In The Supreme Court of Bermuda

CIVIL JURISDICTION
2020: No. 31

BETWEEN:

RACHELLE FRISBY AND JOHN JOHNSTON
(As Trustees of the Property of Harold Joseph Darrell, a Bankruptcy)

Plaintiffs

-and-

HAROLD JOSEPH DARRELL

Defendant

Before: **The Hon. Mr. Justice Juan P. Wolffe, Puisne Judge**

Appearances: Mr. Rhys Williams, Conyers Dill & Pearman Limited for the Plaintiffs
Mr. Jaymo Durham, Amicus Law Chambers Ltd. for the Defendant

Date(s) of Hearing: 17th August 2022
Date of Ruling: 24th August 2022
Date of Reasons: 28th December 2022

RULING

Application by the Defendant for the Plaintiffs' legal representatives to be removed as Counsel.

WOLFFE, J:

1. By way of a Summons dated 13th June 2022 the Defendant made an application for an order that the law firm of Conyers Dill & Pearman Limited ("Conyers") be removed as Counsel

for the Plaintiffs (the Trustees in Bankruptcy of the Defendant). On the 24th August 2022 I dismissed the Defendant's application and set out herein are my reasons for doing so.[1]

2. The undisputed factual background to the Defendant's application is that on the 10th November 2017 a Receiving Order was made against the Defendant and on the 18th December 2018 he was declared bankrupt. The Official Receiver was initially appointed trustee in bankruptcy pursuant to the Bankruptcy Act 1989 (the "Act") and on the 14th February 2019 the Plaintiffs were appointed as trustees in bankruptcy in place of the Official Receiver. On or about the 24th January 2020 Conyers filed into Court an Originating Summons on behalf of the Plaintiffs seeking an order for possession of the Defendant's property located at #12 Cedar Avenue in the City of Hamilton, Bermuda (the "Property").

The Defendant's Application

3. The Defendant takes issue with the Plaintiffs instructing Conyers and it should be noted that he has done so as far back as the 31st March 2019 when he and his then attorney Mr. Gordon R. Woolridge Jr. attended a meeting at the Plaintiffs' offices for the first time to discuss the Defendant's bankruptcy.[2] In support of the Defendant's application to have Conyers removed as the Plaintiffs' counsel Mr. Jaymo Durham submitted that Conyers is conflicted for the following reasons:

    (i) For approximately twenty (20) years Conyers has acted, and still acts, on behalf of The Bank of Bermuda Ltd., which is now HSBC ("HSBC"), in respect of legal matters instituted against and by the Defendant (some of which the Defendant states are still ongoing). Therefore, it is claimed, Conyers could be in receipt of pertinent information about the Defendant

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1 There is a multitude of other legal issues to be resolved between the parties but this Ruling is solely in respect of whether Conyers should be removed as Counsel for the Plaintiffs.

2 As indicated in paragraph 13 of the affidavit of Ms. Frisby sworn on the 13th January 2020 and in the affidavit Gordon R. Woolridge Jr. sworn on the 13th June 2022.

and could therefore rely on such information in these bankruptcy to the Defendant's detriment.

This, Mr. Durham further argues, was the reason why The Hon. Chief Justice Narinder Hargun, the current Chief Justice, recused himself from matters involving the Defendant as he had a previous connection with Conyers prior to his appointment as Chief Justice.

(ii) The Defendant is engaged in two (2) Judicial Review proceedings which are directed at the Human Rights Commission and in which HSBC would be an affected party should those proceedings prove fruitful. Therefore, Mr. Durham says, although the Defendant has not instituted proceedings against HSBC at this time any potential for Mr. Darrell continuing the Judicial Review proceedings, and then pursuing any litigation against HSBC, would be hampered because the Plaintiffs would not be minded to pursue any such litigation on behalf of the Defendant (whether meritorious or not). Mr. Durham further says that this would be an impediment to the Defendant reaching a successful financial outcome of those potential proceedings and that ultimately this would not be in the interests of any creditors of the Defendant.

(iii) The Defendant has made serious allegations against certain Directors of Conyers and one of which has culminated in a criminal complaint involving bribery. In particular, in paragraph 15 of the Defendant's Third Affidavit sworn on the 14th June 2022 the Defendant alleges that Mr. Jeffrey Elkinson, an attorney at Conyers, attempted to bribe the Defendant's then attorney Mr. Woolridge to "drop" him [the Defendant] as a client.

(iv) In paragraph 7 of his Third Affidavit the Defendant states that his objection to Conyers advising the Plaintiffs *"arises from the evidence I have to support an unbiased Trustee or Trustees of my supposedly bankrupt estate*

to challenge Conyers' other client and creditor to my bankruptcy, HSBC Bank of Bermuda Limited's financial claim". Mr. Durham expanded upon this in his oral submissions stating that in the past Conyers was a creditor of the Defendant and that this was the subject of legal proceedings before the Court. Particularly, past orders of costs in relation to the issuance of Writs of Possession against the Defendant's property.

However, in paragraph 8 of his Third Affidavit the Defendant states that he is not willing *"to share this evidence with the current Trustees because they have engaged Conyers as their legal advisors. Moreover, out of fear of undermining an unbiased Trustee or Trustees' future challenge of the Bank's financial claim".* Mr. Durham also accepted that evidence as to any such proceedings whereby Conyers is or was a creditor of the Defendant was not put before me. Additionally, in the last sentence of Mr. Durham's written submissions he writes: *"Further, it is unknown whether Conyers is also a creditor of the respondent, however, if they are, this exacerbated the conflict and is further cause for their removal, as they are unable to be impartial given the status of their advisors".*

4. The upshot of the Defendant's application is that the Plaintiffs have exhibited an *"irrational commitment to having Conyers represent them"*[3] and that it is because of this purported conflict of interest and perception of bias that Conyers cannot be objective in advising the Plaintiffs. The Defendant claims that this calls into question the Plaintiffs' ability to perform their fiduciary duties as trustees in bankruptcy in a manner which is *"fair, just and reasonable"* and which does not *"impair the overall justice of the matter".*

5. Mr. Durham tethers the Defendant's application onto section 94(2)(d) of the Act which provides that:

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[3] See the last paragraph of page 7 of the Defendant's Skeleton Arguments dated 19th July 2022.

"94 (2) On an application of an interested party the Court may, on any or all of the following causes shown:

....

(d) that his connection with or relation to the bankrupt or his estate, or any particular creditor, might make it difficult for him to act with impartiality in the interest of the creditors generally;

or where in any other matter he has been removed from office on the ground of misconduct, remove him from his office, but if the creditors by ordinary resolution disapprove of his removal, he or they may appeal against it to the Court of Appeal.

6. The essence of section 94(2)(d) of the Act is that a trustee in bankruptcy (as the Plaintiffs are) may be removed if any connection or relationship with the bankrupt (as the Defendant is), his estate, or any particular creditor of the bankrupt is such that it would make it difficult for the trustee to act with impartiality and/or in the interests of the creditors. To this, Mr. Durham posits that this requirement under section 94(2)(d) of the Act can be extended to the lawyers of the trustees given that the trustees instruct their lawyers and in turn the trustees are advised by their lawyers. I will address this later.

Decision

7. Having heard Counsel and reviewed the cited authorities my route to deciding whether Conyers could continue to act on behalf of the Plaintiffs requires that I resolve the following issues:

(i) What duty, if any, do the Plaintiffs, as trustees in bankruptcy, owe to the creditors and/or to the Defendant?

(ii) Whether Conyers acting on behalf of the Plaintiffs amounts to a conflict of interests against the Defendant and therefore renders the bankruptcy proceedings unfair.

What duty, if any, do the Plaintiffs, as trustees in bankruptcy, owe to the creditors and/or to the Defendant?

8. The Defendant's application to remove Conyers as Counsel for the Plaintiffs is premised on the notion that the Plaintiffs owe him a fiduciary duty to act in his best interests, and that by extension that Conyers therefore owes him [the Defendant] a duty to advise the Plaintiffs in a manner which is in his best interests. This is a flawed position to embark upon.

9. The idea that trustees in bankruptcy owe a fiduciary duty to act on behalf of the creditor (which they do owe) and also concomitantly have a fiduciary duty to act on behalf of the debtor would be a statutory stretch of the Act which surely the legislators did not contemplate. Part V of the Act, specifically sections 77 to 94, provides the parameters of the fiduciary relationship between trustees and creditors. Pursuant to sections 78 and 94 of the Act respectively the creditors exclusively appoint or remove trustees[4], and most importantly under section 80 of the Act it is the duty of the trustees to ascertain and carry out the wishes of the creditors. Section 80 stipulates that:

> *"80 (1) Subject to this Act, the trustee shall, in the administration of the property of the bankrupt and in the distribution thereof amongst his creditors, have regard to any directions that may be given by resolution of the creditors* [my underline] *at any general meeting, or by the committee of inspection, and any directions so given by the creditors at any general meeting shall, in case of conflict, be deemed to override any directions given by the committee of inspection.*
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> *(2) The trustee may from time to time summon general meetings of the creditors for the purpose of ascertaining their wishes* [my underline], *and it shall be his duty to summon meetings at such times as the creditors, by resolution, either at the meeting appointing the trustee or otherwise may direct, and it shall be lawful for any creditor, with the concurrence of one-sixth in value of the creditors (including himself), at any time to request the trustee or the Official Receiver to call a meeting of the creditors, and the trustee or the Official Receiver shall call such meeting accordingly within fourteen days but the person at whose instance the meeting is summoned shall deposit with the trustee or the Official Receiver, as the case may be, a sum sufficient to pay the costs of summoning the meeting, such sum to be repaid to him out of the estate if the creditors or the Court so direct.*

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4 Section 94 lists the reasons upon which creditors may remove a trustee.

(3) The trustee may apply to the Court in manner prescribed for directions in relation to any particular matter arising under the bankruptcy. (4) Subject to this Act, the trustee shall use his own discretion in the management of the estate and its distribution among the creditors."

10. Part V of the Act is also replete with references to the powers of the creditors vis-à-vis the duties of trustees. Such as: the creditors remunerate the trustees (section 83)(it should be noted that section 83(5) prohibits trustees, under any circumstances, from accepting any gift or remuneration from a bankrupt); when required to do so the trustee shall furnish any creditor with a list of creditors showing the amount of debt due to each creditor (section 85); the creditor may call upon the trustee to produce a statement of accounts (section 86); and, the trustee shall keep minutes of meetings which, subject to the control of the Court, may be inspected by a creditor (section 87).

11. So in the context of this matter, the Plaintiffs have a statutory and fiduciary duty to conduct themselves in accordance with the Act and therefore in a manner which is consistent with the directions and wishes of the creditors of the Defendant. No such statutory or fiduciary duty of the Plaintiffs exists or flows towards the Defendant. I should say that it is correct that the Plaintiffs have an overriding duty to both the creditor and debtor to not misapply the Defendant's money or property (for which they can be held liable to repay under section 82 of the Act). It is also correct that the Defendant (or any creditor), if dissatisfied with any act, omission, or decision of the Plaintiffs, may apply to the Court to have the Plaintiffs' act or decision reversed or modified (section 81 of the Act). The Defendant or a creditor may also have one of the trustees removed for misconduct, dilatory behavior, or for being of unsound mind.

12. However, sections 81 and 82 of the Act, nor any of the statutory obligations of the Plaintiff as trustees in bankruptcy, do not nor are they intended to constitute a fiduciary duty of the Plaintiffs to follow or pursue the directions or wishes of the Defendant or to purposefully act on the Defendant's behalf. Indeed, by acting on the creditors' behalf, as they are compelled to do so under the Act, the Plaintiffs will invariably make decision which are the detriment of the Defendant or which will not be in the

Defendant's best interests (as the Defendant may perceive it). If the thrust of the Act was for the Plaintiffs to act on behalf of the creditors and simultaneously act on behalf of the Defendant then this would in and of itself amount to an inherent conflict of interests because the Plaintiffs would essentially be serving two opposing masters. It would be tantamount to the Plaintiffs pursuing the Defendant for the creditors so that the Defendant's debts may be satisfied, but at the same time staving off creditors for the Defendant. This would not only be nonsensical but it would actually fly in the face of section 94 of the Act which prohibits the Plaintiffs from having any connection to the Defendant (as the bankrupt) which would render it difficult for them to act with impartiality and in the best interests of the creditors.

13. More specifically to section 94(2) of the Act, if I understand Mr. Durham's argument correctly, he is submitting that since the Plaintiffs are prohibited from having any connection or relation to the Defendant then somehow this prohibition also applies to Conyers who are advising the Plaintiffs. It is unclear as to what exactly Mr. Durham deems to be the connection between Conyers and the Defendant but presumably he is seeking to persuade me that the connection arises by virtue of the legal proceedings which have been instituted between the Defendant and HSBC (who Conyers has represented). I am not so persuaded.

14. Section 94(2) of the Act strictly pertains to the duty owed by the Plaintiffs to the creditors to not have or cultivate any connections or relations with the Defendant which would compromise or prevent them from impartially carrying out their statutory obligations in the interests of the Defendant's creditors. Obviously, the type of connection or relation contemplated by the Act is one which will or has the potential to benefit the Defendant in some way and simultaneously hurt the interests of his creditors. Including but not limited to a connection or relation which would lead to the Plaintiffs concealing or diminishing vital information about the true extent of the assets or liabilities of the Defendant or by not pursing the Defendant or selling his property with reasonable expedition.

15. No such line is or could be drawn between Conyers (as lawyers of the Plaintiffs) and the Defendant. Firstly, and as stated earlier, the Act does not create a fiduciary duty of Conyers towards the Defendant or to his creditors. Conyers' duty is only to the Plaintiffs. Secondly, the fact that Conyers represented and still represents HSBC in actions instituted by and against the Defendant does not amount to a connection or relation which benefits the Defendant to the detriment of the creditors.

16. It is therefore without great effort for me to reach the conclusion that the Plaintiffs do not owe a duty to the Defendant outside of section 82 of the Act. Accordingly, I find that the Plaintiffs are under no duty whatsoever to advise or assist the Defendant in launching any litigation against HSBC or any other person or entity.

Whether Conyers acting on behalf of the Plaintiffs amounts to a conflict of interests against the Defendant and therefore renders the bankruptcy proceedings unfair.

17. A basic but sacrosanct principle throughout most jurisdictions is that an individual is entitled to a lawyer of their choice to assist in navigating through what can often be a rough topography of legal proceedings (no matter their nature), and of course to ensure that their legal and/or constitutional rights are protected. With this squarely in mind, the starting point should be that the Plaintiffs are entitled to choose Conyers as their lawyers. However, an entitlement to have a lawyer of your choice should not be confused with having an absolute right to choose <u>any</u> lawyer. There is solid jurisprudence, coupled with jurisdiction-specific barristers' codes of conduct, which firmly establish that one's choice of a particular lawyer can be stripped away if their choice of lawyer, or the conduct of their lawyer, offends the proper administration of justice. This is the crux of the Defendant's application to remove Conyers as counsel for the Plaintiffs.

18. It is incontrovertible that a lawyer has a duty to carry out their client's work with integrity and impartiality, and, that he/she should do all that is reasonably possible to avoid any conflict of interests which arise or which may arise. The Barristers' Code of Professional Conduct (1981)(the "Barristers' Code") in Bermuda, which was created by section 9 of the

Bermuda Bar Act 1974 (the "BBA"), makes this pellucid when it states, *inter alia*, that a barrister:

- Shall hold in strict confidence all information acquired in the course of his professional relationship with his client, and must not divulge such information unless expressly or impliedly authorized to do so by his client (Rule 15).

- Shall not disclose to one client the confidential information concerning or received from another client (Rule 17).

- Shall not advise nor represent both sides to settle a dispute and he, nor his firm, should act or continue to act where there is or is likely to be a conflict of interest (Rule 22).

- Shall not act for an opponent of a client, or a former client, where his knowledge of the affairs of such client or former client may give him an unfair advantage (Rule 24).

- Shall not appear as counsel in a matter in which he is likely to be a necessary witness unless it relates to an uncontested issue or nature or value of legal services rendered, or the Bar Council gives approval for him to appear. A barrister may appear as counsel in which a partner or employee of his firm is likely to be called as a witness unless his so appearing would involve a breach of some other provision of the Barrister's Code (Rule 29).

19. As can be seen, the Rules are constructed to protect not only the lawyer's client but to a limited degree also the opponent of the client. In other words, by the Barrister's Code a lawyer must conduct themselves in a way which is not only ethical to their client but also in a manner which is fair and ethical to the other side. Any departure from this fundamental principle could, quite rightly, result in a complaint being made to the Bermuda Bar Council (pursuant to section 21 of the BBA) which could then refer the complaint to the

Professional Conduct Committee (the "PCC") for further inquiries or for investigation into the complaint.[5] If the PCC determines that a *prima facie* case of improper conduct has been made out against the barrister then it could refer the matter to a Disciplinary Tribunal[6] to determine, beyond a reasonable doubt[7], whether or not a complaint of improper conduct has been made out[8]. If a complaint is proved then the Disciplinary Tribunal, under Rule 18(3) of the Bar Disciplinary Tribunal Rules 1997, could sentence the barrister to one of a range of sentences including: admonition or reprimand; disbarment; striking off the Roll of the name of the barrister; restriction of practice or any part thereof; suspension; or a fine.

20. So there are safeguards put in place by the governing body of barristers to ensure that barristers are ethical and impartial, and, that any contravention of the Barristers' Code could result in the ultimate sanction of disbarment being imposed by a Disciplinary Tribunal. While I am not acting in the capacity of the Disciplinary Tribunal for the purposes of this application the Barristers' Code does give instructive guidance as to whether I should exercise my undisputed supervisory jurisdiction and discretion to remove Conyers as the attorneys for the Plaintiffs.

21. The Defendant's complaint, channeled through Mr. Durham, is that for the past twenty (20) years he has been embroiled in legal proceedings against HSBC (including in its previous iteration as the Bank of Bermuda) which has at all material times been represented by Conyers, and that because of this Conyers could be in receipt of confidential information from those proceedings which could now be used to his detriment in these bankruptcy proceedings. Through the Defendant's lenses I could see why the Defendant would be concerned about any confidential information/evidence which may have been collated by Conyers during the course of other legal proceedings being used against him by the Plaintiffs in these bankruptcy proceedings. However, I find that the Defendant's

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5 Section 18A of the Bermuda Bar Act 1974 ("BBA") sets out the general powers of the Professional Conduct Committee ("PCC"), and the Bar Professional Conduct Committee Rules 1997 set out the procedures of the PCC when making preliminary inquiries into complaints.

6 Established by section 19 of the BBA.

7 Section 19(6) of the BBA provides that the standard of proof required is the same as in criminal proceedings.

8 Section 19A sets out the powers of Disciplinary Tribunals, and the Bar Disciplinary Tribunal Rules 1997 set out the procedures of the Disciplinary Tribunal when determining whether a complaint is made out.

complaint, as it currently stands, does not rise to the point where it would persuade me to prohibit Conyers from acting for the Plaintiffs.

22. The Defendant's claim that (i) Conyers has in its possession confidential information about him, and (ii) that Conyers will disclose this confidential information to the Plaintiffs for their use in these bankruptcy proceedings, is purely speculative and does not invoke Conyers' obligation to then show that there is no risk that such confidential information will be disclosed. It is also not helpful that the Defendant has not particularized what confidential information about him which Conyers may have in their possession.

23. On behalf of the Plaintiffs Mr. Rhys Williams cited the authority of *Sannapareddy and Ors. V. Commissioner of Bermuda Police Service [2019] BDA LR 31* which although factually is not on all fours with the facts of the case at bar it does lend assistance. *Sannapareddy* involved circumstances whereby the Commissioner of the Bermuda Police Service (the First Respondent) alleged a conflict of interest under Rule 24 of the Barristers' Code (cited earlier in this Ruling) against the law firm of Chancery Legal ("Chancery") which represented the Intervener Applicant. The Senior Counsel and Director of Chancery was a Mark Pettingill and who was a former Attorney General of Bermuda between 2012 and 2104. Assisting Mr. Pettingill was Ms. Victoria Greening who was a former Crown Counsel (Prosecutor) in the Bermuda Department of Public Prosecutions ("DPP") between 2014 and 2017. The case involved the execution of Special Procedure Warrants against the Applicants (Mr. Sannapareddy, Bermuda Healthcare Services, and Brown Darrell Clinic Limited) and the complaint by the First Respondent was that as former Attorney General and as former Prosecutor Mr. Pettingill and Ms. Greening respectively would have been in possession of privileged information relating to the criminal investigation which formed the basis for the said warrants being obtained. As noted by Acting Justice K. Bell, there was no dispute that the criminal investigation was ongoing while Mr. Pettingill was Attorney General and when Ms. Greening was in the DPP's office. Nor was there any dispute that any discussions with Mr. Pettingill or with Ms. Greening about the criminal investigation would have been not only confidential but also privileged.

24. Before reaching her decision Bell AJ summarized the burden imposed upon the party seeking to restrain a lawyer from continuing to act. She said:

> *"In summary, the burden is on the party seeking to restrain the barrister or law firm from continuing to act to establish (1) that the lawyer or firm is in possession of information which is confidential to him and to the disclosure of which he has not consented, and (2) that the information is or may be relevant to the new matter in which the interest of the other part is or may be adverse to his own. The burden of proof on the party complaining is not a heavy one.*
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> *If these facts are established, the evidentiary burden then shifts to the lawyer or law firm to show that even so there is no risk that confidential information will be disclosed. This is a difficult burden to meet. The Court will intervene unless there is no risk of disclosure of confidential information."*

25. From this Bell AJ went on to find that the evidence established that both Mr. Pettingill and Ms. Greening were in possession of privileged and confidential information in connection with the criminal investigation and that there was a risk of disclosure of this information which would be adverse to the interests of the First Respondent. Chancery legal was then restrained from acting for the Intervener Applicant.

26. It is extremely important to note for the purposes of this application by the Defendant to remove Conyers as the lawyers for the Plaintiffs that Bell AJ in <u>*Sannapareddy*</u> had before her copious amounts of evidence/material from which she may comprehensively determine: (i) whether the First Respondent met its burden of proving that Chancery was in possession of confidential/privileged information; and (ii) whether Chancery then met its evidentiary burden of showing that there was no risk that such confidential/information would be disclosed. In particular, the following were before Bell AJ: affidavits from a John Briggs who said that he was in regular meetings with Ms. Greening when she was a prosecutor in respect of the criminal investigation of the Applicants, and, that he had spoken to Mr. Pettingill when he was the Attorney General about the criminal investigation; an affidavit from then prosecutor Mr. Loxley Ricketts who was in meetings with Mr. Briggs and Ms. Greening and who confirmed the contents of Mr. Briggs affidavit; affidavit from Ms. Greening who said that she was assigned to a specialist team within the DPP's office which handled the said criminal investigation but that her involvement was

minimal; and, an affidavit from Mr. Pettingill who did not dispute the contents of Mr. Briggs' affidavits but stated that he would not have disclosed what was discussed between him and Mr. Briggs about the criminal investigation.

27. There is no such evidence in the case at bar for me to conclusively find that the Defendant has met his burden of showing that Conyers is in possession of confidential information about the Defendant which the Plaintiffs can then use against the Defendant. Specifically, there are no affidavits, no communications between Conyers and the Defendant or anyone else, and no copies of any legal proceedings in which any confidential information was set out or even alluded to. This is not unlike the predicament that the respondents in *Re Recover Ltd. (in liq) [2003] EWCA 536 (Ch)* found themselves in.

28. In *Re Recover* the respondents made an application in proceedings by the liquidator of Recover Ltd. (the "company") to remove the solicitor from acting for the liquidator. The solicitor had once acted for the company in respect of substantial litigation and the company owed the solicitor £250,000 in legal fees. These outstanding legal fees appeared in a report prepared by the official receiver. The application to remove the solicitor as lawyer for the liquidator was on the grounds that there was a conflict of interest because the solicitor was the largest unsecured creditor of the company and he therefore had a financial interest in the proceedings. Further, that he was likely to be called as a witness at any subsequent hearing and that he held confidential information.[9] In dismissing the application Pumfrey J. held that:

(i) The confidential information held by the solicitor was not identified and that such an allegation had to be properly particularized. Further, that *"a vague suggestion of confidential information was not enough"* and that *"Where there was no protectable confidential information, the removal of a lawyer would have to be fully justified"*.[10]

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9 Paragraph C of page 976 and paragraph H of page 979 of *Re Recover*.
10 Paragraphs G to H of page 976 of *Re Recover*.

(ii) Although the solicitor would have to give evidence at any hearing there was no conflict of interest between the solicitor and his client the liquidator.

(iii) The decision whether to act was one for the solicitor and that it was for him to determine whether he would harm his client if he gave evidence. However, if at all material times the solicitor acted in accordance with his client's instructions then he should not be removed.

29. The overarching thrust of *Re Recover* is that a Court should proceed with caution when deciding whether or not to go behind the basic principle that an individual is entitled to a lawyer of their choice. The exercise of such caution requires the Court to compel those who are seeking to remove the other party's lawyer to undergird their application with sufficient credible and reliable evidence. Particularly where the application involves allegations that the other party's lawyer is in possession of confidential information that can and will be used against the applicant.

30. In the case at bar, the Defendant's mere unsubstantiated and vague assertions that Conyers could be in possession of confidential information is insufficient for me to definitively find that confidential information about the Defendant is actually in the hands of Conyers. Simply put, the Defendant, as required by Bell AJ in *Sannapareddy*, has not even stepped into the starting blocks of proving that Conyers is in possession of confidential information about him. Therefore, in no way whatsoever is it necessary for me to move to the next crucial step of calling upon Conyers to meet its evidential burden of showing that there is no risk of disclosure (as also required by Bell AJ in *Sannapareddy*).

31. I commented earlier that the facts of *Sannapareddy* are not on all fours with the case at bar and I did so because *Sannapareddy* pertains to circumstances which are obviously covered by Rule 24 of the Barristers' Code. That is, that a lawyer shall not act for an opponent of a client, or a former client, where his knowledge of the affairs of such client or former client may give him an unfair advantage. Strictly speaking, the Defendant's complaint is not that Conyers should be removed as counsel for the Plaintiffs because they previously

acted for him and are therefore in possession of confidential or privileged information which may now give the Plaintiffs an unfair advantage in these bankruptcy proceedings. If this were the case I probably would not have troubled my mind too much in restraining Conyers from acting for the Plaintiffs. The Defendant's issue is that Conyers represented HSBC which was suing or being sued by him and therefore Conyers should not now be allowed to represent the Plaintiffs. Rule 24 of the Barristers' Code does not, nor does any other Rule, prohibit a lawyer from representing two different clients against the same opponent in separate matters, even if there is an overlap in the factual matrices of the two different matters.

32. The only prohibition in relation to the disclosure of information would be pursuant to Rules 15 and 17 whereby the lawyer should not divulge an existing or former client's information without consent of that client and nor should the lawyer disclose to one client the confidential information of another client. Therefore, Conyers' duty under Rules 15, 17 and 24 of the Barristers' Code is owed to the Plaintiffs and not to the Defendant, unless of course the Defendant was an existing or former client of Conyers.

33. I also have regard to the cited authority of *Re Schuppan (a bankrupt) [1996] 2 All ER 664* in which Walker J. held that:

> *"It was not unreasonable for the trustee in bankruptcy to retain the petitioning creditor's solicitors, particularly where the anticipated difficulties related to the identification, tracing and recovery of assets for the bankrupt's estate; in that situation, the retainer of solicitors who were already aware of those difficulties could be advantageous to all the creditors, not just the petitioning creditor. If the petitioning creditor was the largest creditor and no difficulties were expected in quantifying the provable debts, the risk of conflict of interest would appear to be only a distant possibility. If, however, a conflict of interest was identified, but there was no real risk of confidential information miscarrying or being misused, or any identified risk could be averted by a division of responsibility, a balancing exercise might be appropriate to determine whether the conflict was something which the court might countenance."*

34. The circumstances in the case at bar are not altogether disparate from those in *Schuppan*. I agree with the submissions of Mr. Williams that the 2005 judgment obtained by HSBC

(which I suspect at the time was the Bank of Bermuda) against the Defendant involves a provable and indisputable judgment debt which one would have no difficulty quantifying. Further, that it is unlikely that the Plaintiffs will go behind the judgment. Therefore, as Mr. Williams posits, any challenge to HSBC's proof of debt would be a "mere distant possibility" and so would be the risk of any conflict of interest arising by virtue of Conyers now representing the Plaintiffs.

35. Having said this, legal proceedings have a tendency to evolve. Therefore, if at any time and for some reason proof of HSBC's judgment debt against the Defendant is brought into legitimate question, and thereby potentially moving any conflict of interest from being a mere distant possibility to being a real risk, then the Court may very well be called upon to determine whether Conyers could continue to act for the Plaintiffs or whether Conyers' representation of the Plaintiffs should be limited. That time has not yet arisen.

Conclusion

36. In consideration of the above paragraphs, I confirm my Ruling of the 24th August 2022 dismissing the Defendant's application to have Conyers removed as Counsel for the Plaintiffs.

37. As for costs, I will reserve any decision until after other substantive issues related to the bankruptcy proceedings are determined by this Court.

Dated the 28th day of December , 2022

THE SEAL OF THE SUPREME COURT OF BERMUDA

The Hon. Mr. Justice Juan P. Wolffe, JP