>
> *I believe that as long as the Bermuda Police Services are in possession of my private medical records, my fundamental constitutional right to confidentiality is being breached.*
>
> *I call for an end to this reprehensible violation of our rights.*
>
> *I understand that an action against the seizure of medical records from the premises of Bermuda Healthcare Services and Brown-Darrell Clinic by BPS is being led by (WF) and I give consent for my name to be included in said action"*

26. On **22 November 2018** an Order was made by which WF was permitted to intervene in the proceedings, representing the patients referred to in the previous paragraph. Mr Pettingill represented WF on this occasion.

27. On **29 November 2018** and **4 January 2019** MDM wrote to CL in relation to the Access Summons, seeking to secure agreement on a draft protocol which would

[1] This the phraseology of Subair Williams J in the Ruling, no doubt reflecting the fact that two of those named were dead.

facilitate access by the BPS to the medical files. MDM indicated that consideration would be given to all reasonable suggestions. The letter of 29 November 2018 enclosed a copy of the draft protocol which had previously been shared with the Applicants.

2019

28. On **7 January 2019** Ms Victoria Greening joined CL. She had between April 2014 and April 2017 been a Crown Counsel at the DPP.

29. On **14 January 2019** CL wrote to MDM to say that they would:

> "*not agree, nor sanction any attempt by you to use [the medical files], period. These files belong to our clients, it is our view that you came by them illegally and we want them back. We have no confidence in the integrity of the police in this regard.*"

30. On **12 February 2019** the parties appeared before Subair Williams J. She refused an application by the Intervener for an adjournment of the Access Summons pending the determination of a Contempt Summons issued by the Intervener dated **25 January 2019**, alleging that the BPS was in breach of the Court Order of 13 February 2017 or pending the determination of a summons filed by the Intervener on 11 February 2019 seeking disclosure of documents from the BPS. She adjourned the Access Summons to 14 February 2019. (The Contempt was later found not to have been established). On this occasion MDM raised with Counsel for the Intervener, Jeremy Lynch QC, the conflict of interest position of Ms Greening. Her employment by CL had become apparent from the fact that she was the author of four letters sent to MDM by CL in early February

31. On **13 February 2019** a meeting took place between the parties (at which Jeremy Lynch QC represented the Intervener, and Delroy Duncan the Applicants) to go

through the draft protocol. It is the case of MDM that the protocol was then agreed, save for an issue as to the number of files to be the subject of it.

32. On **14 February 2019** the Court ordered that the BPS should have access to the materials seized under the SPWs in the manner set out in the protocol. Mr Lynch QC confirmed that the parties had achieved an agreed protocol, without prejudice to his primary objection to the making of any protocol at all: see para 78 of the Ruling. His submission was that the Court ought not to permit police access to the seized material until a ruling was passed on the lawfulness of the search warrants and their execution.

33. On **19 February 2019** MDM sent a letter to CL concerning the conflict of interest in respect of Ms Greening. The letter invited CL to cease to act immediately and gave notice that, if it did not, BPS would have little choice but to apply to the Court for an injunction to prevent CL from continuing to act. On 21 February 2019 CL replied saying that, although Ms Greening had had discussions with Senior Crown Counsel, Garrett Byrne about her being involved in some way with the BPS' investigation of Dr Brown those discussions never amounted to anything and she had no involvement whatsoever with the case.

34. On **21 February 2019** the Court made orders adjourning the Contempt Summons and a summons of the Intervener of 11 February 2019 for certain disclosure until 11 March 2019, and gave the Applicants leave to apply to vary the order of 14 February 2019 and Part 2 of the Protocol, which is the part dealing with the clinics' records and not the patients" files. A Summons seeking to vary the order was filed on **12 April 2019.**

35. On **18 March 2019** BPS issued a Summons ("the Conflict Summons") seeking an order that CL be removed as Counsel of Record for the Intervener.

36. On **3 April 2019** the Intervener issued a Summons seeking the right to join the Applicants in their judicial review or, in the alternative, seeking the right to proceed independently in order to challenge (i) the lawfulness of the grant and execution of the SPWs as they relate to the patients' files and (ii) the BPS' decision to seize the medical files without the consent of the patients.

37. It is apparent that the Intervener took this position because it apprehended that the Applicants might not proceed with the judicial review, provided any concerns about the scope of the protocol were resolved,

The potential conflicts – Mr Pettingill

38. Mr Pettingill was the Attorney General of Bermuda between 2012 and 2014. In that capacity the BPS was not his client but he was privy to information given to him by the BPS in his capacity as Attorney General.

39. In his Third Affidavit of 27.2.19 Mr Briggs, who is a Senior Investigating Officer and was a member of the JIPT and the Deputy SIO, says, in paragraph [17] that Mr Pettingill, when AG, was briefed by him (Mr Briggs) on all aspects of the BPS' investigation into Dr Brown. He regularly requested and received updates. Intelligence information about Dr Brown came to the attention of the BPS and was shared with him. In paragraph [18] he says that there were multiple meetings with SIO Tomkins, SCC Byrne and Mr Pettingill to discuss evidence pertaining to the ongoing criminal investigation. Mr Briggs says that it was his understanding that the information was shared with Mr Pettingill in his capacity as Attorney General. In paragraph [20] Mr Briggs expresses himself certain that the information shared with Mr Pettingill during these briefings was highly confidential and concerned strategy operations of the BPS which would give the Intervener an unfair advantage,

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40. Mr Pettingill swore a responsive affidavit. He confirmed that he was Senior Counsel and Director of CL and that he was Counsel for WF. In paragraph 2 of his affidavit he says this:

> *"..I have known John Briggs for a number of years in a professional capacity and always found him to be an individual of truth and integrity, I do not take issue with the truth* ***of any of the matters that he raises in relation to me*** *and make this affidavit to* ***clarify a few issues*** *to the best of my recollection and indicate that in my respectful assessment I have never been in possession of information that would have been relevant to disclose in relation to the current matter*",

41. It might be thought that the fact that Mr Pettingill did not take issue "*with the truth of any of the matters that [Mr Briggs] raises in relation to [Mr Pettingill]"* was a clear acceptance of the matters summarised in the penultimate paragraph. But in the following paragraphs of his affidavit, as explained in his submissions to us, a different picture is painted. In paragraphs 6ff Mr Pettingill said:

> *"6 I am unequivocally not in possession or have knowledge of any information related to any police investigation… that would place me in a position of conflict in this matter representing the Intervener."*
>
> *"7 I did on a few occasions discuss various aspects of* ***a BPS investigation*** *in relation to Dr Brown but that I do not recall anything that was of a particularly specific evidential nature and in relation to paragraph 17 of Detective Briggs' affidavit I have absolutely no recollection of what this "intelligence" was other than to say I am certain it had nothing to do with an investigation into the operation of Bermuda Health Care Services or Dr Reddy…."*
>
> *"8 That with regard to paragraph 19 I have no recollection of taking part in a meeting which involved Senior Crown Counsel…but I do not deny it could have been the case. I can certainly state* ***that no such meeting related to any investigation whatsoever in relation to the current matter*** *nor can I recall any information that would give me or my current client any advantage in the current proceedings."*

> *"9 I have no idea what information I could possibly have that would give the intervener any advantage to their files being unlawfully seized by the BPS in 2017 and as relates "to strategy" other than my assessment that the a (sic) certain contingent of the BPS were obsessed with endeavouring to find any evidence they could to prosecute Dr Brown.…"*
>
> *"10 It is a fact with which I fully agree…that I the Attorney-General was considering and did in fact set up a Civil Recovery office to consider civil actions against a number of individuals."*
>
> *"11 I agree I may have been in possession of some information related to allegations against Dr Brown but candidly to my mind not anything more than the Country was aware of through extensive media coverage and leaks related to an investigation. I did have a significant concern, and it was certainly a reason that I made inquiry from time to time, as to how any investigation was proceeding because of the time delay and the fact it was costing the GOB an exorbitant amount of money.…"*

42. The gravamen of this evidence, as explained to us by Mr Pettingill, was that he was not privy to any information as to the BPS investigation into the medical malpractice at the clinics or Dr Reddy i.e. the Criminal Investigation, as opposed to BPS' investigation into other matters relating to Dr Brown.

43. Mr Diel for BPS submits that paragraph 7 is a contradiction in terms in that if Mr Pettingill had "*absolutely no recollection*" of what the intelligence was, it is difficult to see how he could be certain that it had nothing to do with investigations into the operation of Bermuda Health Care. Mr Pettingill's response to that is that you can perfectly intelligibly have no recollection of a particular something but be perfectly clear that it was not of a certain character.

44. Similar considerations apply to paragraph 8 In relation to the meetings referred to in paragraph 18 of Mr Briggs' affidavit in respect of which Mr Pettingill said that he

had no recollection of taking part[2], but averred that no such meeting related to any investigation in relation to the current matter. Paragraph 9 is to the same effect, although curiously worded. I suspect that what is meant is that Mr Pettingill had no idea what information he could possibly have that would give the in intervener any advantage "*in relation to the claim as*" to the files being unlawfully seized.

45. In his responsive affidavit Mr Briggs suggests that Mr Pettingill's reference to a certain contingent of the BPS being "*obsessed with endeavouring to find any evidence that they could to prosecute Dr Brown*" itself suggests not only that he was in possession of confidential information but also charged with determining whether a civil case could be brought against Dr Brown in relation to the evidence provided by the BPS.

The hearing before the Supreme Court

46. Before the Supreme Court Counsel for the parties chose not to cross examine any of the deponents. The result is that the Court was presented by clear evidence of a witness (Mr Briggs), accepted by Mr Pettingill, the former AG, to be an individual of truth and integrity, with the truth of whose evidence no issue was taken; but in relation to whose evidence Mr Pettingill took issue in subsequent parts of his affidavit and Ms Greening said that some of it was completely untrue: see [54] below. Mr Briggs for his part described Ms Greening's affidavit as "*grossly offensive and lacking substance*" and her "*attempts to distance herself from the investigation by hurling insults in the JIPT direction*" as falling short. Whilst I appreciate the difficulties that may arise in relation to the preservation of confidentiality and privilege, if cross examination takes place, it is not clear to me that no way round such difficulties could be found; and it seems to me unfortunate that no cross examination whatever took place.

[2] Mr Pettingill refers to paragraph 19 of Mr Briggs' Third Affidavit but it seems clear that he means paragraph 18.

47. It seems to me plain that Mr Briggs, when he referred to "*all aspects of the BPS investigation*" – see [17] of his Third Affidavit - must have been including the investigation of Dr Brown in relation to medical malpractice. Were it otherwise his evidence would have been deceptive. In any event his Fourth Affidavit makes it plain [13] that the information shared with Mr Pettingill related to information concerning whether BHC was over scanning patients and then charging insurers. Four of the insurance entities concerned were, he says, government entities so that the GOB would be entitled to bring a civil recovery action against Dr Brown and others if the same were found to be necessary.

Ms Victoria Greening

48. A similar problem arises in relation to Ms Greening. In his Third Affidavit Mr Briggs records that in April 2014, i.e. shortly after Ms Greening took up her appointment, the DPP increased the legal commitment to the investigation to include Ms Greening, working under Mr Byrne's direction. In his Fourth Affidavit Mr Briggs says that the background to her appointment was that Mr Byrne was considerably committed to other cases and did not spend sufficient time on the case. So she became involved, to support Mr Byrne. He knew that she was assigned to support him because he had numerous meetings with the DPP to explain how the "joint" part was not working and the DPP gave the recommitment by appointing Ms Green to the JIPT. In order to function as a member of the team, she was given a series of briefing documents and personal briefings by the SIO, Chief Inspector Tomkins, and by Mr Briggs, himself, which outlined the allegations and the current position of the investigations. Following these briefings Ms Greening worked together with Mr Byrne from "*an office adjoining that of the SIO and Deputy, where they were afforded unfettered access to all of the information held by the investigators in both documentary and electronic form*". There were regular formal and informal meetings involving the SIOs and Byrne/Greening.

49. During the time that she worked alongside Mr Byrne and the police investigation team, she was, Mr Briggs says, aware of the detailed allegations, data and the

evidence involving medical fraud focusing on the activities of Dr Brown and Dr Reedy, and the two practices, along with emerging data on patient's treatment which was being provided by insurance companies. She used that knowledge to assist and help craft the necessary advice proffered by Mr Byrne throughout her time of attachment to him which spanned several months.

50. In his First Affidavit Loxley Ricketts, a barrister employed in the Department of Public Prosecutions, swore that he was in November 2013 assigned by the DPP to the Specialist Team under the direct supervision of Garret Byrne. He says that in early 2014 Victoria Greening joined the department as Junior Crown Counsel and was assigned to the Specialist Team and was under the direct supervision of Garret Byrne. He was aware that Garret Byrne was tasked with being the primary point of contact and consultation for "*the investigative team dealing with the subject investigation*", which we take to be what was or became the JIPT. He records that Ms Greening joined the Department as Junior Crown Counsel and was assigned to the Specialist Team and was, consequently under the direct supervision of Garett Byrne.

51. He goes on to record that in late 2014 the then DPP convened a meeting with the investigative team which he attended along with Ms Greening. In paragraph 7 – 9 he says this:

> "*7 The Investigators at the meeting were John Briggs and Grant Tomkins who both briefed us fully about the following, inter alia:*
>
> *(a) the origin of the investigation;*
> *(b) the evidence gathered thus far;*
> *(c) the strategic decisions taken;*
> *(d) the intended duration of the investigations;*
> *(e) aspects on which they may need legal advice support for our department."*

> *"8 The meeting was held at the offices of the police as there was a need for confidentiality and that was emphasized with both me and Victoria Greening given the nature of the investigation. The offices themselves were designated as a sterile area that was accessible only by the few officers on the investigating team and the specifically identified members of our department that were given clearance, viz Garrett Byrne, Victoria Greening and myself".*
>
> *"9 Subsequent to that meeting, Garrett Byrne then assigned separate tasks to me and Victoria Greening, but I would not personally know the details of his instructions to her. However, I am aware that Victoria Greening had continued interaction with the investigative team".*
>
> *"11 It is the view of the department that Victoria Greening would be in a clear conflict of interest with Chancery Legal representing the Intervener given the confidential information to which she was privy. As such we support the request that Chancery Legal be removed as attorneys of record for the Intervener".*

52. In her responsive affidavit of 27 March 2019 Ms Greening confirms that she was employed as Crown Counsel with the DPP from 14th April 2014 to 28th April 2017 and was initially assigned to the Specialist Team, which was supervised by Garrett Byrne. That team was, as she explains, intended to be assigned to less mainstream prosecutions such as money laundering cases, but, in reality, all Crown Counsel were assigned to and prosecuted all types of case. Despite the use of the phrase "Specialist Team" Ms Greening is using that phrase to refer to a group of counsel in the DPP's department who were to deal with less common offences.

53. She records that, shortly after beginning of her employment, she was asked by the then DPP if she would be interested in assisting Mr Byrne and the police on the ongoing investigation into Dr Brown and others. She was advised by Mr Field in a casual meeting in his office sometime in 2014 that the police were investigating Dr Brown and others. She understood from that meeting that Mr Field intended her to

assist Mr Byrne; but in fact, she was never asked to do anything and was never in possession of any confidential material in relation to this matter.

54. She was aware that the investigation was to be held in even more confidence than the usual work at the DPP's office, to the extent that the police and Mr Byrne when he was working on this investigation worked for a separate office with a door locked by security code. Bur it was "*simply and completely untrue*" that she worked from an office adjoining that of the SIO and his Deputy (Mr Briggs); and she was not aware of the detailed allegations, data and evidence involving medical fraud focusing upon the activities of Dr Brown, Dr Reddy and the two clinics. To say that she was was "*a complete and utter fabrication*". She did go to the office in the summer of 2014 twice, after work on a Friday, for a glass of wine and some potato chips, at the invitation of Jimmy Hoyte.

55. In paragraph 10 she said that she did not want to be involved in the investigation. She had recently moved back to Bermuda to embark on a career as a litigator and did not want to get caught up in politics. She says that Rory Field did not sound like he knew what the investigator was about and "*I did not want to be associated with the incompetency*".

56. In his Fourth Affidavit Mr Briggs says that Ms Greening spent a considerable period of time with Mr Byrne in the adjoining office to that of him and Inspector Tomkins. She worked in a secure office specifically established for Mr Byrne and her within the suite of offices in Global House occupied by the BPS. There was, he says, no lock between the office for the legal team and the BPS office with the only security being on the exterior door. Each lawyer appointed to work as part of the JIPT was briefed by the investigating team at the commencement of his/her involvement in order to bring them up to speed on the investigations and its status at the time of the briefing.

57. As to the meeting referred to by Loxley Ricketts, Ms Greening said that she had no recollection of it until she read his affidavit. She now had a vague recollection of being at the meeting with Ricketts and Tomkins but no recollection whatever of what was discussed. She was "*never assigned any tasks by Mr Byrne or anyone else in relation to the investigation".* It was her older brother who told her everything she knew about the investigation until she commenced employment with CL on 7 January 2019.

58. The Court was, thus, presented with an account by Mr Briggs, for whose integrity Mr Pettingill vouched, which was described by Ms Greening as, in the most relevant part, a complete fabrication.

The Supreme Court judgment

59. In her judgment the judge set out the factual background at paragraphs [19]-[40]. In paragraphs [43] – [45] she set out the relevant provisions of the Code of Conduct as follows:

> "*43. Rule 24 of the Code of Conduct provides:*
>
> *"A barrister shall not act for an opponent of a client, or of a former client, in any case in which his knowledge of the affairs of such client or former client may give him an unfair advantage."*
>
> *"44. Rule 24A provides:*
>
> *"Where a barrister or a member of his staff who has acted on behalf of a client in a matter, irrespective of the nature of the matter, subsequently joins another firm ("the new firm") which acts or has the opportunity of acting for a party with interests adverse to those of the former client, he or that staff member and the new firm should cease or decline to act in the matter if he or the staff member is by virtue of his former capacity in possession of material information which would not properly have become available to him in his new capacity:*

> *Provided that the Bar Council may, after ascertaining the views of the former client, exempt a barrister or a member of his staff from the above requirement."*
>
> *"45. Rule 101, also relied upon by the First Respondent, provides:*
>
> *"A barrister should not represent in the same or any related matter any persons or interests with whom he has been concerned in an official capacity. Likewise, he should not advise upon a ruling of an official body of which he is a member or of which he was a member at the time the ruling was made."*

60. In relation to Ms Greening the judge said this:

> "*35 There is divergence between the recollection of Mr Briggs and the recollection of Ms Greening in connection to how much exposure Ms Greening had to the Criminal Investigation. However, the collective evidence of Mr Briggs, Ms Greening and Mr Ricketts is consistent with a finding that Ms Greening did have knowledge, was exposed to, and did have discussions about the Criminal Investigation in her capacity as Crown Counsel. It is also clear that she worked in close proximity to the relevant personnel who were substantially involved in the Criminal Investigation. Ms Greening has acknowledged that she did have briefing meetings with the investigating team on the Criminal Investigation even if, as she now states, she has limited recall and did not engage substantively thereafter on this particular investigation.*

Waiver

61. In her judgment the judge first dealt with the issue of waiver, which CL had not advanced in their written skeleton argument but did in oral submissions. She first considered the line of authority which suggests that a client may impliedly consent to a conflict of interest when he instructs a firm when he know that the firm occupies a position which is said to give rise to a potential conflict. She held, rightly in my opinion, that that principle had no application here.

62. CL contend that the BPS has waived any right to object to the engagement of Mr Pettingill or Ms Greening to act for WF. CL, as they claim, threw down the gauntlet in February 2017 when they challenged the BPS to show by what lawful authority they seized the files. From the Autumn of 2018 onwards WF took over the cause, from an intervener's perspective, and sought to intervene to question the legality of what the BPS had done, and then to seek to take over, if necessary, the challenge, by way of an application for judicial review, to the legality of what had occurred and to demand the return of the files. If BPS wanted to challenge CL's acting for the Intervener it behoved them to do so before early 2019. Its failure to do so amounted to a waiver of any right that it may ever have had to do so. It had led CL to believe that no claim about conflict would be made and it would not now be equitable for BPS to resile from that position.

63. The judge did not agree with CL's submissions. In relation to Ms Greening she held that there had been no delay in raising the conflict issue. Her employment began on 7 January 2019. The judge recorded the evidence of Mr Briggs that:

> "*it was not until 14 January 2019, through correspondence… that the First Respondent became aware that the Intervener sought the return of the files and would not agree or sanction the BPS attempts to use the medical files. It was at this stage that it became clear that a conflict arose with Chancery Legal's representation of the Intervener. Shortly thereafter MDM communicated to Senior Counsel for the Intervener, Jerome Lynch QC, in February 2019, that given Chancery Legal's challenge to the legality of the SPW's and the overall hostility towards the First Respondent … Chancery Legal has taken a position that is adverse to the interests of the First Respondent and should withdraw from the record*".

64. BPS raised its concern about her appointment by letter of 19 February 2019. The judge found that in those circumstances there was, so far as she was concerned, no waiver. I agree.

65. In relation to Mr Pettingill the judge found that the delay of five months (from September 2018 to February 2019) in objecting to CL's representation of the patients in the light of Mr Pettingill's prior involvement as AG did not bar the BPS from raising concerns about conflict of interest and duty of confidentiality. She thought that this was particularly the case "*when the scope of the engagement has recently expanded materially and Mr Pettingill's knowledge of the Criminal Investigation is increasingly relevant."*

66. The judge took the view that the delay from February 2017 did not preclude the BPS from raising the conflict issue. I agree. The letter of 17 February 2017 was, as the judge said, "*isolated correspondence, more than 18 months prior to the filing of the Intervener Summons*". It was written by Mr Crockwell; and responded to on 1 March 2017. Thereafter nothing relevant happened so far as CL was concerned until September 2018, when they appeared on the scene acting for WF. The fact that Mr Pettingill had established CL may well have been a matter of public knowledge; but he was playing no apparent part viz-a-viz BPS until September 2018.

67. As for the delay from September 2018 the judge said this:

> *"While it may be that the First Respondent should have considered the possibility that the interest of the Intervener patients might expand from protecting their confidential medical information to a more adversarial position attacking the Criminal Investigation as a whole and the foundation for the SPW's, this is not such an inordinate delay so as to deprive the First Respondent of their right to be protected from the risk that their confidential information may be disclosed."*

68. The approach of CL's clients changed over time. In February 2017 CL expressed their then client's concerns about the breach of confidentiality and demanded to know by what authority the BPS had acted. They expressed themselves to be exploring the potential breach of confidentiality. They did not themselves ask for the return of the files. Thereafter matters went into abeyance, so far as CL was concerned, until September 2018 when CL sought leave for WF to intervene (leave being granted on 22 November 2018) and have the Court rule in regard to the irregularity of the seizure. But in the months thereafter it became apparent that, provided that satisfactory arrangements could be made about confidentiality, the Applicants might not advance the judicial review at all. Whilst, therefore, the application for judicial review impugned the validity and, thus, the foundation of the SPWs, it seemed on the cards that, if the confidentiality issues could be resolved, the judicial review might not take place. The BPS wrote twice to CL seeking agreement on the protocol with no response. That position changed significantly when on 14 January 2019 CL made it entirely clear that they opposed any use by the BPS of their clients' files and wanted them back and expressed no confidence in the interests of the police.

69. In our view the judge was entitled to find that there had been no waiver of any right to challenge the continued engagement of CL. It was not inequitable of the BPS not to take the conflict point before, and to take the point when, it did.

Confidentiality

70. In relation to the question of confidentiality the judge found that CL was in possession of confidential information in the following terms:

> "68 *I find that the confidential information included strategy discussions around* ***the Criminal Investigation****, the evidence, the lines of enquiry and other aspects on which legal advice, support or direction might be required.*

> *69. While neither Mr Pettingill nor Ms Greening were significantly involved in the Criminal Investigation both of them have conceded that they were present at briefing meetings* ***discussing the Criminal Investigation****. Mr Pettingill for his part has confirmed that he specifically asked for updates on* ***the Criminal Investigation*** *connected to Dr Brown from time to time. (HB Tab 42 paragraph 11)*
>
> *70. Therefore I do find that they did receive and are in possession of confidential and privileged information so far as Mr Pettingill from the period of 2013-2014 and Ms Greening from 2014 – 2017."*

71. It is important to note that the judge used the expression "Criminal Investigation" to mean (see [10] of the judgment) the "*ongoing investigation into allegations of fraudulent medical practice connected to the alleged ordering of unnecessary diagnostic tests for patients for financial gain*".

72. It was, in our judgment, open to the judge to find that both Mr Pettingill and Ms Greening had received privileged and confidential information in connection with the Criminal Investigation as she defined it. We do not accept that, in a case such as this where neither side chose to cross examine the other, and there was a dispute between them, the judge was bound to conclude that she could not decide what the position was. She was, as she put it entitled to look at the "*collective evidence*" of the participants. It is apparent that the judge accepted that the picture given by Mr Briggs and Mr Ricketts was the right one. In circumstances where Mr Pettingill spoke of the truthfulness and integrity of Mr Brown in paragraph [2] of his Affidavit and said that he did not take issue with any of the matters that he raised in relation to him, that was a view she was entitled to take.

73. In relation to Ms Greening the position is that she could not dispute that she was present at the meeting in late 2014 described by Loxley Ricketts in paragraphs [6] – [8] of his affidavit at which confidential information about the Criminal Investigation was given, although his evidence as to her receipt of confidential

information went further than that. The fact that she was present at that meeting in late 2014 is difficult to square with her suggestion that the possibility of her joining the JIPT was mooted shortly after the beginning of her employment in April 2014 but never taken forward. In addition, her observation about the incompetency of the investigation is difficult to square with the proposition that she played no effective part in relation to it.

74. In relation to Mr Pettingill we question whether the judge was right to say, as she did in [69] that Mr Pettingill conceded that he was present at briefing meetings "*discussing the Criminal Investigations*" insofar as she referred to those criminal investigations with a capital "C" and a capital "I". It depends which part of his evidence you take. Paragraph [2] of his affidavit said that he did not take issue with the truth of "*any*" of the matters that Mr Briggs raised in his Third Affidavit. In paragraph [7] he referred to discussion on a few occasions of various aspects of "*a BPS investigation*" in relation to Dr Brown, which he did not identify to the judge (he handed up to us two examples of such investigations). The tenor of paragraphs [7] – [9] was that, so far as he recalled, he was not involved in discussion on the subject matter of the Criminal Investigation, as defined by the judge, but of some other investigation.

75. As I have said the judge was, in my view, entitled to look at matters in the round and to reach the conclusions that she did. Further, it would seem to me, if either Mr Pettingill or Ms Greening were conflicted it would not be open to CL to continue acting for WF and the patients.

Relevance

76. In relation to whether the confidential information was relevant or possibly relevant to the new matter in which the interest of the other client (the Intervener), and those she represents, may be adverse to the interest of BPS she said this:

> "*74 I repeat my finding in paragraph 68 above. I am satisfied that the confidential information received from the First Respondent and the BPS by the two attorneys in their respective capacities of Attorney General and Crown Counsel,* ***is sufficiently related to the judicial review proceedings and the execution of the SPW's to be relevant and certainly possibly relevant****. I am also satisfied that any disclosure of confidential information would be adverse to the interests of the First Respondent.*
>
> *75. Furthermore, a patient who is or may be the subject of the Criminal Investigation and other investigations is also represented by Chancery Legal in the Intervener action. The confidential information of the First Respondent and the BPS disclosed to Mr Pettingill and Ms Greening is clearly relevant to that client whose interest in this action goes beyond patient confidentiality."*

Paragraph 75 must be a reference to Dr Brown.

Discussion

77. In many cases the relevance of the confidential information is clear: e.g. the information about the wife's financial circumstances gained by her former solicitor in the case of *Georgia Marshall and Rachael Barritt v A* [2015] Bda LR 101, which could have been adverse to the husband's, and hence to her interest, in the second proceedings between the husband and his former wife. Here the position is not so straightforward.

78. The judgment contains no further analysis as to the nature of the relation between any confidential information and the judicial review proceedings that made the former relevant to the latter, or as to why disclosure of the information would be adverse to the interests of the DPS. The ambit of those proceedings does not seem to have been considered in any detail, if at all. When we sought assistance on the relevance point from Mr Diel, we did not really receive any. Mr Pettingill made the general submission that it had simply not been shown that, if any confidential

information had been received, it had any relevance to the present dispute. We must, therefore, embark on an analysis on our own.

The application for judicial review

79. The application for judicial review in its current form (i.e. as amended in April 2017 – when WF was not yet an Intervener) is a lengthy (37 page) document. It seeks review of (i) the decisions of the Commissioner of Police to seek and to execute the SPWs; and (ii) the decisions of the Senior Magistrate of 2nd and 10th February 2017. The relief sought is an order quashing the decisions of the Senior Magistrate; a declaration that the searches carried out by the BPS were unlawful; directions for the return of the items seized during the execution of the warrants; and compensation for material damage caused. It also seeks continuation of the interim relief granted on 13 February 2017[3]. The Intervener's summons of 3 April 2019 has not been heard. Since, however, the Intervener seeks to become an applicant in the judicial review application or to take it over, it is appropriate to consider the position on the footing that she succeeds in that endeavour.

80. The granting of the warrants is said to be unlawful on account of (i) material non-disclosure by the BPS; (ii) non-fulfilment of the statutory conditions for the issuing of a warrant and (iii) the fact that the warrants were disproportionately and unreasonably wide, amounting to the bulk collection of confidential patients' information.

81. The Application Notice indicates that reference will be made to a number of affidavits including those of Dr Reddy, Dr Brown and Wanda Henton Brown.

[3] The Applicants also claim that the execution of the warrants by the BPS was unlawful in that CCTV equipment was interfered with, and that as the warrants were obtained unlawfully the force used by the BPS to execute them constituted trespass to property which should be compensated. In addition, the material seized is said to include electronic material which is subject to legal professional privilege which the BPS must not be allowed to review before a protocol is established as to how legal professional privilege is to be filtered and quarantined.

Non-disclosure

82. In relation to material non-disclosure there is said to have been a "*massive failure to provide full and frank disclosure"* [23] and that much of the information which was included was "*false, misleading and/or incomplete*". Further the missing information was either already available to the BPS or should have been available following reasonable inquiries. It is said [24] that many of the misstatements and non disclosures were deliberate.

83. The non-disclosure is said to fall into three categories. The first is information relating to the statutory conditions for the issuing of a warrant. As to that it is said there was information that a production order would not seriously prejudice the investigation so that the issue of SPWs was unnecessary. The BPS sought to satisfy the Magistrate that the warrants were needed because, if the objects of the investigation were aware that the BPS was interested in the material sought, they might destroy it or ship it abroad. But this argument, it is said, would only be coherent if the subjects of the investigation were in fact unaware that the BPS was investigating the offences concerned. As to that, nothing could be further from the truth. It has been publicly known since the middle of 2011 that the BPS was investigating corruption allegations against Dr Brown. He had repeatedly offered to be interviewed, an offer that was never taken up. The basic allegation underlying the warrants had been the subject of an investigation in respect of Dr Reddy by the BMC in 2014 which concluded that no further action was warranted. The BPS had acknowledged that it was investigating alleged fraudulent over prescription of diagnostic tests at the clinics of the 2nd and 3rd Applicant in correspondence with counsel for the Applicants. Several subsequent paragraphs set out details of the way in which the investigations are said to have been well known to the Applicants, including details as to incidents where Dr Reddy had been detained at passport control in Bermuda or the USA, or interviewed by the Department of Homeland Security, which suggested that he should testify against Dr Brown in reaction to ordering unnecessary tests.

84. The second set of information is in relation to the alleged offending. The Dramatis Personae and the Information supplied to the Magistrate are said to contain statements or allegations that are manifestly false. The breadth of the misinformation is said to show a worrying disregard for accuracy and completeness in the BPS approach to the gathering and presentation of evidence and a highly inappropriate bias. The BPS is said to have been negligent in its collection and presentation of information and in making no efforts to corroborate the information provided by those who were in dispute with the Applicant and Dr Brown. As a result the Magistrate is said to have been seriously misled as to the credibility of the informants to the BPS and the strength of the evidence against those under investigation. Specific allegations are made in relation to seven people, evidence in relation to whom is referred to in the Dramatis. Aspects of that evidence or what is said about the individuals in the Dramatis are said to be untrue.

Non fulfilment of the statutory conditions

85. In relation to non-fulfilment of the statutory conditions it is said that it is clear from the history of the investigation that the contention that it would not be practicable to communicate with the subjects of the investigation for fear that material subject to seizure could be deployed or moved beyond the reaches of the police was unjustified. In the light of the history (the subjects of the investigation having been aware of it for years and co-operated voluntarily with various investigations) there could be no reasonable concern on that account. It is said that no evidential basis was put forward as to why any of the conditions in paragraph 14 of Schedule 2 of PACE 2006 were satisfied.

Disproportionality

86. Next it is sad that that the terms of the warrants authorised the BPS to proceed with the bulk collection of confidential date concerning hundreds of patients (including in relation to some items more than the 3 named patient and the 265 patients listed in a schedule). According the warrants were unlawfully disproportionate.

87. Complaint is then made that the BPS disconnected the CCTV system or covered the camera with post-it notes at the premises of the 2nd and 3rd Applicant on 11 February 2017. It is also said that the BPS caused significant damage to the premises and property within the premises.

88. Finally, it is said that the nature of the non-disclosure and misleading statements made is such that the Court should conclude that it was deliberate and designed to withhold crucial information from the Magistrate. It is said that the evidence that the BPS is no longer conducting an objective investigation is to be found in the fact that the AG of Bermuda (not then Mr Pettingill) had prepared a civil claim based on the guilt of Dr Reddy and Dr Brown which was filed in the US Federal Court on 14 February 2017, days after the execution of the warrants.

89. The above is the case for the Applicants. We cannot tell how exactly the BPS will respond to it, or how the case (and the method by which it is determined i.e. with or without cross examination) may develop.

Discussion

90. In my view a consideration of the judicial review application serves to confirm the view taken by the judge that confidential information about the Criminal Investigation may be relevant to the present dispute in which the interests of WF are or may be averse to the BPS, in at least the following respects.

91. First, Dr Brown is one of the witnesses whose affidavit evidence is relied on in the judicial review application. He is also one of those whom WF, and thus CL, is said to represent. The evidence adduced appears designed to show that the allegations made against Dr Brown are manifestly ill founded. Confidential Information relating to the investigation into the allegations against Dr Brown is intrinsically likely to be relevant to that issue, and the possession of it by those on the Intervener's side

prejudicial to BPS, especially if it shows holes or weaknesses in the case against him.

92. Secondly, it is apparent that the case sought to be brought against the BPS is that the BPS has been negligent in its collection and presentation of information and in making no efforts to corroborate the information provided by those who were in dispute with the Applicants and Dr Brown, and, to use CL's words, that the BPS have behaved in such a way that "*we have no confidence in the integrity of the police in this regard"*. Confidential information relating to the investigation is again likely to be relevant and its possession potentially prejudicial to BPS, especially if it shows a failure to carry out appropriate procedures or a lack of objectivity. We note in this connection Mr Pettingill's statement that "*I have no idea what information I could possibly have that would give the intervener any advantage to their files being unlawfully seized by the BPS in 2017 and as relates to strategy other that my assessment that a certain contingent of the BPS was obsessed with endeavouring to find any evidence they could against Dr Brown*". This assessment is likely to have been derived, at least in part, from what he learnt in the communications between the BPS and him. It would seem, of itself, to be of assistance to WF and to the disadvantage of BPS.

93. Thirdly, looking at the matter in more general terms, there would seem to be an inherent conflict when CL/Mr Pettingill/Ms Greening are intent on showing that the actions of the BPS in seeking, obtaining and executing the SPWs were unlawful and a disgrace, in circumstances where Mr Pettinghill/Ms Greening, as the judge has found, received information in their professional capacity from the BPS about the progress of that investigation. I note that in the English case of *Duncan v Duncan* [2013] EWCA Civ 1407 Macur LJ summarised the principles that *Blokiah* established as including the following:

> *"…counsel's duty of confidentiality is unqualified. The Court if asked, will intervene unless satisfied that there*

is no risk of inadvertent or accidental disclosure to those with adverse interest. This is a matter of perception as well as substance"

As a matter of perception there seems to be a relevant risk.

94. In addition, it is apparent from the evidence of Mr Walsh (Third Affidavit paragraph [18]) that Mr Pettinghill was considering whether the Government of Bermuda could pursue various civil proceedings seeking various remedies against Dr Brown "*and anyone connected with the offences*". This must mean the offences in relation to medical malpractice. Mr Pettinghill accepts that he was considering and did set up a Civil Recovery Office to consider civil actions against a number of individuals; put together a small team of lawyers and successfully added a provision for Civil Recovery to legislation. His assessment was that, given the time and delay and the lack of any charges being filed, the Police investigation was not yielding evidence to found criminal prosecutions; and the consideration was as to whether any civil action could be taken. He made inquiry from time to time as to how any investigation was proceeding – see paragraph [11] - because of the time delay, and the fact that it was costing the GOB an exorbitant amount of money; and he was, as Minister of Justice at the time, conscious of that fact and properly concerned: see paragraphs [10] and [11] of his affidavit, If, as the judge has found, he was given information relating to the Criminal Investigation there would appear to be a potential conflict in two directions. Insofar as any information indicated that no crime had been committed that would be averse to the BPS. Insofar as it suggested that there may have been but it was difficult to prove that would be averse to Dr Brown and the patients whose camp he had joined.

Risk of disclosure

95. The judge considered the submission of CL that there was no real risk that any confidential information that may have been shared with them would be disclosed because Mr Pettingill and Ms Greening say that they do not specifically recall anything that they think is relevant or material. The judge referred to the evidence

of Mr Pettingill (paragraph [11] of his Affidavit) that, although he may have been in possession of some information related to allegations against Dr Brown, to his mind it was not anything more that the Country was aware of through media coverage and leaks.

96. The judge regarded this as tantamount to an admission that he had difficulty recalling what he learned in an official capacity and what he knew from media reports. She also gave weight to the evidence of Mr Briggs and Mr Ricketts as to substantive meetings and discussion with the attorneys concerned on matters discussing the strategy and scope of the Criminal Investigation. She held that cases of conflict of interest could not turn on an attorney's subjective assertion that they do not recall anything or that what they do recall is not relevant.

97. In the circumstances she was not satisfied that there was no risk of disclosure of confidential and privileged information. In my judgment she was entitled to take that view. Mr Pettingill submitted that any risk must be a real and not a fanciful one, or one that was purely theoretical, and suggested that the judge had relied on a risk of the latter character, given the absence of any reference to specific information or any affidavit from Mr Byrne. He drew attention to the fact that in paragraph [77] she said that "*if there is a risk, even a slight risk, the Court should intervene*"

98. I agree that the risk must be a real one. But, as *Boliah* makes clear, it is difficult to discern any justification which exposes a former client to "*any avoidable risk, however slight*", that confidential information may come into the possession of a third party and be used or his disadvantage. The result is that the court should intervene "*unless it is satisfied that there is no risk of disclosure*". The judge was satisfied that there was a risk.

99. I recognize that this is a strict approach. But in this context that is appropriate. The authorities make plain the vital importance of confidentiality as between client and counsel. As Kawaley CJ said in *In the Matter of a Firm of Barristers and Attorneys* 2014 No 133:

> "*Mr. Hill relied on the following passage in the judgment of Timothy Walker J in Re Solicitors' Firm [2000] 1Lloyd's Rep 31 at 34 as demonstrating the low threshold his client had to meet in terms of demonstrating that relevant confidential information had been received in the previous retainer:*
>
> *"Having regard to the future and the past, I am prepared to draw the inference that some of the existing (or future…) information imparted by the club to the solicitors…may be relevant…I am unable to specify the precise nature of the information, or the degree of its relevance…"*
>
> *11. I agree that specificity is not a requirement at this stage of the analysis. The position is different when one is considering whether the former lawyer is able to establish that there is no risk that the potentially relevant information will in fact be used to the detriment of the former client. In this regard, it is not sufficient for the former lawyer to simply say that due to the passage of time they have forgotten the information, because:*
>
> *"…it is well recognised in the authorities that things may happen, perhaps unexpectedly, which reawaken subconscious memories. We have all had the experience of retrieving information unexpectedly after some trigger…."*

100. The burden of proof on the BPS is not a heavy one. The burden on CL is a heavy one. The judge was entitled to take the view that BPS had discharged the former and that CL had not discharged the latter.

101. In those circumstances it is not necessary to consider at any length the application of the Code of Conduct. It is sufficient to say that in the light of the findings of the

judge, rule 24 was applicable in the case of Mr Pettingill and Ms Greening, Rue 24A is applicable to Ms Greening. I would not regard Rule 101 as applicable. I do not regard either Mr Pettingill or Ms Greening as advising upon "*a ruling of an official body*" of which they were members.

102. The circumstances in which, despite the injunction granted by Assistant Justice Bell, CL came to represent WF before us are in part set out in our ruling of 3 June 2019. Thereafter, and with a view to securing an expeditious hearing of an appeal, an Order was made, by consent, by which leave to appeal the Conflict Ruling was refused, but a stay was granted of that ruling pending the Intervener's application for leave to the appeal or the Court of Appeal.

Disposition

103. I would grant the Intervener leave to appeal the 2 May 2019 Conflict Ruling of the Hon Assistant Justice Bell. I would, however, dismiss the appeal. In those circumstances the order of the judge restraining CL from acting for the Intervener and the patients will continue in force.

Kay JA

104. I agree

Smellie JA

105. I, also, agree.

C.S.P.S.C.Clarke

Clarke P

Maurice Kay

Kay JA

Smellie JA