Neutral Citation Number [2026] CA (Bda) 9 Civ

CIVIL APPEAL No. 9 of 2025

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
BEFORE THE HON. CHIEF JUSTICE LARRY MUSSENDEN
CASE NUMBER 2024: No. 251

Before:

PRESIDENT THE HON IAN KAWALEY

JUSTICE OF APPEAL THE HON DAME ELIZABETH GLOSTER

and

JUSTICE OF APPEAL THE RT HON SIR JULIAN FLAUX

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Between:

REVEREND DR. LEONARD NICHOLAS SANTUCCI

Appellant

and

THE BERMUDA UNION OF TEACHERS

Respondent

Mr Vaughan Caines of Forensica Legal for the Appellant
Mr Kyle Masters and Ms Mahogany Bean of Carey Olsen Bermuda Limited for the Respondent

Hearing date: 2 June 2026
Draft judgment circulated: 9 June 2026
Judgment delivered: 19 June 2026

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Suspension of union member-whether decision contrary to the rules of natural justice-proportionality

JUDGMENT

Background

1. On 8 September 2021, the Appellant requisitioned a special general meeting ("*SGM*") to investigate alleged irregularities concerning the management of the Respondent, his trade union. The irregularities had been initially raised by him in a letter to the Respondent dated 1 July 2021 to which there was apparently no response. On 21 September 2021, the Respondent (occasionally referred to below as the "*Union*") declined to convene a meeting immediately due to the Covid19 restrictions then in place and suggested the Appellant's concerns could be addressed at the forthcoming November annual general meeting. The suspension of in-person meetings was confirmed on 29 September 2021 in a Covid update letter from the Respondent to all members. On the same date the Appellant filed nomination papers for his own election as Vice-President and Counsellor Representative.

2. The Appellant, perceiving that an attempt was being made to stifle his serious concerns provided information for a story in the Royal Gazette. The Respondent was contacted for comment on the pending Royal Gazette story; on 30 September 2021, an emergency meeting of the Executive Committee was held (the "*EECM*") and the Appellant attended. Concerns were expressed about the publicising of the Union's business by the Appellant. When the Royal Gazette approached the Respondent for further comments about a second story, on 4 October 2021 an internal memo was circulated to Union members describing the Appellant's behaviour *as* "*treasonous".* On 14 October 2021, the Executive Committee suspended the Appellant, subject to confirmation by the membership in general meeting and possible expulsion (the "*Interim Suspension*"). The Royal Gazette reported on the suspension on 15 October 2021 with the Appellant quoted as saying: "The executive committee of the union would rather get rid of you than answer the problems at hand". The SGM requisitioned by the Appellant was held on 4 November 2021 and attended by the Appellant. A resolution that he be suspended for 2 years was passed (the "*Suspension*"). By a Writ dated 30 March 2022, the Appellant applied to the Supreme Court to, most significantly, set aside the suspension.

3. Following a four-day trial, Mussenden CJ delivered a comprehensive 57-page judgment ("*the Judgment*") on 14 April 2025 concluding that the Interim Suspension and the Suspension were valid and dismissing the Appellant's claim. By a Notice of Appeal dated 21 May 2025, the Appellant appealed against that decision. Mr Caines in his Skeleton Argument (at [5]) invited the Court to determine the following questions:

"(a) Whether the Chief Justice erred by finding the Appellant liable for an offence never charged;

(b) Whether any duty of confidentiality exists in the Union Constitution, the Act, or at common law;

(c) Whether the public interest defence applies to the disclosure of internal governance failures;

(d) Whether the disciplinary proceedings were vitiated by procedural unfairness and structural bias;

(e) Whether the sanction was disproportionate."

4. The first of these five issues had no material relevance to the disposition of the present appeal. The second issue was capable of almost summary determination. The final three issues were closely connected and lie at the heart of an evaluation of the merits of the present appeal. These three issues ((c)-(e)) are a helpful distillation and refinement of grounds (1)-(7) and (9)-(10) in the Notice of Appeal. Ground (8), a complaint about the dismissal of an un-pleaded defamation claim, was wisely not pursued in oral argument.

The Supreme Court decision

5. The Judgment, by way of introduction, provides an overview of the history of the Respondent, formed in 1919 and registered as Bermuda's first trade union in 1947 with solely Black membership during the segregation era. It merged with the White Teacher's Association in 1964 to become the Amalgamated Union of Teachers in 1964. In 1997, the Respondent adopted the 1947 registered union's original name, the "Bermuda Union of Teachers", commonly referred to in abbreviated from as the "*BUT*". The Appellant was at all material times a teacher at the Berkeley Institute, a member of the Union and the Union representative for Berkeley teachers. The Judgment then summarises the pleadings ([5]-[8]) and sets out extracts from the Union Constitution. Two provisions are of particular relevance to this appeal. Firstly, Article VI provides:

"(6) General Membership Meeting
All formal meetings of the members shall be private. Any person not a member may be invited to attend for a special purpose. He/she may be allowed to speak, but no other person other than a bona fide member may vote at a meeting."

6. Secondly, Article VIII provides:

> *"(3) Any member [sic] be suspended by the Executive Committee, and later expelled from the union, if the Executive Committee's proposed action is endorsed by a simple majority vote at the next General Meeting. The number [sic] under suspension shall have the right to be present at the General Meeting and may speak on his/her behalf*."

7. The Judgment then sets out a chronology and summary of facts not in dispute (at [14]). In addition to the matters summarised at the beginning of this judgment, relevant background facts included the following. In June 2021, the Executive Committee issued a communiqué about proposed structural changes which the Appellant objected to because he felt the Committee lacked authority to implement the changes. This communiqué was marked "*For Internal Dissemination Only*". At some point between 21 and 29 September 2021, the Appellant shared contents of the communiqué with the Royal Gazette. He did not deny doing so at the EECM, asserting that he had the right to do so. Various members including the Appellant spoke at the SGM and the vote in favour of the Suspension was carried, by a vote of 50 for, 7 against with 2 abstentions. The oral evidence is then summarised in the Judgment (at [15]-[51]). Section 8 ("*Protection of freedom of conscience*"), section 9 ("Protection of freedom of expression") and section 15 ("*Enforcement of fundamental rights*") of the Constitution are set out; so is section 29 of the Trade Union and Labour Relations Act 2021 ("Duty of officers of trade unions to render accounts") (at [52]-[53]). At [55]-[67], the following four issues are identified:

> (1) "*Breach of Confidence – Balancing the Union's expectation of confidentiality and Dr. Santucci's freedom of expression*";
>
> (2) "*Bias – Whether the ExCo was guilty of bias or apparent bias when making the decision to impose the Interim Suspension*";
>
> (3) "*Application of the Unjustifiable Discipline Guidance*";
>
> (4) "*Whether Dr. Santucci's natural justice rights were infringed, in particular, whether the Union exercised its duty/duties owed to Dr. Santucci as explained in the Union Constitution and the Bermuda Constitution*."

8. As regards Issue 1, the key findings were as follows:

"*56. In the case of The Commissioner of Police and The Attorney General v Bermuda Broadcasting Co Ltd et al [2007] Bda L.R. 40 at 15 Ground CJ considered the law in respect of breach of confidence and injunctions. He stated as follows:*

'15. ... The principles applicable to an injunction were explained by Lord Goff in Attorney-General v Guardian Newspapers (No. 2) [1990] 1 AC 109 HL at 281 as follows:

'I start with the broad general principle . . . that a duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others.'..

57. Ground CJ then went on at paragraphs 17 to set out the provisions of the Bermuda Constitution section 9 Protection of freedom of expression. At paragraphs 18 and 19 he continued: ...

'19. The result of these conflicting considerations is that a Judge considering an injunction in a breach of confidence case has to perform a balancing exercise. This is particularly so where the confidential material may disclose impropriety: "The courts have, however, always refused to uphold the right to confidence when to do so would be to cover up wrongdoing. In Gartside v. Outram (1857) 26 L.J. Ch 113, it was said that there could be no confidence in iniquity. This approach has been developed in the modern authorities to include cases in which it is in the public interest that the confidential information should be disclosed: see Initial Service Ltd. v. Putterill [1968] 1 Q.B. 396, Beloff v. Pressdram Ltd. [1973] 1 A.E.R. 241 and Lion Laboratories Ltd. v. Evans [1985] Q.B. 526. This involves the judge in balancing the public interest in upholding the right to confidence, which is based on the moral principles of loyalty and fair dealing, against some other public interest that will be served by the publication of the confidential material. Even if the balance comes down in favour of publication, it does not follow that publication should be to the world through the media. In certain circumstances the public interest may be better served by a limited form of publication perhaps to the police or some other authority who can follow up a suspicion that wrongdoing may lurk beneath the cloak of confidence. Those authorities will be under a duty not to abuse the confidential information and to use it only for the purpose of their inquiry. If it turns out that the suspicions are without foundation, the confidence can then still be protected: see Francome v. Mirror Group Newspapers Ltd. [1984] 1 W.L.R. 892. On the other hand, the circumstances may be such that the balance

will come down in favour of allowing publication by the media, see Lion Laboratories Ltd. v. Evans [1985] Q.B. 526. Judges are used to carrying out this type of balancing exercise and I doubt if it is wise to try and formulate rules to guide the use of this discretion that will have to be exercised in widely differing and as yet unforeseen circumstances. I have no doubt, however, that in the case of a private claim to confidence, if the three elements of quality of confidence, obligation of confidence and detriment or potential detriment are established, the burden will lie upon the defendant to establish that some other overriding public interest should displace the plaintiff's right to have his confidential information protected." Attorney-General v Guardian Newspapers (No. 2) [1990] 1 AC 109 HL at 268 per Lord Griffiths.'

58. In my view, Dr. Santucci's conduct amounted to a breach of confidence for several reasons as follows:

> *a. The Union Constitution set out at Article VI (6) Organization of the Union – General Membership Meetings that 'All formal meetings of the members shall be private.' The section defines the types of General Meetings as a General Membership meeting, a Special General meeting and an emergency general meeting.*
>
> *b. The June Communique and the October Communique were both marked 'For Internal Dissemination Only'.*
>
> *c. The evidence that Dr. Santucci in his email of 9 September 2021 cautioned the Berkeley Members that the information he was sharing with them was not for public consumption but was being addressed according to the Union Constitution. Thus, it is clear to me that at the early stages of this matter, Dr. Santucci accepted that Union business was private...*

59. I am guided by the Bermuda Broadcasting case, although the present case is not about injunctions, in undertaking a balancing exercise to resolve this factual point before moving on to other areas. Also, I rely on the principle stated by Lord Goff in the Guardian Newspaper case to accept that there was a duty of confidence imposed on Dr. Santucci in his role as a member of the Union and as a Union Representative when he received information, in particular the Communiques, in the circumstances that he had notice that the information was for internal dissemination only. I find that there was no impropriety or wrongdoing in the Union's conduct such that it warranted Dr. Santucci to commit acts of breach of confidence in light of the need for confidence in Union business as set out above. Thus, it follows that I am not satisfied that the Union's conduct amounted to disregarding Dr. Santucci's rights of freedom of

conscience and freedom of expression. I found no merit in Dr. Santucci's arguments of contract theory and Union membership…."

9. In short, Mussenden CJ found that a duty of confidence arose in equity in light of the fact that the information communicated by the Union to the Appellant was confidential due to its character and because the Union Constitution expressly provided that the subject matter of general meetings was "*private*". Freedom of expression under the Constitution is not an absolute right; it is subject to, amongst other things, rights of confidentiality. Breaching confidentiality on the grounds of some competing public interest in publication requires the public interest to outweigh confidentiality; the main recognised instance of this is where publication is required to reveal iniquity. Here there was no qualifying iniquity.

10. As for Issue 2, the Chief Justice rejected the structural bias complaint for the following main reasons:

> "*62. I rely on Director of Public Prosecutions v Cindy Clarke [2019] Bda LR 46 where Kay JA stated at paragraph 30 that a where a decision maker has a general interest in the outcome of a decision, they would only be disqualified in the event of a more pronounced personal interest in the outcome. Although members of the ExCo would have had a general interest in the good order of the Union, I am not satisfied that there is any evidence supporting that any ExCo member had a more pronounced personal interest in the outcome. Clarke also set out the principles at paragraph 35 – 39 on necessity, citing Wade and Forsyth Administrative Law, 11th Edition at pages 395 – 396 stating 'In most of the cases so far mentioned the disqualified adjudicator could be dispensed with or replaced by someone to whom the objection did not apply. But there are many cases when no substitution is possible, since no one else is empowered to act. Natural justice then has to give way to necessity; for otherwise there is no means of deciding and the machinery of justice or administration will break down.' Thus, in the present case, I accept that the ExCo had a non-delegable duty to consider matters of discipline and that bias and apparent bias played no part in such decision making*."

11. Issue 3, i.e. the Chief Justice's rejection of the relevance of the UK trade union disciplinary guidance document, was not pursued on appeal. As for Issue 4, Mussenden CJ was primarily guided by the principles in relation to the fluid nature of the rules of natural justice applied by Subair Williams J in *Dennis Robinson v The Parole Board* [2019] SC Bda 76 at [41], [46] and by Hargun CJ in *Cheyra Bell v The Attorney General et al* [2021] SC (Bda) 43 Civ at pages [24] – [26]. The first case concerned prisoners' rights; the second case concerned employees' rights in disciplinary proceedings regulated by statute. I mention the contexts, because in my judgment stricter rules of natural justice would seem likely to apply to prisoners' and employees' rights than in relation to union membership. Apposite authority was relied upon in rejecting the malicious motivation complaint:

"*72. I am not satisfied that the Suspensions were imposed by the Union having denied Dr. Santucci his natural rights of justice for several reasons. As a starting point, I am not satisfied that the ExCo suspended Dr. Santucci on the basis of a malicious motivation. In Hopkinson v Marquis of Exeter (1897) LR 5 EQ 63 a club had the power to expel a member based on a vote by two-thirds of the members. Lord Romilly, M.R. ascertained that in the proceedings "there was a bona fide meeting, and one that was fairly called; that the question was fairly submitted to the meeting, and the decision adopted bona fide, and not through any caprice; and therefore, that the decision was final." In my view, I am satisfied of the evidence of the witnesses (Crenstant Williams, Laurel Burns, Mr. Wolffe, Ms. Bailey) that the Interim Suspension was based on the issue of Dr. Santucci sharing Union business with the media. On the contrary, I am not satisfied that there was some capricious reasons, in other words, some impulsive or unpredictable or unaccountable reasons…*"

12. As regards the Interim Suspension, the Mussenden CJ held as follows:

"*79. In my view, the ExCo acted fairly when at a later time they met and decided that they should suspend Dr. Santucci. I rely on Cheyra Bell where it referred to De Smith's Judicial Review stating that 'fairness does not require that there should be an oral hearing in every case'. Thus, I rely on Lloyd v McMahon where Lord Bridge stated that 'the so-called rules of natural justice are not engraved on tablets of stone'*[1]*. In my view, it was vividly clear that faced with the circumstances leading up to the Interim Suspension, the ExCo acted fairly to impose the Interim Suspension on Dr. Santucci. Thus, I reject Dr. Santucci's assertion that he was ambushed a second time when an ExCo Meeting was held, and he was not present at it nor did he know of the details of the ExCo meeting and the vote to suspend him. I should add here that Minutes should have been taken of the ExCo Meeting when the decision to suspend was reached, but in my view, the failure to do so does not undermine the ultimate decision to suspend Dr. Santucci. It was compelling that the ExCo imposed the Interim Suspension based on Article VIII of the Union Constitution that it had to be ratified in a General Membership Meeting*."

13. As regards the Suspension, Mussenden CJ held as follows:

"*80. In relation to the Final Suspension, in my view, the proceedings were in accordance with the rules of natural justice. Dr. Santucci was informed in the letter of suspension of the Suspension Reasons, he was referred to Article VIII and the right to attend the next General Membership meeting where he would be allowed to speak. The meeting was held within 3 weeks of the Interim Suspension. I have reviewed the SSGM Minutes and the SSGM Transcript*

[1] [1987] AC 625 at 702.

carefully. I accept that Dr. Santucci attended the SGMM and he was given the opportunity to speak after which the vote was taken by the General Membership, the Supreme Authority, to confirm the Suspension for a period of 2 years. Thus, I find that these circumstances were consistent with the principles set out in the cases including Dymoke[2] *where it stated that fairness calls for an unbiased decision maker, notice of the charges and a right to be heard in answer to those charges. Further, several witnesses stated that they were aware that they could have made a motion but did not do so*."

14. This was a clear finding on the issue most relevant to the present appeal. A finding which was not, on its face, easily reviewable on appeal.

Findings: merits of appeal

Preliminary

15. Mr Masters for the Respondent Union correctly reminded the Court of the proper scope of appellate review. In the Respondent's Written Submissions, it was argued:

> "*It is well established that an appellate court will not lightly interfere with findings of fact or evaluative conclusions reached by a trial judge following consideration of the evidence as a whole. In Lightbourne- Lamb and Lamb v Brightside Enterprises Ltd and another [2024] Bda LR 18, the Court of Appeal helpfully summarized the governing principles applicable to challenges to factual findings on appeal. At paragraph [69], the Court, relying on Kwok v Yao [2022] UKPC 52, Henderson v Foxworth Investments Ltd [2014] UKSC 41 and Beacon Insurance Co Ltd v Maharaj Bookstore Ltd [2014] UKPC 21, confirmed that findings of primary fact will only be disturbed where they are 'plainly wrong', including where there was no evidence to support the finding, the finding was based on a misunderstanding of the evidence, or the conclusion reached was one which no reasonable judge could have reached. The Court further confirmed that appellate restraint applies with particular force to findings turning on the credibility of witnesses, having regard to the trial judge's advantage of seeing and hearing the witnesses give evidence*."

16. The apposite approach adopted in Mr Masters' and Ms Bean's Written Submissions was to respond to the complaints made about the Judgment and explain why they were not open to appellate review. The present appeal appeared at first blush to blur the lines between points of law and an impermissible attempt to persuade this Court to substitute its own views for the evaluative conclusions arrived at by the Learned Chief Justice. Nonetheless, it was easy to understand why the Appellant may have felt obliged to pursue an appeal in

[2] *Dymoke v Association for Dance Movement Psychotherapy UK Ltd* [2019] EWHC 94.

the hope that he might achieve at the very least some measure of moral vindication for his impugned actions. And the natural justice grounds of appeal were clearly arguable.

Was the information the Appellant disclosed to the media confidential?

17. In my judgment, the matters which the Appellant wished to have addressed at an SGM were clearly confidential as Mussenden CJ rightly found. This was partly because the matters were addressed through circulars which made it clear that the matters were for Union members only to be aware of, and partly because the Union Constitution expressly mandated that general meetings were to be "*private*". As I observed in the course of the hearing, the strict legal position might well not have been obvious to the Appellant at the time. The idea of duties of confidentiality arising out of particular circumstances without any clear contractual or other express obligation might well not have been apparent to the Appellant, a cleric, at the time. The common law might have required express contractual obligations to protect confidentiality. The equitable duty of confidence was developed precisely to prevent the sort of arguments the Appellant advanced about the absence of any express confidentiality obligations from being run. As Lewison LJ held in *Travel Counsellors Limited-v-Trailfinders Limited* [2021] EWCA Civ 38:

> "*14. In order for an equitable obligation of confidence to arise, confidential information must have been communicated in circumstances importing such an obligation. It is common ground that the correct test is the test that I derived from earlier authorities in Primary Group (UK) Ltd v Royal Bank of Scotland plc [2014] EWHC 1082 (Ch), [2014] RPC 26 at [223], which was approved by this Court in Matalia v Warwickshire County Council [2017] EWCA Civ 991, [2017] ECC 25 at [46]:*
>
> > *'It follows from the statements of principle I have quoted above that an equitable obligation of confidence will arise not only where confidential information is disclosed in breach of an obligation of confidence (which may itself be contractual or equitable) and the recipient knows, or has notice, that that is the case, but also where confidential information is acquired or received without having been disclosed in breach of confidence and the acquirer or recipient knows, or has notice, that the information is confidential. Either way, whether a person has notice is to be objectively assessed by reference to a reasonable person standing in the position of the recipient.*'"

18. These observations are cited simply to illustrate the character of the relevant legal rules. These are essentially the same context-focused principles which the Chief Justice applied in concluding that the subject-matter of the proposed SGM which were disclosed to the media was confidential. He accordingly applied the correct legal principles and his application of those principles to the facts cannot be faulted.

19. I am also bound to reject Mr Caines' submission that there was no express provision dealing with confidentiality (based on an alleged admission to this effect in oral evidence). Article VI (6) expressly mandates the privacy of general meetings, which may be viewed as a

freestanding positive legal confidentiality obligation binding on all member in any event in relation to the business of general meetings. Arguably, perhaps, this provision strictly only applies to general meetings themselves, and not references to business to be conducted at future meetings. It was nonetheless open to the Chief Justice to view this provision as indicative in a more general sense that Union business was viewed as confidential, taking into account the context and the 'internal use only' labels attached to communications including the Appellant's own communications with the Berkeley Institute members. This was the holistic view he took of the *evidence,* and no valid basis has been advanced for this Court to fault his evaluation of the key evidence.

20. However, it was further submitted:

> "*17. Even if the learned Chief Justice relied upon common law principles of breach of confidence, the claim fails. In Coco v A.N. Clark (Engineers) Ltd [1969] RPC 41 at 47, Megarry J established the three mandatory elements:*
>
> *(i) The information must have the necessary quality of confidence about it;*
>
> *(ii) The information must have been imparted in circumstances importing an obligation of confidence;*
>
> *(iii) There must be an unauthorized use of that information to the detriment of the party communicating it.*
>
> *8.* ***All three limbs fail:*** *(a) Limb 1 — the 'Completed Work' was circulated to all Union Representatives via the Internal Communique; information widely disseminated lacks the necessary quality of confidence; (b) Limb 2 — Mr. Wolffe admitted the Constitution contains no confidentiality requirement, and the President admitted no confidentiality practices were 'in place'; there were no circumstances importing an obligation; (c) Limb 3 — the Union suffered no detriment; on the contrary, the Appellant was vindicated and the President admitted the governance failure*."

21. As the Chief Justice properly found, the relevant material was clearly confidential as between Union members as opposed to the public at large. It was expressed to be information provided only for Union members. Disclosure to the Royal Gazette was indeed unauthorised. If detriment needed to be proved, and this Court was required to make its own judgment on a matter overlooked by the trial judge, I would find that it was inherently harmful to the Union to be accused of obstructing the holding of an SGM which it ultimately held, regardless of the fact that the concerns the Appellant wished to canvass were accepted as valid. The Coco case was not initially placed before us for the purposes of the present appeal, but in a short supplementary submission Mr Caines confirmed his reliance upon it while conceding that detriment was not an invariable requirement.

Was the disclosure justified in the public interest?

22. The Chief Justice's framing of the relevant legal principles was not challenged. Freedom of expression will trump confidentiality when the public interest factors in favour of publicising the matters in question outweigh the competing confidentiality rights. The most clearly recognised factual basis for overriding confidentiality obligations (in private law at least) is the public interest in revealing "iniquity". Thus, when Mr Caines submitted that the Appellant, the Reverend Dr Santucci, considered that the Union's conduct was iniquitous and this prompted his press disclosures, I found it easy to accept that this may well have been the Appellant's subjective motivation. In most controversies, the contending parties are genuinely convinced of the rightness of their position in the heat of battle.

23. It is firstly necessary to consider whether the Chief Justice was right to follow the approach taken by Ground CJ (as he then was) in The Commissioner of Police and *The Attorney General v Bermuda Broadcasting Co Ltd et al* [2007] Bda L.R. 40 in the context of injunctions by analogy in the present case. The starting point is to review the provisions of section 9 of the Bermuda Constitution upon which the Appellant relied at trial and before this Court:

> "***Protection of freedom of expression***
> *9 (1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this section the said freedom includes freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.*
>
> *(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—*
>
> *(a) that is reasonably required—*
>
> *(i) in the interests of defence, public safety, public order, public morality or public health; or*
> *(ii) for the purpose of protecting the rights, reputations and freedom of other persons or the private lives of persons concerned in legal proceedings, preventing the disclosure of information received in confidence, maintaining the authority and independence of the courts, regulating telephony, telegraphy, posts, wireless broadcasting, television or other means of communication or regulating public exhibitions or public entertainments; or*
>
> *(b) that imposes restrictions upon public officers or teachers,*
>
> *except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society*." [Emphasis added]

24. Whether one's rights under section 9 have been contravened is sometimes a purely public law analysis of the provisions of the Constitution and the legislation or governmental

actions which are impugned. When it comes to protecting "information received in confidence", the relevant analysis is whether the private law rights of confidentiality are "reasonably required*" so* as to justify constraining the claimant's freedom of expression rights. Subject to an important caveat, I agree that evaluating whether privacy or publicity should prevail is a balancing exercise. If an application is made for constitutional relief under section 15, the applicant would be expected to establish a prima facie interference with their section 9 (1) rights, which is typically straightforward, as in the present case. However, the evidential burden would then shift to the Crown (or other public body) to show that the interference was "reasonably required" in a way which qualifies under section 9((2)). The same evidential approach should in my judgment be adopted when section 9 or other fundamental rights and freedoms are considered in *private or* public law proceedings which are not formally brought under section 15 of the Constitution. As I observed in *Ayo Kimathi-v-The Attorney General* [2017] SC (Bda) 30 Civ where section 9 was considered:

> "*88. Whether the Minister can justify the interference which has been found has two main elements to it in a case where the constitutionality of the law deployed is not itself subject to challenge. Firstly, was the aim of the interference a legitimate one, namely a permitted ground of restriction authorised by law? And, secondly, was the interference which occurred reasonably required or proportionate having regard to the nature of the governing public policy imperative which inspired the restraint and the form which the impugned expression took?*"

25. When one is concerned with a clash between the law of confidentiality and conflicting freedom of expression rights, the balancing act involves weighing the public policy imperatives which underpin the relevant confidentiality obligations against the interests of free speech. No question of legitimacy of the law of confidentiality as such will likely arise; the primary question is whether, on the facts of the case before the Court, the confidentiality obligations being relied upon are reasonably required or proportionate. In my judgment it should be for the party enforcing confidentiality obligations to establish that these requirements are met. However, in most cases (save for obviously unusual confidentiality obligations), this burden will be easily discharged as it was in the present case. It was not argued that the confidentiality obligations were disproportionate. It was contended that either they did not exist or that, if they did, their breach was justified to reveal iniquity. In my judgment once one gets to the point where it is clear that the confidentiality obligations are a proportionate interference with freedom of expression, it must be for the free speech applicant to make out a case for breaching the obligations. In the language of section 9(1), the interference with free speech will be permitted if it is "reasonably required… except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society".

26. In a private law context concerning whether a plaintiff should be relieved from equitable duties of confidence, a logical shorthand reference point for this constitutional requirement is the law of equity itself. Equity does not permit any rules of law, legal or equitable, to be used for iniquitous purposes. And so neither the rules of equity nor the terms of section 9 of the Constitution would permit a defendant to enforce confidentiality provisions to conceal iniquitous conduct or wrongdoing. Accordingly, while placing a very light gloss on the Chief Justice's reasoning (essentially making explicit what was implicit in his analysis), I have no hesitation endorsing the main thrust of his legal findings on this issue.

27. The merits of this ground of appeal therefore turn on whether the Appellant has made a case for this Court concluding that the Chief Justice's evaluation of the evidence surrounding this issue was flawed. The Chief Justice summarily found that the Union was not guilty of any wrongdoing which justified publication. Evidentially it was a short point. Mr Caines' appeal submissions dealt with the evidential limb of the public interest argument very briefly indeed:

> "*23. **The Iniquity Rule.** In Initial Services Ltd v Putterill [1968] 1 QB 396 at 405, Lord Denning MR stated: 'There is no confidence as to the disclosure of iniquity.'*
>
> *24. **Extended Public Interest.** In Lion Laboratories Ltd v Evans [1985] QB 526 at 537, Stephenson LJ held that the defence extends to 'matters which affect the public interest' — not only iniquity. Griffiths LJ added at 550: 'I can see no sensible reason why this defence should be limited to cases in which there has been wrongdoing on the part of the plaintiffs.'*
>
> *25. **Application.** The Appellant disclosed that the Executive Committee was implementing constitutional amendments without proper authority — acting 'under the guise of the Constitution' (the President's words, HB-1 p.210). This was a matter of legitimate public interest to every Union member. The President's admission vindicated the Appellant completely.*
>
> *26.As the Union Representative for The Berkeley Institute, the Appellant was a whistleblower exposing governance failures. The Royal Gazette categorized him as such*." [Emphasis added]

28. In the Appellant's Closing Submissions at trial, the wrongdoing complaint was dealt with equally briefly (at [115]):

> "*…The information shared with the Royal Gazette showed past, present or likely future wrongdoing. Wrongdoing which showed a propensity to fail to comply with a legal and or constitutional obligation (obligations under the Trade Union and Labour Relations (Consolidation) Act 2021 and the BUT Constitution*."

29. It is, or ought to be, obvious that disclosing confidential information cannot be *justified simply* by establishing that it concerns wrongdoing in some general way. Were this not so, the value of confidentiality rights would be greatly diminished. Publicising otherwise protected information must be necessary to prevent wrongdoing occurring or, if it has already occurred, from being concealed or further perpetrated. As Mr Masters and Ms Bean rightly argued in their Written Submissions:

> "*48. The authorities relied upon by the Appellant concerning the 'iniquity rule' and broader public interest disclosure principles are entirely*

distinguishable. No fraud, illegality, corruption, public danger or comparable misconduct was established before the Court below. Indeed, the learned Chief Justice made no finding whatsoever, that the Executive Committee acted unlawfully or outside the Union Constitution. On the contrary, the Court found that the suspension process was undertaken pursuant to the Union Constitution and ultimately endorsed by the General Membership, (paras. 41; 48 and conclusion).

49. The Appellant's attempt to characterize himself as a 'whistleblower' is similarly unsupported by the evidence. This was not a disclosure exposing wrongdoing to protect the public. Rather, it was the disclosure of confidential internal Union communications to the media during an ongoing internal dispute concerning Union affairs. The fact that the Royal Gazette chose to publish articles concerning the dispute does not transform an internal membership disagreement into a matter of legitimate public interest.

50. Further, even if the Appellant believed that aspects of the Executive Committee's conduct warranted challenge, the Union Constitution itself provided mechanisms through which such disagreements could be addressed internally by the membership. As the learned Chief Justice recognized, the General Membership constituted the Supreme Authority of the Union and ultimately considered and voted upon the matter." [Emphasis added]

30. The mere fact that valid constitutional irregularities are raised in a request for an SGM was clearly not wrongdoing about which the public should have been informed before the SGM was held. The Chief Justice was entitled to so hold and a contrary finding was probably not properly open to him. Had the Union been subverting the constitution and unreasonably refusing to convene the SGM altogether, the subversion of the constitution would very arguably have been iniquitous. It is true that an email from Sarah Lagan of the Royal Gazette to the Union on 30 September 2021 records that the Appellant complained of the substance of the irregularity complaints as well as the fact that the Union was "*stalling*" about convening the SGM. This was a potentially valid justification *for* the Appellant 'going public' and rationally explains why he would have been convinced he was entitled to do what he did at the time. Objectively viewed, however, the surrounding circumstances clearly did not justify the breaches of confidence which occurred. In fairness to the Appellant, however, this evaluative finding is inevitably influenced by hindsight. The Appellant did not know with certainty, having had his 1 July 2021 letter seemingly ignored, that the SGM would be heard in due course. But the Union's written response relied centrally on Covid19 restrictions. The irregularities complained of were important matters involving the proper interpretation of the Union's constitution and the filing of accounts. But these were not matters obviously requiring a lightning rapid response. And so the Chief Justice properly rejected this limb of the case in understandably brief terms.

31. In fairness to the Appellant, it seems appropriate to record that I can see no basis for believing that he was guilty of anything more than an error of judgment in breaching confidentiality obligations in the interests of what he considered was the greater good. If a list were to be made of legal cases which have been triggered by fallings out, missteps and

misjudgements during the height of the Pandemic, it would not be a short one. I take judicial notice of the fact that between July and November 2021 there was a spike in Covid19 deaths which accounted for roughly half of the Covid19 deaths in Bermuda over a *three-year* period. One of the most high-stress occupations during that period would have included ministers of religion, required to minister to elevated levels of sick and/or bereaved members of their congregations, presiding over an unusually large number of funeral services. These professional burdens sat alongside the personal burdens of coping with friends and/or family affected by the Pandemic. Persons like the Appellant were compelled to expose themselves to abnormal mortality risks. Occupying a unique zone of dedication, the Appellant may well have subliminally reflected, like another Reverend Doctor more than half a century ago, that "*longevity has its place*" and experienced a heightened sense of urgency about the need to address perceived injustices. Were this to have been the case, it would likely have influenced the way in which the Appellant perceived and responded to the Union's objectively reasonable initial responses to his SGM request. Against this background, in my judgment the Union's decision ('in the heat of battle') to accuse the Appellant of "treasonous" behaviour, while understandable, was unjustified. The entire controversy may now be viewed as a 'storm in a teacup' in a time of Covid.

The fair hearing complaints

32. The fair hearing complaints were nonetheless to my *mind the* most arguable grounds of appeal. This is why I encouraged Mr Caines to focus his oral argument on them. The Interim Suspension seemed vulnerable to attack on the grounds that it was seemingly imposed without express notice. The Suspension appeared vulnerable to attack because the specific period of suspension was raised from the floor a few minutes before the vote was taken, with no pre-meeting notice that this penalty was on the cards. The Appellant was not expressly invited to address the proposed penalty and said nothing, although he admitted that he could have, and he did speak at an earlier stage of the SGM. However, a pertinent intervention by Flaux JA during Ms Bean's responsive submissions suggested that the Appellant may well have contemplated being expelled rather than simply suspended. This caused me to analyse the factual and legal matrix in a more nuanced way.

33. It is said that "*to someone with a hammer, everything looks like a nail*". Whether someone's fair hearing rights have been contravened depends on the substantive rights engaged and the legal and factual *context and* cannot be approached in a 'one size fits all' manner. It is far easier to state the governing principles than to apply them properly, but it is clear that the Chief Justice did both. The agreed principle is essentially that what the requirements are for a fair hearing depends on the circumstances of the case. Two circumstances are particularly relevant in the present case:

    (a) the provisions of the Union constitution and the nature of union membership; and

    (b) whether or not the Appellant was in all the circumstances afforded a fair hearing.

34. Minimum fairness levels rise and fall relative to the gravity of the proceedings and the degree of prejudice the party against whom adverse findings are recorded will suffer. What is fair in a speeding trial may not be fair in a murder trial. An employee facing disciplinary proceedings may suffer financial loss and/or prejudice. A prisoner failing to obtain parole may suffer an extended loss of liberty. Proceedings regulated by statute will be informed by the relevant legislative provisions in their context. Membership of a trade union is not an insignificant right, but it is more akin to membership of a club. Where collective bargaining agreements are in place, non-union members will generally benefit from wages negotiated by the union. The Union's constitution has a very straightforward approach to disciplining members as already noted:

> *"(3) Any member* [sic] *be suspended by the Executive Committee, and later expelled from the union, if the Executive Committee's proposed action is endorsed by a simple majority vote at the next General Meeting. The number* [sic] *under suspension shall have the right to be present at the General Meeting and may speak on his/her behalf.*"

35. The Executive Committee is empowered to impose interim suspensions, but only the members in General Meeting can finally suspend or expel. As one would expect for the BUT, the implicit assumption is that suspension or expulsion will be exceptional occurrences. Accordingly, expulsion is on the table whenever an interim suspension is placed before the membership to adjudicate upon. The Interim Suspension was found in this case by the Chief Justice to be adequately fair. This was on a careful evaluation of the evidence taking into account the fact that the Appellant was heard at the EECM, although not actually heard on notice that a suspension might be imposed. The Chief Justice paid particular regard to the evident need for urgent action in light of the Appellant going to the press again after the meeting. He also took into account the interim nature of the Interim Suspension. He also relied in particular on the following famous statement of Lord Bridge in *Lloyd-v-McMahon* [1987] 1 AC 625 at 702-703:

> "*My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when anybody, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on anybody the power to make decisions affecting individuals, the courts will not only require the procedure*

prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

36. In my judgment the application of the law to the legal and factual context of the present case by the Chief Justice is, on a careful analysis, unimpeachable. The challenge to the Interim Suspension accordingly fails.

37. The Suspension itself is in any event the critical decision. That was a substantive 2-year suspension, albeit one which has now apparently been fully served. My provisional view was that, even though notice of the SGM was clearly given and the Appellant was able to address the meeting in relation to the grounds for his suspension, (1) the failure to explicitly give him prior notice of the 2 year suspension proposed from the floor and (2) the failure to expressly invite him to respond to it was fatal to the validity of the decision. However, when one analyses Article VIII of the Union's constitution and appreciates that the Appellant attended, realising that expulsion was a potential penalty, it puts his seemingly surprising failure to contest the suspension proposal in an entirely different light. General membership meetings *are* unpredictable decision-making bodies, especially when dealing with an ad hoc disciplinary matter. It seems most likely that the Appellant *(*and his supporters) declined to contest the proposed suspension, because it was better than expulsion and further debate could potentially have resulted in an expulsion proposal being tabled. In giving evidence at trial*,* the Appellant apparently admitted he could have addressed the meeting further, and in any event offered no explanation for not challenging the proposed suspension before it was finally imposed.

38. The Union members in general meeting were not a court or statutory tribunal and so the requirements for procedural fairness and impartiality were markedly different. The structural bias complaint was paper thin. A reviewing court is not the place to launch an initial challenge on the proportionality of a sentence, having been informed of the proposed suspension and not challenged it before the decision-making body. The Appellant's counsel failed to deliver a 'knockout blow' to any of the Chief Justice's findings, which were a careful and rational analysis of the legal and evidential context of the impugned decision. This ground also fails.

Conclusion

39. For the above reasons I would dismiss the appeal. It is difficult to see why costs should not follow the event in accordance with the usual rule. Unless either party applies by letter to the Registrar within 14 days to be given an opportunity to provide further submissions

as to costs, I would award the costs of the appeal to the Respondent to be taxed if not agreed on the standard basis.

Dame Elizabeth Gloster JA

40. I agree with the conclusion reached by the President that this appeal should be dismissed and that the costs of the appeal should be awarded to the Respondent.

Sir Julian Flaux JA

41. I also agree.