In The Supreme Court of Bermuda

CIVIL JURISDICTION
2020: No. 146

BETWEEN:

MARSHALL DIEL & MYERS LIMITED

PLAINTIFF

-and-

CAMERON HILL

DEFENDANT

Before: **Hon. Chief Justice Hargun**

Appearances: **Mr Jai Pachai, Wakefield Quin Limited, for the Plaintiff**
Mr Cameron Hill, appearing in person

Date of Hearing **8 July 2020**

Date of Ruling **12 August 2020**

RULING

Conflict of interest on the part of former attorney; relevant test to be applied; whether attorney in possession of confidential information which may be relevant to the new retainer

Introduction

1. In this action, commenced by Marshall Diel & Myers Limited ("**MDM**"), a firm of barristers and attorneys, an injunction is sought against Mr. Cameron Hill ("**Mr. Hill**"), a barrister and attorney, restraining him from continuing to act on behalf of Andrew Lundin Crisson ('Mr. Crisson"), the defendant in proceedings commenced by MDM in the Supreme Court of Bermuda, Case No. 2019: No. 491.

2. On 8 July 2020, I heard the application for an interlocutory injunction in terms of the Writ of Summons, with the understanding that, in practical terms, the outcome of the interlocutory application would determine the matter.

3. This is regrettably yet another application arising out of the long running and bitterly fought divorce proceedings between Mr. and Mrs. Crisson during the period 2012 to 2019. In relation to the ancillary relief application, Stoneham J delivered her judgment on 7 November 2019. The underlying proceedings in relation to this chapter relate to the attempt by MDM to collect their outstanding fees (the "**Fee Action**"), primarily under a written agreement between MDM and Mr. Crisson dated 22 January 2018 (the **"Fee Agreement**"). Mr. Hill is acting for Mr. Crisson in the Fee Action. By this action MDM seek to restrain Mr. Hill from so acting for Mr. Crisson in the Fee Action on the basis that Mr. Hill acted for MDM in 2015 and 2016 and is in possession of confidential information which may be relevant in the Fee Action to the disadvantage of MDM.

Factual Background

The Previous Proceedings

4. The previous proceedings related to an allegation of conflict of interest, by a former client of MDM, on the part of Mrs. Marshall of MDM and culminated in the judgment of the Court of Appeal in *Georgia Marshall & Rachael Barritt v A*, Civil Appeal No. 7 of 2015, delivered on 20 November 2015 ("**Georgia Marshall case**"). In those proceedings Mr.

Hill acted on behalf of Mrs. Marshall and MDM, both in the Supreme Court (Hellman J) and in the Court of Appeal. The main judgment in the Court of Appeal was delivered by Bell JA.

5. In the previous proceedings, Mrs. Marshall and MDM had acted for the wife in her divorce proceedings ("**the First Proceedings**") and the outstanding issues in the divorce, including ancillary relief, were resolved by a consent order made in October 2008 ("t**he Consent Order**").

6. Subsequently, Mrs. Marshall and MDM elected to act for the wife ("**the Wife"**) in the divorce proceedings in the Supreme Court ("**the Second Proceedings**"). The outstanding issue in the Second Proceedings was the children's education and how it was to be funded.

7. The wife in the First Proceedings remarried in May 2011 and her new husband was the husband in the Second Proceedings ("**the Husband**").

8. The wife in the First Proceedings alleged that as a result of acting for her in the First Proceedings Mrs. Marshall and MDM were in possession of confidential information about her financial circumstances which would be adverse to the Husband's and hence to her interests in the Second Proceedings. In the circumstances, she commenced proceedings seeking an injunction restraining Mrs. Marshall and MDM from acting any further in the Second Proceedings.

9. Hellman J noted at paragraph 21 of his Ruling that he had read the Consent Order, and was satisfied that Mrs. Marshall had similarly done so, and so would have been in possession of confidential information that was likely to be relevant to the Wife's present financial circumstances. Hellman J referred, in particular, to two paragraphs of the Consent Order, both of which concerned future events or circumstances.

10. Bell JA noted that the relevant provisions of the Consent Order, which had been identified by Hellman J during the course of the proceedings before him covered, firstly, the Wife's

entitlement to a share of her former husband's deferred compensation plan, which was payable in five annual instalments, and which would have been payable in consequence of his death; the second relevant clause was one providing that the Wife's former husband should take out a life insurance policy for the benefit of the children of the family, in a given amount. Bell JA concluded that it can be readily seen that the provisions of the Consent Order related to amounts which the Wife might expect to receive from her late former husband's estate, and specifically insurance proceeds for the benefit of the children. The Court of Appeal concluded that it was "obvious" that the confidential information set out in the Consent Order was *or might be* relevant to the issues in the Second Proceedings.

11. It can be seen that the issues in the Previous Proceedings were:

    (a) whether Mrs. Marshall was in possession of confidential information imparted to her by the wife in the First Proceedings;

    (b) if so, whether that confidential information was *or might be* relevant to the issues which the Court had to determine in the Second Proceedings; and

    (c) whether the wife in the First Proceedings had waived any right she might have to object to Mrs. Marshall and MDM from acting for the Wife in the Second Proceedings. In this regard MDM relied upon the engagement letter which provided, inter-alia, that "*the Client will not assert that our representation of the Client constitutes a basis for disqualifying us from representing another client in any matter whether or not adverse to the interests of the Client, subject to our professional obligation not to disclose any confidential information or to use such information for any other party's benefit."* Both Hellman J and the Court of Appeal rejected the submission that the engagement letter had the effect that the wife in the First Proceedings had agreed to Mrs. Marshall and MDM acting for the Wife in the Second Proceedings.

12. Mrs. Marshall has given affidavit evidence setting out what she contends is confidential information imparted to Mr. Hill during the course of his representation of Mrs. Marshall

and MDM both in the Supreme Court and the Court of Appeal. The relevant confidential information is described as follows:

(a) *"We spent countless hours going over the case in preparation during which time I no doubt made numerous comments about how I conduct my practice, including how I work as a team, my billing structures, retainer information and generally my approach to litigation"* (paragraph 4 of Mrs. Marshall's First Affidavit).

(b) *"[Mr. Crisson] will be advantaged and my firm and I will be disadvantaged by confidential information that I discussed with [Mr. Hill] on occasions whilst he was acting for me and my firm and from the specific information and knowledge which he obtained whilst acting for me and my firm as to my demeanor, my general approach towards settlement negotiations, my attitude towards former clients and my tactical approach towards adversaries. All of this will give him an advantage that any other attorney who had not had such specific information, knowledge and experience will not have to employ against me and my firm"* (Paragraph 14 of Mrs. Marshall's Second Affidavit).

(c) For completeness I should refer to the related contempt proceedings which were commenced against Mrs. Marshall and Mr. Adam Richards, another partner in the family practice of MDM, in September 2016. Mr. Hill was once again retained by Mrs. Marshall and MDM given his knowledge of the case. Mrs. Marshall states that: *"Given the nature of the dispute and the direct allegations concerning our actions and our professionalism (which was strenuously denied) it is almost certain that Mr. Richards and I would have discussed at length private and confidential matters relating to ourselves and our respective practices. Given that the nature of the dispute on this issue referred to in the contempt proceedings, related to my professionalism and that of Mr. Richards, it is directly referable and relevant to the issues in the Crisson case"* (paragraph 24 of Mrs. Marshall's Second Affidavit).

The Current Proceedings

13. The current proceedings, the Fee Action, relate to the attempts by MDM to collect outstanding legal fees due from Mr. Crisson arising out of the protracted divorce proceedings between Mr. and Mrs. Crisson during the period 2012 to 2019, resulting in a judgment of Stoneham J delivered on 7 November 2019.

14. It appears that by January 2018, Mr. Crisson owed MDM a sum in excess of $280,000 on account of legal fees incurred by him relating to the divorce proceedings. Indeed in January 2018, MDM ceased to act as Attorney of Record on behalf of Mr. Crisson on account of non-payment of outstanding fees. This was confirmed by an order of this Court dated 11 January 2018.

15. However, Mr. Crisson was keen to retain the services of Mrs. Marshall and on 22 January 2018, he executed the following document setting out the agreed position between MDM and Mr. Crisson in relation to the issue of payment of outstanding fees:

> *"Acknowledge of Debt Due and Payment Agreement to Marshall Diel & Myers Limited*
>
> *The following Payment Agreement is associated with the outstanding debt to Marshall Diel & Myers Limited ("the Firm"), with respect to Georgia Marshall representing me, Andrew L. Crisson in my divorce proceedings (Andrew L. Crisson and Christine H. Crisson) to date, i.e., to January 2018. In which case, I, Andrew L. Crisson ("the Respondent"), acknowledge that my current debt is BD$288, 417. I am committed to paying this debt by means of the following, and in this order:-*
>
> 1. *With respect to the above stated debt, I confirm that I will begin making weekly payments of BD$ 346.26 (based upon BD $1, 500 per month annualised) until the Judgment of the court is rendered. The payment will be made by way of an attachment of earnings so that the funds are*

paid by the payroll clerk of Crisson Limited directly to the Firm. My first payment will be arranged on or prior to January 31, 2018.

2. *I guarantee that upon completion of the case and rendering of the Judgment, I will ask that the Trustees of the Andrew L. Crisson Trust, to exercise their discretion to release to the Firm from the net equity of Mirabeau, sufficient funds to clear off my debt to the Firm. If there are insufficient funds received from the sale of Mirabeau or if the Trustees do not exercise their discretion in my favour, then a Guarantee from the owners of the New York apartment will be relied upon, in accordance with the "Charge Over Security Guarantee" dated…*

3. *Please see attached "Charge Over Security Guarantee", with respect to the New York apartment.*

4. *Any sum which remains outstanding after paragraph 2 above and the fulfilment of the "Charge Over Security Guarantee" will be paid from my other resources, but in any event in the sum of not less than $1,500 per month."*

16. Following the delivery of the judgment, Mrs. Marshall, in her First Affidavit filed in the Fee Action and dated 12 December 2019, states that she confirmed with Mr. Crisson that payment would be transferred by the Trustees of the Andrew L. Crisson Trust to MDM to meet the balance of the outstanding legal fees owed by the Mr. Crisson.

17. Mr. Crisson, in his First Affidavit filed in the Fee Action and dated 10 February 2020, states that when approached *"the trustees began to evince a certain squeamishness about paying such a large sum to my lawyers".* Mr. Crisson further states that "*in the circumstances, I asked the trustees to transfer my share of the net proceeds of the Former Matrimonial Home to my account held with HSBC Bermuda. This was not an attempt to*

place those funds beyond the reach of my creditors. Quite the contrary, I did so in order to ensure that the funds were available to me to meet my obligations to my creditors".

18. In light of these developments, MDM applied for a freezing injunction by summons dated 13 December 2019. The application was supported by an affidavit of Mrs. Marshall dated 12 December 2019. The hearing of the application took place before Stoneham J on 13 December 2019 and at the conclusion of the hearing, Stoneham J made an order that *"the Defendant must not in any way dispose of, deal with, or diminish any funds held in any bank account in the Defendant's name, whether held solely or jointly, save for funds in excess of the amount of $242, 457.99."*

19. In April 2020, I considered an application by Mr. Crisson to vary the ex parte Order made by Stoneham J on the ground that under the *Angel Bell* exceptions he is entitled to have the Order varied to provide for his living expenses, liability for legal costs and other liabilities incurred in the ordinary course. By a Ruling dated 7 May 2020, I refused to vary the ex parte Order on the ground that the ex parte order was not made pursuant to the *Mareva* jurisdiction but was made for the purposes of preserving the funds until MDM's interest in the funds could be determined by the Court. As such, the ex parte Order was not subject to the provisos enabling the use of money for normal business purposes, or for the payment of legal fees, or the like.

20. The primary case of MDM, in the Fee Action, is that there is no arguable defence to the claim under the Fee Agreement and MDM have in fact issued summons seeking summary judgment against Mr. Crisson for the amounts claimed in the Specially Endorsed Writ of Summons and Statement of Claim dated 12 December 2019. The Statement of Claim expressly pleads the Fee Agreement and asserts that Mr. Crisson is in breach of the Fee Agreement by having the trustees transfer the trust funds to his personal account at HSBC Bermuda as opposed to transferring the funds to MDM, in order to discharge the liability for legal fees.

21. At this stage it is not clear what defence would be asserted by Mr. Crisson in response to the application for summary judgment under the Fee Agreement, other than the assertion in Mr. Hill's First Affidavit that Mr. Crisson maintains that he is not in breach of the Fee Agreement.

22. Consistent with the Statement of Claim, MDM have taken the position, both in correspondence and affidavits, that Mr. Crisson is in breach of the Fee Agreement. There is a suggestion by Mr. Crisson that as any alleged repudiation of the Fee Agreement has not been accepted by MDM, MDM is not entitled to rely upon the retainer agreement (as opposed to the Fee Agreement) to claim a greater sum by way of damages other than the sum due under the Fee Agreement. Under the Fee Agreement, MDM had agreed to reduce the amount due on account of legal fees.

23. In connection with this argument, Mr. Crisson has asserted that if the claim is made under the retainer agreement he will allege that (a) costs claimed by MDM are unreasonable; (b) Mrs. Marshall's conduct of the proceedings on behalf of Mr. Crisson was negligent; and (c) the Fee Agreement was entered as a result of undue pressure placed upon Mr. Crisson by Mrs. Marshall. In particular, in his affidavits and the letter addressed to the Chief Justice, Mr. Crisson says if a claim is made under the retainer agreement he will assert the following:

    (a) <u>Fees incurred by MDM were unreasonable</u>

        (i) "Ms Marshall appears to have formed a view that she could present massive bills secure in the knowledge that they would be met by my family interests."

        (ii) "Ms Marshall set about defending each and every application with aggression and in doing so paid little or no regard to the costs being incurred. All understanding of proportionality was lost."

(iii) "a portion of my defence… will be that the fees charged were not reasonably incurred."

(iv) "I am currently investigating whether any steps could have been taken by any reasonable lawyers… to prevent the massive escalation in costs."

(v) "A significant proportion of my fees related to Ms. Marshall's responses… where no advice was given."

(vi) "It will be alleged that the variation application that developed in the face of the former wife's judgment summons was vastly disproportionate and the fees generated for the benefit of Mrs. Marshall. It will be said that this conduct infects and perhaps pervades the entirety of a representation."

(vii) "The Defendant will seek to use the mechanisms available to have those fees reviewed. His situation presents cause for serious soul-searching by anyone involved in the justice system."

(b) Mrs. Marshall was negligent

If they accept the repudiation on the other hand, and the writer is not encouraging them to do so, they will, or arguably will, have a claim in damages but that has never been asserted indeed quite the opposite. Most notably in an email from Mrs. Marshall to Mr. Hill in which she states that she will do nothing to affect the guarantees. This is, and has always been, an attempt to place pressure on Mr Crisson, who far from being dishonest, paid over $100,000 that he did not owe. If they assert the retainer then Mr. Crisson recovers his right to sue for negligence, over billing and many more things."

(c) Fee Agreement is the result of undue pressure

(i)" Ms. Marshall took the drastic step of applying to come off record. I am told that there are other cases in which the same strategy has been adopted by her."

(ii)"Perhaps this is how Ms. Marshall treats her clients. She waits until they will have no choice but to further indebt themselves before applying to come off the record."

24. For completeness I should note that MDM have now amended the Statement of Claim and now claim, in the alternative, fees owed under the retainer agreement, which are higher than the amount due under the Fee Agreement.

MDM's Submissions

25. Counsel for MDM submits that:

(a) Mr. Hill actively and extensively represented Mrs. Marshall and MDM in the 2015 and 2016 contempt proceedings during the course of which confidential information was disclosed to him as to the conduct of Mrs. Marshall's practice including her demeanour, the general approach towards settlement negotiations, how she works as a team, her billing system, her attitude towards former clients, the tactical approach towards adversaries and her general approach to litigation;

(b) In particular, Mrs. Marshall's professionalism was brought into question in the 2016 contempt application and affidavits were filed with the Court addressing private and confidential matters relating to Mrs. Marshall and Mr. Richards and their respective practices. It was for these reasons that the Court file was sealed at the request of Mr. Hill himself;

(c) In the context of MDM's action against Mr. Crisson to recover fees, such information is directly relevant, bearing in mind that no defence has yet been filed in that action and the allegations of serious misconduct levelled against Mrs. Marshall, include negligence, over billing, collusion and duress. The test is not whether such information is actually relevant, but whether such information is or *might be* relevant;

(d) The burden on both of these aspects is a light one and may be readily inferred;

(e) On the other hand, Mr. Hill has a heavy burden to show that there is no risk of the information coming into the possession of Mr. Crisson for whom he is now acting. This burden cannot be met since Mr. Hill is not in a position to take any protective measures to ensure that no dissemination will take place;

(f) As noted by Lord Millett in *Prince Jefri Bolkiah v KPMG (A Firm)* [1999] 2 AC 222 and confirmed in subsequent cases, it is of fundamental importance for the proper administration of justice that a client be able to have complete confidence that what he tells his lawyer will remain secret. This is a matter of perception as well as substance.

(g) There can be little doubt in this case that Mr. Hill is not only in contravention of paragraph 24 of the Barristers Code of Professional Conduct 1981, also of the *Bolkiah* principles by being in possession of confidential information divulged to him by Mrs. Marshall in his previous representation, which is or may be relevant in the Fee Action proceeding such as to give him an unfair advantage and for which there is no risk of the information not coming into the hands of Mr. Crisson.

Mr Hill's submissions

26. Mr. Hill submits that:

(a) He acquired no information concerning Mrs. Marshall, that he did not already have concerning the management and administration of Mrs. Marshall's practice nor a general approach to litigation. What Mr. Hill knows about all the matters complained of, he learned while working with Mrs. Marshall in 1999 and against her for the years following. Furthermore, the knowledge complained of is not information belonging to MDM. It amounts to no more than a general description of Mrs. Marshall's habits and these habits mirror the habits of the vast majority of practitioners at the Bar in Bermuda. For this reason alone the application should be dismissed.

(b) However, even if it is found that Mr. Hill acquired some information that information is not relevant to the defence of the claim in debt. The claim, properly analysed, is a claim under the promissory note evidenced by the Acknowledgement of Debt (Fee Agreement). Mr. Hill has been clear from the outset that his defence of the claim will be that the pleadings do not disclose a cause of action and no breach of the Fee Agreement is, in fact, alleged. Mr. Hill contends that it is not a breach of the Fee Agreement for Mr. Crisson to have the fund paid to himself.

(c) The claim advanced by Mrs. Marshall in her correspondence with the trustees was not a claim for fees. Accordingly, the knowledge described is not material to the cause of action.

(d) In any event, MDM chose to place the information now said to be confidential, into the public domain. The evidence filed in the Previous Proceedings sets out how Mrs. Marshall managed her practice. This information is now in the public domain and cannot be confidential thereafter. The file was sealed only for a

limited period as is apparent from the Order of Hellman J dated 16 January 2017 made in the Previous Proceedings which also expressly referred to the contempt proceedings. Paragraph 3 of the Order provided that "*This matter will be consolidated with the case In the Supreme Court of Bermuda, Civil Jurisdiction 2016 No. 351"* which is a reference to the contempt proceedings. Paragraph 4 of the said Order provides that "*The file in this action, that of the action referred to in paragraph 3 above, shall be sealed, and the public to have no right of access thereto, until the conclusion of the matter or further order."*

(e) The assertion that the Court File is sealed is misguided. The decision in the Court of Appeal firmly provides that the file in the Previous Proceedings should not be sealed. At paragraph 25 of the Court of Appeal judgment, Mr. Kessaram, acting for the Wife, is recorded as having submitted that as far as the identity of the lawyers is concerned, there was no private interest to be protected. Bell JA concluded that he would follow the provisions of the Practice Direction in relation to the parties, where naming them might lead to the identification of the children involved, but there was no question of any such danger operating in relation to Mrs. Marshall or MDM, and he would accept Mr. Kessaram's argument in this regard. Accordingly, the Court file is open to perusal by any member of the public in accordance with the Practice Direction of Kawaley CJ on the subject of access to court by the public.

(f) Mr. Hill was allowed to continue to act for Mr. Crisson for a number of months before this application was made. By virtue of the nature of the relief sought, Mrs. Marshall's and MDM's claim is subject to equitable defence of laches, acquiescence, waiver and estoppel. It is unconscionable to allow Mrs. Marshall and MDM restrain Mr. Hill where they have stood back so long, allowed him to take steps in the preceding before asserting their alleged equitable right to an injunction.

The relevant legal principles

27. Both parties are agreed that the relevant legal principles are set out in the authoritative speech of Lord Millett in *Prince Jefri Bolkiah v KPMG (A Firm)* [1999] 2 AC222. As illustrations of the relevant principles counsel relied upon the Bermuda authorities of *In the Matter of A Firm of Barristers and Attorneys*, Civil Jurisdiction 2014, No. 133 (Kawaley CJ); *A v B (Director of C Ltd)* [2015} SC Bda (31 March 2015 (Hellman J); and *Georgia Marshall& Rachael Barrit v A* [2015] CA (Bda) 35 Civ (20 November 2015). Counsel also relied upon the English decisions of *In The Matter of A Firm of Solicitors* [2000] I Lloyd's Law Reports 31 (Timothy Walker J). At the hearing reference was also made to my own Judgment in *MJM Limited v Apex Fund Services Ltd* [2019] SC. (Bda) (28 November 2019).

28. In *Bolkiah*, Lord Millett stated the relevant principles as follows:

> ***"The basis of the jurisdiction***
>
> *Where the court's intervention is sought by a former client, however, the position is entirely different. The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.*
>
> *Accordingly, it is incumbent on a plaintiff who seeks to restrain his former solicitor from acting in a matter for another client to establish (i) that the solicitor is in possession of information which is confidential to him and to the disclosure of which he has not consented and (ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his*

own. Although the burden of proof is on the plaintiff, it is not a heavy one. The former may readily be inferred; the latter will often be obvious. I do not think that it is necessary to introduce any presumptions, rebuttable or otherwise, in relation to these two matters. But given the basis on which the jurisdiction is exercised, there is no cause to impute or attribute the knowledge of one partner to his fellow partners. Whether a particular individual is in possession of confidential information is a question of fact which must be proved or inferred from the circumstances of the case. In this respect also we ought not in my opinion to follow the jurisprudence of the United States.

The extent of the solicitor's duty

Whether founded on contract or equity, the duty to preserve confidentiality is unqualified. It is a duty to keep the information confidential, not merely to take all reasonable steps to do so. Moreover, it is not merely a duty not to communicate the information to a third party. It is a duty not to misuse it, that is to say, without the consent of the former client to make any use of it or to cause any use to be made of it by others otherwise than for his benefit. The former client cannot be protected completely from accidental or inadvertent disclosure. But he is entitled to prevent his former solicitor from exposing him to any avoidable risk; and this includes the increased risk of the use of the information to his prejudice arising from the acceptance of instructions to act for another client with an adverse interest in a matter to which the information is or may be relevant.

Degree of risk

Many different tests have been proposed in the authorities. These include the avoidance of "an appreciable risk" or "an acceptable risk." I regard such expressions as unhelpful: the former because it is ambiguous, the latter because it is uninformative. I prefer simply to say that the court should intervene unless it is satisfied that there is no risk of disclosure. It goes without saying that the risk must

be a real one, and not merely fanciful or theoretical. But it need not be substantial. This is in effect the test formulated by Lightman J. in Re a Firm of Solicitors [1997] Ch. 1, at p. 9 (possibly derived from the judgment of Drummond J. in Carindale Country Club Estate Pty. Ltd. v. Astill (1993) 115 A.L.R. 112) and adopted by Pumfrey J. in the present case.

29. In *Bolkiah,* Lord Millett referred to the requirement on the plaintiff, who seeks to restrain his former legal adviser from acting in another matter, to establish that the legal adviser is in possession of confidential information which is or maybe relevant to the new matter in which the interests of the other client is or may be adverse to his own. The relevance of the confidential information imparted to the legal adviser is an essential requirement before an injunction can be granted restraining the legal adviser from acting in the new matter. In the *MJM case* I referred to how the issue of relevance had been explored in the previous cases:

46. The authorities make it clear that if an attorney is in possession of confidential information belonging to a former client, but the information is not relevant to the current retainer, then there is no risk of the misuse of confidential information. See his Honour Judge Curran QC in Western Avenue Properties Ltd v Patel [2017] EWHC 2650 at [21]:

> *"v) The Court must consider whether the Defendants have any confidential information received from the Claimants, which is or may be relevant to the dispute between them and the Thukrals. If there is confidential information, but it is clear that it is not relevant to the dispute, there is no risk of the misuse of the confidential information. (E-Clear (UK) Plc v Elias Elia [2012] EWHC 1195 (Ch) at [20]-[21])*

47. His Honour Judge Mackie QC referred to the critical importance of "relevant information" in this analysis in E-Clear (UK) Plc v Elias Elia [2012] EWHC 1195 at [20]-[21]:

"20. There does, however, remain a burden of proof on the third defendant. The generalities in the witness statement do not show the existence of information which is confidential and which may be relevant to the matter in which the dispute has arisen. When I asked Mr. Crystal to explain to me in summary terms what that information was, he referred to the way that the business was being run, to how Mr. Elia was involved in the business, to the circumstances in which Elia became indebted to E-Clear and facts to show in some way why what Mr. Elia asserts was the case should or should not be believed. Given what any firm instructed by the Administrators would learn from the available material that list is not convincing.

21. The passages in the correspondence to which Mr. Crystal took me do not begin to show that FFW have information of a confidential nature relating to Mr. Elia which could effect at all on this claim. The main application before the court concerns issues surrounding the source and timing of payments for a property. The material put forward by the solicitors appears to be controversial but straightforward. No passages in the claimant's evidence have been identified as revealing a potential breach of the duty of confidence. So it seems to me that there is no basis for this limb of the application either."

48. As noted by Lord Millett in Bolkiah, Lightman J. also analysed the requirement of relevant information in this context In re Firm of Solicitors [1997] Ch. 1. as to the requirement of relevant information, Lightman J. said at 9H-10G:

"For the purpose of the law imposing constraints upon solicitors acting against the interests of former clients, the law is concerned with the protection of information which (a) was originally communicated in confidence, (b) at the date of the later proposed retainer is still confidential and may reasonably be considered remembered or capable, on the memory being triggered, of being recalled and (c) relevant to the subject matter of the subsequent proposed retainer. I shall refer to

information that satisfies these three qualifications as "relevant confidential information". (emphasis added)

...

On the issue whether the solicitor is possessed of relevant confidential information: (a) it is in general not sufficient to make a general allegation that the solicitor is in possession of relevant confidential information if this is in issue: see Bricheno v Thorp, Jac. 300 and Johnson v Marriot 918330 2 C. & M. 183. But the degree of particularity required must depend upon the facts of the particular case, and in many cases identification of the nature of the matter on which the solicitor was instructed, the length of the period of the original retainer and the date of the proposed fresh retainer and the nature of the subject matter for practical purposes will be sufficient to establish the possession by the solicitors of relevant confidential information."

49. The issue of relevance was also considered by Timothy Walker J. In Re Solicitors' Firm [2000] 1 Lloyd's Law reports 31, at 33-34:

"Further, this case on the facts is far removed from the facts of the two main cases upon which the club relied, namely In re A Firm of Solicitors, [1992] 1 Q.B. 959 and Bolkiah v KPMG [1999] 2 W.L.R. 215. In both these cases the unsuccessful defendant (solicitors in one case, forensic accountants in the other) had essentially changed sides, and having been enlisted on one side, then took up arms in an obviously contrary cause.

In my judgment the relative weakness of the link is a matter which I can (and should) take into account when considering the existence of any real, as opposed to theoretical, risk of disclosure adverse to the club's interest." (emphasis added)

30. On the basis of these authorities I expressed the view at [57]:

> *"57. These authorities, in my judgment, provide ample support for the proposition that in order for conflict to arise the attorney must be in possession of confidential information from the previous retainer which may be relevant to the new retainer. In considering whether the confidential information may be relevant to the new retainer, the Court looks at the issues raised in the new retainer. In considering the risk of disclosure, the Court has to be satisfied that the risk is a real and not merely fanciful or theoretical. If the confidential information is not relevant to the current retainer, the Court will conclude that there is no risk of misuse of confidential information".*

Discussion

31. In the ordinary case the confidential information imparted to the legal adviser is said to be potentially relevant because it is relevant to one of the issues raised in the subsequent retainer.

32. In *Bolkiah,* confidential information was imparted by Prince Jefri to KPMG when KPMG was retained on its behalf and at his request to undertake a substantial investigation in connection with major litigation in which he was personally involved ("Project Lucy"). Project Lucy involved the forensic accounting Department of KPMG in the provision of extensive litigation support services in the course of which they performed tasks usually performed by solicitors. They investigated the facts, interviewed witnesses with or without solicitors being present, searched for documents, took part in conferences with counsel and in the absence of solicitors, drafted subpoenas, review draft pleadings and prepared ideas for cross examination. The relevant litigation was settled in March 1998.

33. In July 1998, KPMG accepted instructions from Brunei Investment Authority ("BIA") which involved tracing and recovering assets and might have led to civil and criminal proceedings against Prince Jefri. It was clear that the investigation of the withdrawal of

assets from the BIA by means of special transfers was in part adverse to Prince Jefri's interests. An injunction was granted restraining KPMG from acting on behalf of the BIA because the confidential information acquired by KPMG in relation to Project Lucy was potentially relevant to the investigation on behalf of the BIA in relation to special transfers.

34. In the *Georgia Marshall case,* an injunction was granted restraining the attorneys from continuing to act because the information contained in the Consent Order in the First Proceedings was potentially relevant to the issues in the Second Proceedings. The Consent Order in the First Proceedings disclosed confidential information relating to the wife's entitlement to a share of her former husband's deferred compensation plan and the requirement for the husband to take out a life insurance policy for the benefit of the children of the family, in a given amount. This confidential information was potentially relevant to the determination of the husband's liability to fund the children's education in the Second Proceedings.

35. In *Mahesh Sannapareddy et al v The Commissioner of Police*, Civil Appeal Nos. 2 and 6 of 2019, the Court was presented with an application relating to whether Mr. Pettingill, a former Attorney General, and Ms. Greening should be restrained from acting for the Intervener on account of conflict of interest. The Court noted that the Bermuda Police Service ("BPS") had for some time been carrying out an investigation ("the Criminal Investigation") into the medical activities of Dr. Sannapareddy, Bermuda Healthcare Services Ltd, and Brown Darrell Clinic Limited. The BPS objected to Mr. Pettingill and Ms. Greening acting for the Intervener in the judicial review proceedings in relation to certain aspects of the Criminal Investigation. The BPS objected on the basis that Mr. Pettingill, when he was the Attorney General, had been briefed by the BPS on all aspects of the Criminal Investigation. Mr. Pettingill, according to the BPS, regularly requested and received updates. Intelligence information about Dr. Brown came to the attention of BPS and was shared with Mr. Pettingill. In relation to Ms. Greening the BPS alleged she worked alongside another DPP counsel and the police investigation team and was aware of detailed allegations, data and the evidence involving medical fraud focusing on the activities of Dr. Brown and Dr. Sannapareddy.

36. The Court of Appeal held that it was open to the Judge to find that both Mr. Pettingill and Ms. Greening had received privileged and confidential information in connection with the Criminal Investigation. The Court of Appeal also considered that the information in possession of Mr. Pettingill and Ms. Greening was likely to be relevant to the present judicial review proceedings. First, Dr. Brown's affidavit evidence was designed to show that the allegations made against Dr. Brown were manifestly ill founded. Confidential information relating to the investigation of the allegations against Dr. Brown was intrinsically likely to be relevant to that issue and the possession of it by those on the Intervener's side was potentially prejudicial to BPS. Second, the case to be brought against the BPS was that BPS had been negligent in its collection and presentation of information and in making no effort to corroborate the information provided by those who were in dispute with the Applicants and Dr. Brown. Confidential information relating to the investigation, again, was likely to be relevant and its possession potentially prejudicial to BPS, especially if it showed a failure to carry out appropriate procedures or a lack of objectivity.

37. However, in the present case there is no suggestion that any confidential information was imparted by MDM to Mr. Hill in the Previous Proceedings which may be directly relevant to any pleaded issues between Mr. Crisson and MDM in relation to the Fee Agreement or in relation to the claim for fees based upon the retainer agreement.

38. To restate, what is being asserted by MDM and Mrs. Marshall is not that any specific confidential information relating to the Crisson Fee Action was disclosed to Mr. Hill in the previous proceedings, but that Mr. Hill must have absorbed how Mrs. Marshall and other partners in MDM go about running their professional practices generally. The confidential information relied upon is that:

    (a) *"We spent countless hours going over the case in preparation during which time I no doubt made numerous comments about how I conduct my practice, including how I work as a team, my billing structures, retainer information and*

generally my approach to litigation" (paragraph 4 of Mrs. Marshall's First Affidavit).

(b) *"... the specific information and knowledge which [Mr. Hill] obtained whilst acting for me and my firm as to my demeanor, my general approach towards settlement negotiations, my attitude towards former clients and my tactical approach towards adversaries"* (paragraph 14 of Mrs. Marshall's Second Affidavit).

39. There is no doubt that during the course of the retainer a legal adviser will form certain subjective impressions of the client such as the client's risk tolerance, approach to dispute resolution or commercial negotiations. These impressions have been referred to as "*getting to know you"* factors[1].

40. It appears that in Australia and in certain States of the United States getting to know you factors are accepted as confidential information and, in an appropriate case, can provide a sufficient factual base to grant an injunction restraining a legal adviser from acting where there is a risk that this confidential information may be used against a former client. It is less certain that this is the settled position as a matter of English or Bermuda law in ordinary commercial cases where the parties make decisions based upon objective merits as opposed to being overly influenced by emotions. The Court is not aware of any case where an English court has regarded "*getting to know you"* factors as confidential information or that it is sufficient to rely upon them in order to restrain a former legal adviser from continuing to act. In this regard I have not overlooked the statement by Bodey J in *Re Z* [2009] EWHC 3621 (Fam) (referred to in the judgment of Kawaley CJ *In the Matter of a Firm of Barristers & Attorneys* [2014] Bda LR 46 at [8]) at [42] that: "*the husband having very probably disclosed to [the solicitor] his attitudes to business and matters of finance*"

[1] In *Yunghanns v Elfic Ltd* (unreported, Supreme Court of Victoria, 3 July 1998) Gillard J said: *"In this regard, the relationship between [lawyer] and client may be such that the [lawyer] learns a great deal about his client, his strengths, his weaknesses, his honesty or lack thereof, his reaction to crisis, pressure or tension, his attitude to litigation and settling cases and tactics. These are all factors which I would call the "getting to know you" factors. The overall opinion formed by a [lawyer] office client as a result of his contact made in the circumstances amount to confidential information that should not be disclosed or used against the client"*

in a case "*where the parties are just as emotionally involved in the outcome*" was capable of being confidential information.

41. Assuming what was disclosed to Mr. Hill can properly be considered as "confidential information", the Court has to consider the impact of that confidential information being disclosed in affidavits which are open to public inspection.

42. Mr. Hill submits that it is axiomatic that information cannot be confidential if it is known to the public. He argues that once information has been included in an affidavit for use in court it ceases to be confidential. Mr. Hill has set out in his First Affidavit extracts from the affidavits filed by Mrs. Marshall in the Previous Proceedings setting out a brief description of how Mrs. Marshall distributes work and research amongst the associates in her department or to the partners where the advice needed is in a different field. Mr. Hill also refers to the affidavit filed by the Managing Director, Mr. Kevin Taylor, dealing with Chinese or ethical walls and which is referred to in paragraphs 43 and 44 of the Ruling of Hellman J.

43. In her Second Affidavit, Mrs. Marshall does not accept that the affidavits filed in the Previous Proceedings and referred to in Mr. Hill's First Affidavit are open to public inspection. She asserts that these affidavits were filed in the contempt proceedings in 2016 and the file in the contempt proceedings was sealed and which remains sealed by the Court.

44. However, Mr. Hill produced to the Court a copy of the Consent Order made by Hellman J on 16 January 2017 dealing with the issue of sealing the file. It is clear to me that paragraphs 3 and 4 of that Order provide that in relation to both the 2015 action and the contempt proceedings, the file shall be sealed and the public to have no right of access thereto "*until the conclusion of the matter or further order"*. There is a dispute between the parties as to whether *"the conclusion of the matter"* has been achieved or not. This issue may not matter as I have concluded that the entirety of the confidential material relied upon and as set out in paragraph 12 is in fact not relevant to the Fee Action (see paragraphs 47 to 52 below). For completeness I record that it is said on behalf of MDM that despite

directions given in paragraphs 1 and 2 of the Consent Order, no further affidavit was filed by the Plaintiff nor were agreed date submitted for hearing and the matter has remained in "abeyance". Mr. Hill, on the other hand, points out that no steps have been taken in these proceedings for a number of years and it is to be assumed that the proceedings have come to an end for want of prosecution. It is not necessary to decide this issue as I take the view that the entirety of the information is not relevant but if I had to make a ruling I would have ruled that the proceedings have "concluded" as the parties have so evinced their intention by taking no action for a number of years. On that basis the position would be that the relevant court files are no longer sealed and are open to public inspection. It must also follow that the information contained in those affidavits can no longer be considered confidential. As the basis of the jurisdiction to grant injunctions in this context, as articulated by Lord Millett in *Bolkiah* at 234 F-G, is the protection of confidential information, a court will not grant such an injunction in respect of information contained in affidavits which are open to public inspection.

45. Mrs. Marshall states in paragraph 36 of her Second Affidavit that this analysis does not apply to other information given to or shared with Mr. Hill over the course of many hours of telephone conversations and meetings during a two-year period the contents of which are not known to the Court. Mrs. Marshall is unable to specify that additional information and says *"[Mr. Hill] was my attorney and I would have provided to him in confidence fulsome information whether it turned out to be relevant and thus found its way into the affidavits or irrelevant and remained with him".* I am prepared to accept that there may be some residual but unspecified information which was imparted to Mr. Hill which did not find its way into the affidavits ("Residual Confidential Information").

46. In *Bolkiah*, Lord Millett stated that the burden of proof is on the plaintiff to establish that the confidential information is or maybe relevant to the new matter in which the interest of the client is or may be adverse to his own. Lord Millett considered that the burden is not a heavy one and "*will often be obvious*". I turn to consider whether MDM have discharged that burden.

47. In relation to the primary claim under the Fee Agreement, MDM rely upon the terms of a written agreement. Mr. Crisson, according to Mr. Hill, maintains that he is not in breach of the Fee Agreement. The issue whether Mr. Crisson is in breach of the Fee Agreement and/or whether he is required to transfer the agreed amount to MDM, are matters which will be determined primarily by construing the Fee Agreement. Any Residual Confidential Information relating to how Mrs. Marshall conducts her practice, including how she works as a team, her billing structure, retainer information and her approach to litigation would be completely irrelevant to the determination of these issues. The position would be the same even if all the information set out in paragraph 12 remains confidential.

48. In the event, an alternative case is presented based upon the retainer agreement and the Court may well have to consider the issues concerning whether fees charged by MDM were reasonable; whether Mrs. Marshall was negligent in her representation of Mr. Crisson; and whether the Fee Agreement was entered into as a result of undue pressure.

49. The issue whether fees charged to Mr. Crisson by MDM were reasonable would be determined by reference to the specific facts of the Crisson matrimonial litigation which spanned the period 2012 to 2019. The Court will have to decide whether Mrs. Marshall's actions in defending the interests of Mr. Crisson in that case were reasonable. By necessity it will be a fact specific enquiry. The Court will have to determine, *inter-alia*, whether the work undertaken was necessary and appropriate and whether the fees charged in respect of that work were reasonable. This enquiry is unlikely to be assisted by Residual Confidential Information relating to how Mrs. Marshall conducts her practice, billing structures, retainer information, her demeanour, her general approach towards settlement negotiations, her attitude towards former clients or her tactical approach towards adversaries. Again, the position would be the same even if all the information set out in paragraph 12 remains confidential.

50. The issue of negligence will have to be considered in the ordinary way. The issue for the Court would be whether, having regard to the background and issues in the Crisson matrimonial litigation, Mrs. Marshall acted and took steps which were not below the

actions of a reasonable competent attorney in comparable circumstances. In relation to that enquiry, any Residual Confidential Information (or the entirety of the information in paragraph 12) relating to Mrs. Marshall's general approach to litigation and other matters referred to in paragraph 12 would not be relevant.

51. In relation to the assertion that Mr. Crisson was pressured into entering the Fee Agreement, the Court will have to consider the specific allegations which are said to constitute undue pressure and Mrs. Marshall's response to those allegations. The Court will not be assisted by Residual Confidential Information (or the entirety of the information in paragraph 12) relating to the Mrs. Marshall's approach to litigation, her general approach towards settlement negotiations, attitude towards former clients or her tactical approach towards adversaries.

52. In the circumstances, I have come to the clear view that the confidential information relied upon by Mrs. Marshall and as set out in paragraph 12 above has no real relevance to any of the issues in the Fee Action. Given that the confidential material relied upon is not relevant to any of the issues in the Fee Action, it follows that there is no real risk of disclosure of that material.

53. Mr. Hill submits that there has been inordinate delay by MDM to make an objection to his representation of Mr. Crisson in the Fee Action. The delay in the present case is five months and Mr. Hill contends that it was five months of near constant activity. Mrs. Marshall was aware that Mr. Hill was acting as an attorney since she brought a complaint as to his conduct to the Bar Council. In bringing that complaint, no mention was made of any alleged breach of the Barristers Code of Professional Conduct based upon any breach of any confidential information in the possession of Mr. Hill and belonging to MDM and Mrs. Marshall.

54. Mr. Hill submits that there has been a clear strategy of non-cooperation and delay coupled with an unnecessary request that the application to set aside the ex parte injunction granted by Stoneham J be linked with MDM's application for summary judgment. A delay of the

kind that has occurred here has been such that Mr. Crisson, submits Mr. Hill, has been denied proper access to the Court to have his application to set aside the ex parte injunction heard.

55. The existing proceedings have now been on foot for some considerable time, nearly 8 months and the application to set aside, which was to be heard on two days' notice has been extant for five months. Mr. Hill submits that the objection was first raised by MDM only when it appeared that the set aside application could be called before a hearing in short order.

56. I accept that there has been material delay in taking the point that Mr. Hill should not be acting for Mr. Crisson in the Fee Action because he is in possession of confidential information, relevant to the Fee Action, imparted to him by Mrs. Marshall and MDM when he represented them in 2015 and 2016. The delay must have caused Mr. Crisson to incur substantial costs during this five month period. As the grant of an injunction sought is a discretionary remedy I consider that the Court can properly take into account the delay of five months as a factor in the exercise of its discretionary jurisdiction whether or not to grant the injunction.

57. Counsel for MDM also relies upon Rules 24 and 25 of the Barristers' Code of Professional Conduct 1981. It is to be noted that these two Rules do not prohibit acting against former clients in all circumstances but only in circumstances where the attorney is in possession of confidential information from the previous retainer which may be relevant to the new retainer. Rule 24 provides that "*A barrister shall not for an opponent of the client, in any case in which his knowledge of the affairs of such client or former client may give him an unfair advantage*" (emphasis added). Rule 25 provides that *"A barrister shall not act for a client in any case where he has reason to believe that the opponent will be calling as a witness another client of former client and there is a probability that he will have to cross-examine that client or former client with regard to matters which have come to his knowledge as a result of the relationship that has existed between them*" (emphasis added).

58. Rule 24 and 25 substantially reflect the legal position, as articulated by Lord Millett in *Bolkiah*, that in an appropriate case, a court may restrain an attorney if that attorney is in possession of confidential information belonging to a former client which may be relevant in subsequent proceedings to the disadvantage of the former client. This Court has an inherent power to prevent abuse of this procedure and accordingly has the power, in an appropriate case, to restrain an advocate from representing a party in breach of Rules 24 and 25. However, a former client has no right to prevent the attorney from acting based upon a breach of the Code of Conduct. The enforcement of the Code of Conduct are primarily matters for the Bermuda Bar Council. Any such application by a former client must be made under the jurisdiction identified by Lord Millett in *Bolkiah.*

59. Having regard to my conclusions that (a) the affidavits filed in the 2015 and the contempt proceedings are now open to public inspection and any confidential information appearing therein has ceased to be confidential; (b) the confidential material relied upon in paragraph 12 is not relevant to any of the issues in the Fee Action; and (c) there was material delay in objecting to Mr. Hill's representation in the Fee Action, I refuse to grant the injunction restraining Mr. Hill from continuing to act on behalf of Mr. Crisson, the Defendant in proceedings commenced by MDM in the Supreme Court of Bermuda, case number 2019: No. 491.

60. I will hear the parties in relation to the issue of costs, if required.

Dated this 12 August 2020

NARINDER K HARGUN
CHIEF JUSTICE