In The Supreme Court of Bermuda

CIVIL JURISDICTION

2017 No: 51

BETWEEN:

WF (anonymized)

Intervener Applicant

MAHESH SANNAPAREDDY

First Applicant

BERMUDA HEALTHCARE SERVICES LIMITED

Second Applicant

BROWN DARRELL CLINIC LIMITED

Third Applicant

And

THE COMMISSIONER OF THE BERMUDA POLICE SERVICE

First Respondent

THE SENIOR MAGISTRATE

Second Respondent

EX TEMPORE CHAMBERS RULING

Ex parte Application on Notice for Leave to Appeal (s. 12(2) of the Court of Appeal Act 1964)

Appeal against Interlocutory Ruling refusing Application to Adjourn

Date of Hearings:	Tuesday 26 February 2019
Date of Decision:	Tuesday 26 February 2019
Date of Reasons:	Friday 01 March 2019

Appearances:	
Intervener Applicant:	Mr. Mark Pettingill (Chancery Legal Limited)
First Respondent (on notice):	Mr. Dantae Williams (Marshall Diel & Myers Limited)

Non-Appearances:	
First-Third Applicants (on notice):	Mr. Delroy Duncan (Trott & Duncan Limited)
Second Respondent (not served):	Mr. Alex Potts QC (Kennedys Limited)

REASONS of Shade Subair Williams J

Introduction

1. This is the Intervener's ex parte application (on notice) for leave to appeal against my interlocutory ruling made on 12 February 2019 wherein I refused the Intervener's application for an adjournment of the hearing of the First Respondent's summons application dated 11 June 2018 ("the protocol access summons"). The protocol access summons prayed an order of this Court sanctioning a written protocol for an independent scanning and review of patient medical files seized by the Bermuda Police Service ("BPS") pursuant to two special procedure warrants issued by the Senior Magistrate on 2 and 10 February 2017 ("the warrants" or "both warrants").

Summary of Police Investigation

2. On the Second Affidavit of Detective Sergeant James Hoyte, sworn on 31 May 2018 in support of the protocol access summons, he summarized the nature of the relevant police investigation at paragraphs 4 and 5 in the following way:

   " *4. …The BPS is in the midst of an ongoing investigation concerning the conduct and activities of Dr. Ewart Frederick Brown ("Dr Brown"), Wanda Gayle Henton-Brown ("Wanda Henton-Brown"), and Mahesh Babu Sannapareddy ("Dr Reddy").*

   5. The line of inquiry into the conduct and activities of the above-named subjects was initiated upon reports of former employees of BHCS, who made allegations of improper practices with respect to the operations of the Clinics, and the conduct of Dr. Reddy

Wanda Brown and Dr Brown. These allegations were outlined in the search warrant applications and Dramatis Personae provided to the court. The BPS thoroughly examined the allegations made by the former employees and conducted its own independent inquiry into matters. That independent inquiry has produced further evidence in addition to and in support of the reports from former employees. As such, the BPS had reasonable grounds to believe that:-

a. Dr Reddy and others committed the indictable offences identified in the Information *namely fraud / corruption and money laundering…*

b. The medical files sought would qualify as excluded material under the Police and Criminal Evidence Act 2006 ("PACE"); and

c. The medical files sought were relevant and of substantial value to the ongoing investigation (as evidenced by paragraphs 52-62 of the Information)."

3. A detailed narrative on the case of the First-Third Applicants (alternatively referred to as "the Applicants") outlining the historical background to the police investigation is provided from paragraph 29 onwards in the Form 86A exhibited to the Notice of Originating Motion dated 21 August 2017.

Background Court Proceedings

The 11 February 2017 Court Order:

4. On Saturday 11 February 2017 the First-Third Applicants appeared before the Court on an *ex parte* with notice[1] basis in pursuit of urgent interim injunctive relief, pending a proposed *inter partes* hearing.

5. The Applicants' concerns, as expressed by Counsel Mr. Delroy Duncan, were that the number of patient files seized and the forced manner in which it was done risked an avoidable cessation to the Applicant's business. Mr. Duncan submitted to the Court that his Clients were cooperative and willing to agree an 'orderly process' for the exchange of information sought by the First Respondent.

6. On 11 February 2017, the learned Mr. Justice Stephen Hellman made the following order:

"1.All patient files seized by the 1st Respondent must be returned to the premises (Bermuda Healthcare Services and the Brown Darrell Clinic) by 8a.m on Monday 13 February.

[1] The Court adjourned momentarily on 11 February 2017 during the hearing to enable Counsel for the First-Third Applicants to contact an appropriate officer of the Bermuda Police Service to be heard by the Court.

2.The 1st Respondent is not to review the content of the material seized, save in so far as is necessary for the purpose of copying the material.

3….

4.This application is adjourned until 10am on Monday the 13th February 2017.

5.The 1st Respondent is to provide the Applicants with a copy of the evidence relied upon before the Magistrate in support of the application for the search warrant issued on the 2nd February 2017. The evidence can, subject to the order of the Court, be redacted to exclude any material subject to public interest immunity.

6.At the hearing on Monday the 13th February 2017, the parties are to provide the Court with a protocol for dealing with the seizure and copying of patient files.

7.The Court will order directions for the Applicants(') application for judicial review

8.The Court will order directions to hear the 1st Respondent's public interest immunity application if so advised.

The 13 February 2017 Court Order:

7. On 13 February 2017 the First Respondent appeared though its Counsel, Mr. Dantae Williams and Mr. Duncan appeared for the First-Third Applicants. The Court heard *viva voce* evidence from Sue Reilly, the Chief Operating Officer of the Second Applicant.

8. At the close of the hearing, the Court ordered, *inter alia*, various directions in relation to the First-Third Applicants' leave application and the First Respondent's anticipated public interest immunity application. Directions were also provided for the First Respondent to disclose the information and materials relied on to secure the issuance of the warrants and for the First Respondent to obtain leave of the Supreme Court before executing any further searches under the warrants.

9. Additionally, the Court ordered a confidential seal on all of the material seized under the warrants pending the outcome of the application for leave for judicial review or further Court order. The effect of the seal was to prohibit the First Respondent from directly or indirectly reviewing or otherwise utilizing the material or any information contained therein for the purposes of their investigation. However, photocopying of any uncopied material (which expressly included medical records) was permitted by the Court's order

subject to various specified conditions. Such conditions included a direction for the photocopying to be carried out by staff members not involved with the investigation and further directions were made outlining the process for removing from the relevant premises additional files, documents or medical records liable to seizure under the warrants for the purpose of completing the photocopying process.

10. Access and use of the seized medical records by the Second and Third Applicants was also permitted under the 13 February order.

The First Amended Form 86A:

11. A Form 86A Notice of Application for leave to apply for judicial review, which enclosed a document entitled 'Detailed Grounds upon Which Relief is Sought', was dated 13 February 2017 and filed by Counsel on behalf of the First-Third Applicants on 17 February 2017. I shall refer to this as "the first amended Form 86A" since it followed the filing of a previous Form 86A dated 11 February 2017 ("the un-amended Form 86A").

12. The subject of the application on the first amended Form 86A was "*The decision(s) of the Commissioner of Police to seek and execute search warrants against the business premises known as Bermuda Healthcare Services located in Paget Parish in the Islands of Bermuda and Bermuda Healthcare Services located in Paget Parish in the Islands of Bermuda*" and "*The decision of a Magistrate made on or about 2nd February 2017 to grant a request for and issue to the Commissioner of Police a search warrant for execution against the medical business and premises known as Bermuda Healthcare Services located in Paget Parish in the Islands of Bermuda*."

13. The First-Third Applicants pleaded that the issuance and execution of the 2 February 2017 warrant ("the First Warrant") was unlawful on grounds of "*a. Non-fulfilment of the statutory conditions for the issuing of a warrant*" and "*b. The warrant was unreasonable and disproportionate in all the circumstances*."

14. In respect of the complaint of non-fulfilment of the statutory conditions, the First-Third Applicants stated that the further conditions referred to at paragraphs 12(a)(ii) and 14 of Schedule 2 of the Police and Evidence Act 2006, were not fulfilled. These further conditions dealt with the practicability of communicating with any person entitled to grant access to the premises in question or the material in question. On the First-Third Applicants' pleaded case, the First Respondent could not have had any plausible concern that by communicating with them beforehand, the evidence would have been destroyed. It is the First-Third Applicants' case that there were alternative means of obtaining the material as "*the subjects of the investigation, in particular Bermuda Health Care Services*

and Dr. Reddy, have co-operated voluntarily with various investigations into the subject-matter of the present investigation." (Se para 9 of the amended Form 86A).

15. Where it was complained that the warrant was unreasonable and disproportionate, the First-Third Applicants averred at paragraph 11 that the issuance of the warrant "*would inevitably lead to sever disruption to the provision of critical medical services in Bermuda. The history of this investigation clearly shows that there were more effective and less disruptive means to obtain such information as the police could lawfully require*."

16. It was further pleaded in the amended Form 86A that the execution of the First Warrant by the First Respondent was unlawful and/or *ultra vires* on the following grounds:

    a. Excessive force was used to gain entrance to the premises resulting in significant damage to property.
    b. Video recording equipment on the premises was unjustifiably interfered with.
    c. Individuals employed at the premises were unjustifiably prevented from observing the execution of the warrant.

17. At paragraph 4, legal professional privilege was pleaded as follows:

    "*In addition, the material seized includes electronic material containing material subject to legal professional privilege. Even if this application were ultimately unsuccessful, the First Respondent must not be allowed to review the electronic material before a protocol is established for how the material subject to legal professional privilege is to be filtered and quarantined*."

18. The Applicants asserted that the warrant was nevertheless issued "*in large-part due to the First Respondent's material non-disclosure*".

19. A breach of right to patient confidentiality was not pleaded in the 'Detailed Grounds upon Which Relief is Sought' in the amended Form 86A. However, in the un-amended Form 86A there was a passage subtitled "Grounds upon Which Relief is Sought" on the final page which provides:

    "*That the learned Magistrate issuing the search warrant(s) and the Commissioner of Police executing the search warrants failed to take into account that confidential and sensitive medical files of patients at Bermuda Healthcare Services, the Brown Darrell Clinic and the King Edward VII Memorial Hospital have been seized in breach of their*

right to confidentiality the effect of which will potentially injure ongoing patient care and treatment."

The 16 March 2017 Court Order for Directions on Strike-Out Summons and Leave to Apply for Judicial Review

20. By summons dated 8 March 2017 supported by the affidavit evidence of Counsel, Mr. Dantae Williams, the First Respondent sought to strike out the First to Third Applicants' application for leave on various grounds which included an averment of abuse of process for non-disclosure of the underlying documents placed before the Court during the course of the ex parte hearings.

21. In open party correspondence between the Counsel for the First-Third Applicants and Counsel for the First Respondent strong complaints of intentional delay in prosecuting the application for judicial review were made and vigorously defended.

22. The strike out summons was made returnable for 16 March 2017 before Hellman J. The Court directed that the Applicants disclose the requested materials in relation to the *ex parte* hearing of 11 February 2017 and granted leave for the filing of a re-amended Form 86A. Directions were also given for the simultaneous hearing of the strike-summons and the leave application for judicial review.

Leave to Apply for Judicial Review Granted by Court Order of 15 June 2017:

23. By Order of the Court dated 15 June 2017, the First-Third Applicants were granted leave to file and serve a Notice of Originating Motion exhibiting what was termed in the said Order as 'the amended Form 86A'. In reality, this was a re-amended Form 86A. I will refer to the re-amended Form 86A as "the Notice of Motion Form 86A exhibit" and for a shortened reference, "the Form 86A exhibit".

24. In the Form 86A exhibit, the lawfulness of both special procedure warrants issued on 2nd and 10th February 2017 is challenged. The relief sought is for an order quashing the Senior Magistrate's decision to issue the warrants and a declaration that the searches made thereunder were unlawful. It is further prayed that the First Respondent return all items seized under the warrants and for the First-Third Applicant to be awarded compensation for the alleged material damage caused (which was pleaded to also arise out of unlawful trespass to property) and their legal costs.

25. Enclosed with the Form 86A exhibit is an amended document outlining the "Detailed Grounds Upon Which Relief is Sought" ("the Detailed Grounds exhibit"). The grounds relied on in the First Amended Form 86A were abandoned and re-pleaded as follows:

    a. *Material non-disclosure...*
    b. *Non-fulfilment of the statutory conditions for the issuing of a warrant…*
    c. *The Warrants were disproportionately and unreasonably wide, amounting to the bulk collection of confidential patient information...*

26. The particulars of ground c. above are contained at part VII of the Detailed Grounds exhibit:

"107. Although item i. on the Warrants is limited ("[i]n the first instance") to three named patients and the 265 patients listed in the schedule labelled JH3, items ii., iv., v., vi., and vii. are not so limited. These items therefore authorise the First Respondent to proceed with the bulk collection of confidential personal, medical data, in the form of sensitive information concerning the medical treatment of hundreds of patients.

108. The Information sets out no reasoning for why such a wide collection of sensitive personal data is warranted and we have no record that the Second Respondent gave any consideration to whether warrants of such an extremely wide scope were proportionate in the circumstances.

109. It is submitted that, at the very least, the very scope for the special procedure warrants sought by the First Respondent with respect to sensitive material and confidential personal, medical data, should have led the Second Respondent to apply particularly close to scrutiny to the application in order to balance the legitimate interests of the hundreds of third parties with the stated interests of the investigation.

110. That this reinforced scrutiny was necessary follows, it is submitted from the plain fact that the constitutionally protected right to privacy was engaged…, as well as the right to respect for private and family life enshrined in Article 8 of the ECHR. The European Court of Human Rights has held, in the context of search warrants, that "having regard to the severity of the interference with the right to respect for his home of a person affected by such measures, it must be clearly established that the proportionality principle has been adhered to…

111. It is submitted that by not addressing the proportionality of proceeding with the bulk collection of confidential and sensitive patient information, the Respondents failed in their duty to have adequate regard to the constitutionally protected fundamental rights of

hundreds of interested third parties into consideration. For that reason the Warrants are disproportionate and fall to be quashed. ”

27. A claim for breach of legal professional privilege is repeated in the Form 86A exhibit.

28. In contemplation of alternative relief, paragraph 6 of the Detailed Grounds exhibit states:

    "…*Even if this application were ultimately unsuccessful, the First Respondent must not be allowed to review the electronic material before a protocol is established for how the material subject to legal professional privilege is to be filtered and quarantined*."

29. The Form 86A exhibit is also supported by affidavits from eight deponents and addresses the affidavit evidence previously filed on behalf of the First Respondent.

The First Respondent's Protocol for Access Summons

30. On 5 June 2018 the First Respondent filed a summons dated 11 June 2018 ("the protocol access summons") seeking the following orders:

    1.The Court approve an independent agency from overseas to store scanned copies of all medical files seized by the First Respondent on 11 February 2017 that were the subject of the Special Procedure Search Warrants ("SPWs") issued by the Senior Magistrate on 2 and 10 February 2017 on a secure file server;

    2.The Court approve two independent medical experts from overseas to review all scanned copies of medical files seized by the First Respondent on 11 February 2017 and forwarded to the independent agency for storage;

    3.The Court approve the protocol outline in Schedule A attached hereto to allow for the storage and review of the medical files by the approved independent agency and medical experts.

    …

31. The Protocol Access Summons was followed by a Consent Order for Directions dated 22 June 2018, which provided for the exchange of further affidavit evidence and skeleton arguments.

Application by WF on behalf of Class of Patients to Intervene

32. Under a cover letter to the Court, dated 14 September 2018, Chancery Legal Ltd ("Chancery Legal") filed the First Affidavit of WF sworn on 13 September 2018 in support of a summons application dated 26 September 2018 to intervene in the proceedings ("the intervener summons"). At paragraphs 1-6 of WF's affidavit she stated:
    1.That I am a patient of the Brown Darrell Clinic and Dr. Ewart Brown has been my personal physician for over 20 years.

    2.That I am aware that my personal medical files in addition to the files of other patients were seized by the BPS on 11 February 2017.

    3. That I attended a public meeting at the Cathedral Hall in Hamilton in May of 2017 where there were over 100 patients of the Brown Darrell Clinic who voiced their significant concern with regard to the seizure of their personal medical files by the BPS.

    4.That I am prepared to be the patient of record in a legal action to intervene in current proceedings on behalf of a large group of patients.

    5.That I have always received excellent health care from both Dr. Brown and The Clinic and I have always had full confidence in the confidentiality that exists between Doctor and patient.

    6.That as a result of the BPS action in executing a warrant and now being in possession of my personal information I feel completely violated and offended by the actions of the Police. I am aware that there are numerous patients that have absolutely no confidence that the Police will properly safeguard their private medical information and that there is a real risk that said information may find its way into the hands of third parties or the public domain through social media or some other unregulated source.

33. In the intervener summons it is prayed that WF be granted on her application"

    '*leave to intervene in these legal proceedings on the grounds that:*

    1. *...*
    2. *...*
    3. *...*
    4. *That the Applicant did not give permission for the removal of the file or for the Police to have access to any of the information on her personal medical files and feels*

completely violated and offended by this action and believes that her right to privacy has been fundamentally breached.

5. *That the Applicant attended a meeting in May of 2017 at the Cathedral Hall in Hamilton with over a hundred (100) patients of the Brown Darrell Clinic in attendance. All of who were vociferous in their disdain for the unlawful Police action.*
6. *That the Applicant is representative of a number of patients who suffered the same injustice.*
7. *That no safeguard or assurance has been given to the Applicant to protect her privacy or safeguard the dissemination of her private information.*
8. *That the Applicant, as supported by the other patients, wishes to intervene as an obviously affected party in these proceedings and have the Court rule in regard to the irregularity of the Police action and order such legal remedy as may be warranted in the circumstances*.'

The 4 October 2018 Case Management Hearing

34. On 4 October 2018 Mr. Pettingill appeared before me on behalf of WF and the class of patients she sought to represent. Mr. Duncan appeared for the First-Third Applicants and Mr. Diel appeared for the First Respondent.

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…*'

36. It was further agreed between Counsel for the Applicants and the First Respondent that the Applicants' summons dated 26 September 2018 to extend the time to file and serve a hearing bundle and skeleton arguments in support of its Notice of Motion for the judicial review application be adjourned *sine die*.

37. Mr. Diel weighed in and stated that it was hoped that all parties would agree to the protocol and abandon the judicial review application. The remainder of the hearing was focused on the Mr. Diel's call for the identity of the class of patients represented by WF to be made known. Mr Diel further argued that any patients whose files had not been seized ought not to be joined nor have any input on the discussions to agree a protocol.

38. I accordingly directed that Mr. Pettingill serve within 7 days a list containing the patient names who WF purported to represent and for the hearing of the intervener summons.

The 2 November 2018 Case Management Hearing

39. On 2 November 2018 the parties through their Counsel (save only for the Second Respondent who to date has never been served with the originating documents to cause an appearance) reappeared before me. Mr Duncan advised that he and Mr. Diel were in the early stages of producing an agreed protocol as sought under the protocol access summons. Mr. Duncan further advised the Court that the protocol would obviate the need for the substantive judicial review proceedings.

40. Mr. Duncan informed the Court that it was a matter of public knowledge that patients were aware that their medical records had been seized. Counsel said that the First-Third Applicants were keen to see the patients, as represented by Mr. Pettingill, formally intervene so that those patients could offer some input and direction on the protocol proposed. This, Mr. Duncan explained, would enable his clients to properly secure the patients' knowledge and consent for the Applicants to discontinue their judicial review application, thereby dissolving the substantive proceedings.

41. Mr. Pettingill agreed that there was wide media coverage and attention given to the police seizure of the patient files and that there were over 100 patients affected by such seizures.

42. Mr. Diel clarified that the First Respondent had no objection to WF being joined to the proceedings as an intervener. He observed that 152 patient names had been provided to him by Mr. Pettingill in compliance with my direction of 4 October 2018 but that 2 of those patients named were in fact deceased. This, said Mr. Diel, would potentially lead to a second set of representatives and further risk objections from the patients to an agreed protocol between the First Respondent and the Applicants.

43. Mr Diel queried how communication would be effected between WF and all of the living individuals out of the 152 patients and how any dissention between the patients on their varying views would be handled. Mr Diel challenged how it could even be known

whether WF had any communication with the patients she purported to represent. He explained that he had thus written to Mr. Pettingill on 23 October 2018 asking for WF to attend Court to be cross-examined on her affidavit, albeit that the Court had not previously been invited to issue a direction for her attendance to Court. Mr. Diel proposed at this stage that the Court direct for WF to appear to be cross-examined on these points.

44. Mr. Pettingill described the notion of a Court direction that WF be so cross-examined as 'grossly unreasonable' and an attempt to intimidate an elderly senior citizen. On the question of whether WF wished to intervene to represent herself and the other 152 patients, Mr. Pettingill stated; " *…no, she will be joined as a party. What she says in her affidavit- not that she's representing- she says at (paragraphs) 5 and 6 that she was at this meeting she attended in May with over 100 patients of the Brown Darrell Clinic, all of whom were vociferous in their disdain for the unlawfulness of the police action- and it's true, I was there. (Paragraph) 6 The Applicant (WF) is representative of a number of patients who suffered the same injustice. It's not one of these specifics where I'm representing as, you know, an individual or as Counsel all of these people that have suffered through the same thing. She is representative of that. If my learned friends want to come along and say, 'That's just not the case. There were no other files taken or her file wasn't taken-' She's representative of a class of people. That's how intervention actions occur. When Mr. Bassett in his affidavit, they had Preserve Marriage as a group- he was representative of the group of people, it was well known, that had an issue with same sex marriage. She (WF) is representative of other people whose files were taken- just speaking for them in a sense directly of this person and this persons…she is speaking for herself and she is aware there were over 100 others. I think to clarify that point, my friend wanted to know, 'well who are these other hundred people? We need to have the names of them' So, we provided that…*"

45. The Court then interjected: "*So Mr. Pettingill I think where the disconnect falls between the two of you is exactly what you mean when you say she is representative because if she is not speaking for the other patients and she is speaking in her own right, so when it comes to establishing the protocol, she is- you're taking instructions from her?*" Mr. Pettingill replied; "*Yes*". I then queried; "*You're not taking instructions from 152 – 152 names*-" to which Mr. Pettingill agreed; "*Just like with Mr Bassett…*"

46. The Court then remarked that WF should then be joined in her own right and Mr Pettingill again agreed; "*She can be and she will be joined in her own right. But for her in her affidavit to say that she is aware that this happened to all these other people- for us by way of a courtesy to provide a list saying, 'here's a list of all the people that she is*

aware of- that we're aware of - whose files were taken-'if that's an accepted fact, that those files were taken- that's the end of it. What do you need to cross-examine her for?"

47. The Court confirmed that it was Mr. Pettingill's intention that WF would be intervening personally as an interested party and not in a representative capacity.

48. Mr. Duncan flagged the importance of distinguishing between intervening as a representative capacity or intervening as a party and submitted that this distinction would be of significant importance on the issue of costs. He emphasized the desire to avoid having 152 named parties to this action and suggested that the ideal approach would be to intervene in a representative capacity. (The Court was then referred to paragraph 2068-2069 of *DeSmith's Law on Judicial Review).*

49. The Court was also referred to other authorities on the law of interveners. Mr. Duncan proposed that an affidavit setting out a narrative on the objection or relevant issue of contention which exhibited a signed document confirming each person's position would be a way for the Court to be clear on the extent to which the intervener spoke on her own behalf and on behalf of others. He submitted that this would stand as a representative intervention.

50. Mr. Duncan encouraged this approach on the basis that it would achieve the desired approach of establishing how many patients supported the proposed protocol. He submitted that the only alternative would be the undesirable approach of having each patient concerned named as a party to the proceedings.

51. Mr. Diel agreed in a general sense to the approach proposed by Mr. Duncan but expressed concern for the exposure to patient objections at this belated stage to the protocol.

52. Mr. Pettingill agreed to provide the suggested signed statements from the patients concerned and it was agreed by all parties present that this would be the settled approach for WF to in fact join in a representative capacity.

The 6- 15 November 2018 Patient Signatures for the Intervener Application

53. Chancery Legal filed with the Court signed statements by the 150-152 patients under the document cover entitled '*Brown Darrell Patients' Support of (WF) Intervener Application*.'

54. Each signed statement reads:

> "*I, undersigned, as a patient of Bermuda HealthCare 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*"

55. The date range on these statements is 6 November 2018 – 15 November 2018.

The 22 November 2018 Case Management Hearing and Consent Order on Application to Intervene

56. On 22 November 2018 Mr. Duncan, Mr. Diel and Mr. Pettingill all appeared.

57. Mr. Diel confirmed his receipt of the patient letters of objections and stated that until his Client had the opportunity to confirm that each of the patients who signed a statement were the subject of a seized medical file he would operate on the presumption in the affirmative. Mr. Pettingill highlighted that the cautious wording employed in each statement confirmed that it was the respective patient's belief that his or her medical file had been seized. Against this background, the parties advised that they would file a draft consent order on the application to intervene.

58. Mr. Diel then requested for a hearing date of 5 December 2018 (as convenient to all Counsel) to be fixed for the hearing of his client's 11 June 2018 protocol access summons. As the Court calendar was unable to accommodate the proposed date, the parties all agreed to my direction for a listing form (Form 31D) to be filed so to secure a January 2019 hearing date.

The Intervener's Contempt of Court Summons Application

59. By summons filed on 25 January 2019 and dated 5 February 2019 ("the contempt summons") Chancery Legal prayed the following orders:

    (i) That as a result of a breach by the First Respondents of the Court Order dated 13 February 2017, the First Respondents be held in Contempt of Court;

    (ii) That Chief Inspector Grant Tomkins be removed from the investigation;

    (iii) Costs in the cause

60. The contempt summons was supported by affidavit evidence of a police officer who is also a patient of the Third Applicant whose medical file was seized. I shall refer to this person as "ABC". As a brief description of the asserted contempt, ABC stated in his/her affidavits that CI Tomkins approached him/her about the seizure of his/her medical file and stated that he understood that he/she had some medical issues. He / She stated that CI Tomkins also queried him/her about the meetings that had taken place at Cathedral Hall with other patients and advised him/her that this exchange was to be regarded as a personal conversation between the two of them.

61. Evidence in support of the contempt also came from the affidavit of another patient 'WB' who asserted that he was visited at his home by two unnamed members of the BPS who ordered him to accompany them to the police station to verify files that had been seized. WB described a hostile exchange and stated that he refused to attend the police station. He was unable to identify any of the officers who he stated approached him.

Notice of the Application to Adjourn the Protocol Access Summons

62. On13 December 2018 Marshall Diel Myers Limited ("MDM") filed a Form 31D requesting a hearing date for the First Respondent's 11 June 2018 protocol access summons. On 20 December 2018 a Court notice was emailed to the parties that the protocol access summons had been listed for hearing fixed for Tuesday 12 February 2019.

63. By letter dated Friday 8 February 2019, Chancery Legal, under the penmanship of Counsel Ms. Victoria Greening, wrote the following to the Court:

"*We refer to the above and write to advise that due to Lead Counsel Mr. Pettingill's unavailability on 12th February 2019, all parties have consented to delist the intervener's application.*

The Delist Form is attached however we have not remitted the Form to Re-list as we do not yet have agreed dates as of yet.

However, our application to have the hearing in respect of the First Respondent's application adjourned, which was to follow our application, is not agreed by consent.

The grounds of our application to adjourn are as follows:

1) *Lead counsel Mr. Mark Pettingill is out of the jurisdiction until 18th February 2019. It is essential that he is in attendance at all hearings;*
2) *It makes sense for the (sic) our application to be heard first;*
3) *We require further disclosure from the First Respondent before being able to respond to their application for access to the medical files. This will require making a separate application to the Courts.*

We apologize for the inconvenience that this may have caused but trust that this advanced notice will leave sufficient time for the Court to re-arrange its diary."

64. This correspondence onset a clear same-date email communication from MDM that it would oppose the application to adjourn its protocol access summons.

The Intervener's Summons Application for Disclosure

65. By summons filed and dated 11 February 2019, Chancery Legal sought an order from the Court that the First Respondent be required to '*provide full disclosure of all materials in their possession in respect of this matter*'.

66. This summons, unsupported by affidavit evidence, was listed (without prejudice to any rights of the First Respondent to be served with sufficient notice) to be mentioned on 12 February 2019 when the protocol access summons was fixed to be heard.

Court's Refusal to Adjourn the Protocol Access Summons and Court's Approval of Protocol

67. On 12 February 2019 the parties' Counsel, Mr. Duncan, Mr. Diel and Mr. Jerome Lynch QC and Ms. Greening (holding for Mr. Pettingill) appeared before me.

68. Mr. Lynch QC submitted that the Court should adjourn on the basis that the Court should hear all of the pending applications simultaneously. More pertinently, he argued, the Court should not hear the protocol summons application prior to hearing the substantive judicial review application.

69. Mr. Lynch QC complained that despite Chancery Legal having filed a search praecipe dated 18 May 2017 for access to the Court file, his Client was still without the benefit of adequate disclosure of the Court documents. Mr. Diel, however, pointed out that the Intervener was not entitled to access the Court file prior to having been joined as a party and that his non-receipt of Court documents since having been joined was a result of Chancery Legal's inaction to secure a copy of the file from the First-Third Applicants or from the Court on a subsequent search praecipe.

70. In assessing the complaints on non-disclosure, I agreed that Chancery Legal were entitled to obtain copies of the Court file from the Court as of 22 November 2019 and that they could have also availed themselves of the First-Third Applicants' willingness to serve them even earlier than that point.

71. On the subject of the contempt summons, Mr. Diel correctly observed that the only police officer named in the supporting affidavit to the contempt summons was CI Tomkins.

72. Turning to the central ground argued during the hearing that judicial review application should be heard first, Mr. Lynch QC argued that the Intervener would be entitled to join the judicial review application as if leave to apply for judicial review had been granted to the Intervener and the First-Third Applicants jointly.

73. I determined that such a submission should be fully argued on a formal application in order to secure a Court ruling on the restrictions or scope of the Intervener's entitlement to join the substantive judicial review application without having filed its own Form 86A application for leave to apply for judicial review. (Notably, at the subsequent leave to appeal hearing of 26 February 2019 Mr. Pettingill informed the Court that Chancery Legal would file its own Form 86A application for judicial review in short order as soon as he obtained disclosure of the Court documents).

74. In the end, in the exercise of my discretion, I refused the adjournment request on the basis that all of the non-disclosure concerns raised by the Intervening party was of its own making or were unresolved as a result of its own inaction.

75. I accepted Mr. Diel's submission that the protocol could be amended to ensure the exclusion of CI Tomkins' involvement in the process, so not to prejudice any subsequent hearing or findings of the Court on the Intervener's contempt summons. I accordingly determined that it was within the Court's powers to approve a protocol which excluded any participation from CI Tomkins.

76. In my assessment, none of the issues of concern raised by the Intervener posed a risk of prejudice to the patients which exceeded the risk of prejudice caused by the existing reality which was that the seized material was already in the sealed possession of the BPS, a process which relies, at least to some degree, on the integrity of the BPS.

77. For these reasons I refused to further delay the hearing of the protocol access summons. Having so ruled, the parties mutually proposed to reappear before the Court on 14 February 2019 so to review the proposed protocol during the interim period and to narrow any issues of dispute in relation to its content.

78. On Thursday 14 February 2019, Mr. Lynch QC confirmed that the parties had achieved an agreed protocol without prejudice to his primary objection to the making of the protocol.

79. Mr. Lynch QC reiterated his objections to approving the protocol without favour from the Court. Mr. Lynch QC made submissions on the importance of doctor patient confidentiality and argued that a doctor-patient relationship trumps in priority nearly any other professional confidentiality including legal professional privilege. Mr. Lynch QC reargued that the Court ought not to permit police access to the seized material until a ruling is passed on the lawfulness of the search warrants and their execution.

80. Having heard Mr. Lynch QC's submissions, I declined to make any findings on issues pleaded under the substantive judicial review application. (Mr. Lynch QC agreed that his primary objection to the Court's approval of the protocol was on the same basis and was inextricably linked to the grounds on which the lawfulness of the search warrants was challenged.)

81. I subsequently approved the proposed protocol placed before the Court.

The Relevant Legal Procedure

Requirement for Leave to Appeal against Interlocutory matters

82. Section 12(2) of the Court of Appeal Act 1964 provides as follows:

"*No appeal shall lie to the Court of Appeal –*

(a) against a decision in respect of any interlocutory matter; or

(b) against an order for costs,

except with leave of the Supreme Court or the Court of Appeal."

Application Procedure

83. Order 2/3 of the Rules of the Court of Appeal outlines the application procedure in respect of leave to appeal:

"*3(1) Where an appeal lies only by leave of the Court or of the Supreme Court, any application to either Court shall be made by notice of motion ex parte in the first instance and the following provisions shall apply:*

(a) where the application is made to the Supreme Court, the notice of motion shall be filed with the Registrar of that Court not late(r) than fourteen days after the date of the decision of the Supreme Court;

(b) if the application is refused by the Supreme Court and the intending appellant desires to apply to the Court for leave to appeal, he shall file his notice of motion with the Registrar not later than seven days after such refusal;

(c) unless the application (whether to the Court or to the Supreme Court) is dismissed or it appears to the Court to which the application is made that undue hardship would be caused by an adjournment, that Court shall adjourn the application and give directions for the service of notice thereof upon the party or parties affected;

(d) if leave to appeal is granted by the Supreme Court, the appellant shall file a notice of appeal;

(e) where leave to appeal is granted by the Court, the time, prescribed by Rule 2 of this Order, within which notice of appeal must be filed shall run from the date when such leave is granted.

(2) Every notice of motion filed in pursuance of paragraph (1) of this Rule shall set out the grounds of the application and shall be accompanied by an affidavit in support thereof and by a statement of the grounds of the intended appeal formulated in accordance with Rule 2 of this Order."

Applicable test in determining Application for Leave

84. In *Avicola Villalobos SA v Lisa SA and Leamington Reinsurance Co Ltd [2007] Bda LR 81*, the learned Chief Justice Mr. Ian Kawaley, as he then was, cited with approval the case of *The Iran Nabuvat [1990] 1 WLR 1115*, in which Lord Donaldson of Lymington stated the testfor leave to appeal; *"no one should be turned away from the Court of Appeal if he had **an arguable case** by way of appeal" (p. 1117 – emphasis added)* and *"That is really what leave to appeal is directed at, screening out appeals which will fail."*

85. I agree that this is the test to be applied in determining the merits of an application for leave to appeal.

Single Justice of Appeal may determine Interlocutory matters

86. Section 14 of the 1964 Act reads:

    "*To the extent prescribed by Rules the powers of the Court of Appeal to hear and determine any interlocutory matter may be exercised by any Justice of Appeal in the same manner as they may be exercised by the Court of Appeal and subject to the same provisions:*
    Provided that every order made by a Justice of Appeal in pursuance of this section may, on application by the aggrieved party and subject to any Rules, be discharged or varied by the Court of Appeal."

87. Order 2/38 of the Rules of the Court of Appeal provides:

    "*38 (1) In any cause or matter pending before the Court, a single Judge may hear, determine and make orders on any interlocutory application.*
    (2) Any order made by a single Judge in pursuance of this rule may be discharged or varied by the Court on the application of any person aggrieved by such order."

Decision

88. Having heard Counsel's submissions and having reviewed the grounds of appeal stated in the Notice of Motion for leave to appeal filed on 25 February 2019 and Mr. Pettingill's first affidavit in support, I find as follows:

    (i) Leave to appeal on Ground 1 is refused as there is no reasonable argument available to the Intervener Applicant that the non-disclosure of documents is the fault of the Court or any other party other than itself. Non-disclosure of documents to the Intervener Applicant is a result of its own omission to file a Court search praecipe since having been joined to the proceedings on 22 November 2018. Further, no reasonable steps were taken by the Intervener to be served with all Court documents by the First-Third Applicants. I also accept Mr. Williams' submission that my decision to refuse the adjournment on this basis was a reasonable exercise of my judicial discretion and not an error of law.

    (ii) Leave to appeal on Ground 2 is refused as I find there no arguable point has been demonstrated to the Court that the protocol access summons should be adjourned on the basis of a substantive judicial application not yet filed with the Court. The Intervener Applicant has had the opportunity since November 2018 to file an application for leave to apply for judicial review and has not done so. Alternatively, the Intervener Applicant has, to date, still not filed an application before the Court for a finding that it is entitled to latch on to the previous order of Mr. Justice Hellman wherein he granted the First-Third Applicants leave to apply for judicial review in the form of the Form 86A exhibit. Again, I accept Mr. Williams' submission that my decision to refuse the adjournment on this basis was a reasonable exercise of my judicial discretion and not an error of law.

    (iii) Leave to appeal on Ground 3 is refused as no meritorious argument was raised which would have enabled the Court to reasonably refuse the First Respondent's proposed protocol.

89. Unless either party wishes files a Form 31D within 7 days to be heard on costs, costs on a standard basis is granted to the First Respondent to be taxed if not agreed.

Dated this 1st day of March 2019

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SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT