In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 163

BETWEEN:

MJM LIMITED

Plaintiff

-and-

APEX FUND SERVICES LTD

Defendant

Before:	**Hon. Chief Justice Hargun**
Appearances:	**Mr Ben Adamson, Conyers Dill & Pearman Limited, for the Plaintiff**
	Mr Alexander Potts QC and Laura Williamson, Kennedys Chudleigh Ltd, for the Defendant
Dates of Hearing:	**5 November 2019**
Date of Judgment:	**28 November 2019**

JUDGMENT

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; whether attorney able to seek a declaration that there is no conflict of interest.

Introduction

1. These proceedings commenced by MJM Limited (the "Plaintiff" or "MJM") against Apex Fund Services Ltd (the "Defendant" or "Apex") by Originating Summons dated 1 May 2019 seek a declaration that MJM is not prevented by reason of its prior representation of Apex in relation to a *subpoena duces tecum* issued in a previous action between two unrelated parties ("the Previous Action") from acting for Mathew Clingerman in his capacity as receiver of the Silk Road M3 Fund in proceedings against Apex in Civil Action 2019 No. 64 (the "M3 Fund action").

Factual background

2. In his first affidavit sworn on 22 April 2019 Mr Andrew Martin, Senior Counsel at MJM, deposes that in April 2015, MJM was approached to act on behalf of Apex to advise in relation to a *subpoena duces tecum* that had been served upon it in the Previous Action.

3. MJM accepted instructions to act for Apex and provided a letter of engagement with the terms of business on which MJM was engaged to act.

4. Mr Martin prepared an affidavit for Mr Peter Hughes, a director of Apex, to swear in those proceedings exhibiting the documents which were the subject of the subpoena which had been served upon Apex.

5. Mr Martin attended with Mr Hughes at the Supreme Court to answer the subpoena and at that time the Court released Mr Hughes.

6. Mr Martin says that he met with Mr Hughes on this one occasion and they observed the normal courtesies and engaged in polite conversation. He says that that they did not discuss any matter concerning the conduct of the business of Apex.

7. About a year later, in May 2017, there was a further request for the production of documents under the subpoena. Mr Martin and his colleague Jennifer Howarth assisted Apex in preparing a second affidavit. This affidavit was sworn by Mr Mahadeo, the Managing Director of Apex. Mr Martin says he never met Mr Mahadeo but they had spoken briefly on the phone.

8. Mr Martin states that the documents that were produced both by Mr Hughes and Mr Mahadeo as exhibits to their affidavits were documents that had been provided to Apex by an Apex affiliated company in Mauritius.

9. In November 2018, Mr Martin was approached by Mr Mathew Clingerman, acting in his capacity as the Receiver of the M3 Fund (a segregated account of Silk Road Funds Ltd), to act in relation to a potential claim against Apex and Mr Hughes arising out of the administrative services provided by Apex and Mr Hughes to the M3 Fund, and against various other parties.

10. Mr Martin says that he conducted a conflict search in the normal way. He noted that MJM had previously provided assistance to Apex in relation to the subpoena and concluded that MJM was able to accept instructions from Mr Clingerman in this new matter because the engagement by Apex had concluded and the subject matter was entirely unconnected with MJM's proposed engagement by Mr Clingerman.

Inter-party correspondence

11. Prior to MJM being asked to represent Mr Clingerman in the M3 Fund action, Mr Clingerman was represented by Appleby and Appleby had written a detailed 20 page letter dated 1 August 2018 to Apex setting out that the M3 Fund considered that it had credible claims against Apex and invited Apex to enter into a Standstill Agreement. In response Kennedys Chudleigh Ltd ("Kennedys"), representing Apex, took the point that Appleby was unable to act for Mr Clingerman due to a conflict of interest.

12. Upon accepting instructions, MJM wrote to Kennedys requesting a substantive response to the letter from Appleby. Kennedys responded by letter dated 21 December 2018 stating:

> *"Please treat this letter as a Pre-Action Letter of Claim, on behalf of our client, requesting formal undertaking from MJM Limited.*
>
> *…*
>
> *MJM Limited is clearly under an obligation not to act for an opponent of Apex Fund Services Limited, in which its knowledge of the affairs of Apex Fund*

Services Limited may give MJM Limited an unfair advantage: see Rules 22 to 29 of the Code of Conduct, and Rule 24 in particular. This is clearly the position in this case.

Further or alternatively, MJM Limited is clearly under an obligation to hold all information and documents that it has acquired about Apex Fund Services Limited, in the course of its professional relationship, in strict confidence: see Rules the 15 to 18 of the Court of Conduct.

…

In the event that our client has not received satisfactory undertakings within 21 days of the date of this letter, we anticipate being instructed to apply to Court for appropriate injunctive and declaratory relief against MJM Limited.

We reserve our client's right to draw this correspondence to the attention of the Court on the question of costs of any such proceedings.

Subject to your response, we must also inform you that we anticipate being instructed to make a complaint on our client's behalf to the Bar Council, for referral to its Professional Conduct Committee."

13. MJM responded to the letter from Kennedys by its letter dated 2 January 2019 objecting to the threat of reporting MJM to the Bar Council for a breach of the Code of Conduct, contending that Kennedys' letter did not set out the basis of the complaint by Apex that MJM was in the possession of alleged confidential information or knowledge that would give MJM an unfair advantage in acting against Apex in the M3 Fund action. MJM's letter ended by stating:

"Your letter fails to meet the requirement of setting out a prima facie case of breach of any rule under the code. We do not believe there is a good faith basis upon which to make the allegations that have been made in your letter. Your threat of making a complaint of professional conduct in order to prevent MJM

acting against your client is a breach of Rule 12 of the Code. In light of the matters set out above, we invite you to withdraw your letter."

14. No reply was received from Kennedys in response to MJM's letter dated 2 January 2019. However, Mr Martin understood from Mr Clingerman that Kennedys continued to assert that MJM had a disqualifying conflict of interest that would prevent MJM from representing Mr Clingerman against Apex and Mr Hughes. In the circumstances, MJM instructed Conyers Dill & Pearman ("Conyers") to act on its behalf in relation to the allegation of conflict.

15. On 28 March 2019 Conyers wrote, on behalf of MJM, to Kennedys stating that:

"We do not understand the assertion that MJM Ltd will obtain an advantage in the current proceedings through their previous engagement by your client. We note that no explanation is given for this assertion.

If your client's position is that MJM Ltd was provided with relevant confidential information, in the course of its work for your client, please provide details by return. "Relevant" in this context means of course relevant to the present litigation."

16. Kennedys responded to the letter from Conyers by its letter dated 4 April 2019, by first questioning whether Conyers itself had a conflict of interest in relation to the matter:

"Before turning to the substance of the letter, we would be grateful if you would please clarify for us whether Conyers Dill & Pearman Limited currently represent or advise, or have previously represented or advised, any other party, individual or entity (a) with an interest in the Silk Road M3 Fund, or (b) with an interest in the subject matter of the claims and allegations being asserted by Mathew Clingerman, or (c) with an interest in any other dispute or transaction involving Apex Fund Services Limited?"

17. The letter dated 4 April 2019 from Kennedys confirmed again that they anticipated receiving instructions to commence proceedings against MJM restraining MJM from acting in the M3 Fund action:

> *"Whatever legal advice you may choose to provide to MJM Limited (without, it would seem, a full and correct understanding and analysis of the facts and the law), please note that our clients maintain their objection to MJM Limited's representation of Mathew Clingerman adverse to Apex Fund Services Limited and Peter Hughes, and we anticipate being instructed to apply for injunctive relief in the event that MJM Limited take any further steps on Mr Clingerman's behalf adverse to our clients' interests.*

18. There was a further letter from Conyers to Kennedys dated 9 April 2019 and in response Kennedys' letter dated 17 April 2019, but the position remained in substance as set out above and the Originating Summons was filed on 1 May 2019.

The issues in the Previous Action

19. Neither Apex nor any Apex affiliated companies were parties to this action. Furthermore, no allegations of any wrongdoing or any claims were made against Apex or Apex affiliated companies in this action.

20. Indeed, it was positively asserted in these proceedings that Apex was a reputable independent administrator.

21. Second, the documents that were provided and exhibited to the affidavits of Mr Hughes and Mr Mahedo did not belong to Apex. The documents belonged to the Master Fund.

22. Third, the retainer was limited to providing legal advice in relation to compliance with a subpoena.

The issues in the M3 Fund action

23. The issues in the M3 Fund action can be gathered from the Complaint filed by Mr Clingerman, in his capacity as a receiver for the M3 Fund, in the Supreme Court of the State of New York County of New York Index No. 651001/2019.

24. The defendants to that complaint are Alisher Ali ("Mr Ali"), Eurasia Capital Ltd ("ECL"), Eurasia Capital (Mongolia) LLC ("ECML"), Silk Road Management Limited ("SRML"), Silk Road Finance Limited ("SRFL"), Apex Fund Services Ltd ("Apex") and Peter Hughes ("Mr Hughes").

25. The summary of the allegations made in the M3 Fund action is set out in the Preliminary Statement as follows:

> *"1. This claim arises out of the fraudulent misappropriation of funds invested in the Silk Road M3 Fund (the "M3 Fund"), a segregated account of Silk Road Funds Limited (the "Fund"), by the Defendants.*
>
> *2. The M3 Fund was established by Mr. Ali in early 2013 with a purported investment strategy to generate long-term returns from investment in securities relating to companies listed on the Mongolia Stock Exchange, the Myanmar Stock Exchange and the Mozambique Stock Exchange.*
>
> *3. In January 2013, Goodwill PTC Limited ("Goodwill"), as Trustee of a discretionary trust called the "Prosperity Trust," invested $10,000,000 in the M3 Fund.*
>
> *4. Shortly thereafter, from February 2013 onwards, that investment was fraudulently misappropriated. At the direction of Mr. Ali, in a series of unauthorized and dishonest payments, SRML channelled that investment to defendants ECL, ECML, SRML, and SRFL, (collectively, the "Transferee Defendants") and non-defendant Silk Road Finance, Inc. ("SRFI"), each an entity that was dominated, controlled and/or operated by Mr. Ali.*

5. As the result of Defendants' actions and/or inactions, the entirety of the $10,000,000 investment by Goodwill into the M3 Fund has been lost.

6. At all material times, Defendants acted in breach of their duties to the M3 Fund and have behaved in a fraudulent, or in the alternative, grossly negligent or negligent manner. Their respective actions, or failure to act, has harmed the M3 Fund (for which Plaintiff acts) causing significant financial harm. Plaintiff is entitled to judgment awarding him, on behalf of the M3 Fund, both actual and punitive damages."

26. There are specific allegations made against Apex and Mr Hughes in the Complaint as follows:

"105. In any event, Apex did not take any or any adequate steps to reconcile the information provided by ECML and/or ECL with records maintained by the Fund or the DBS as custodian or any other counterparty, independent or otherwise, in order to calculate the net asset value of the Participating Shares of the M3 Fund.

110. As was or should have been known by Apex and Mr. Hughes, the structure of the M3 Fund and its service providers was such that, even if Apex had relied upon information provided by other service providers to produce a reconciliation, it would not have been on the basis of independent and/or multi-source reporting and/or would have given no or inadequate assurance as to the accuracy of the assets shown on the ECL and/or ECML account statements.

119. Under these circumstances, reconciliation against information provided by those entities would not (or would not adequately) ensure or confirm the accuracy of information and assets reported on the ECL/ECML account statements. As a result, the Net Asset Value calculated by Apex was not in accordance with its obligations under the Administration Agreement, and both Apex and Mr. Hughes knew or ought to have known the same"

27. The Complaint seeks to plead a cause of action against Apex and Mr Hughes based upon aiding and abetting the fraud committed by the other defendants. The allegation is made in the following terms:

> *"180. Defendant Mr. Ali, individually and through his alter egos and/or instrumentalities, defendants ECL, ECML, SRML, and SRFL, and non-defendant SRFI, knowingly defrauded the M3 Fund (the "Fraud"), resulting in the loss of the entirety of the M3 Fund's assets.*
>
> *181. Defendants Apex and Mr. Hughes either knew, or recklessly disregarded facts that would have revealed the misappropriation of the M3 Fund's assets in a manner that represented an extreme departure from the standards of ordinary care to the extent that the danger was known or so obvious that defendants Apex and Mr. Hughes must have been aware of it. By failing to disclose and/or concealing the evidence of fraud known or recklessly disregarded by defendants Apex and Mr. Hughes, Apex and Mr. Hughes were able to insure a continued supply of fees and profits to themselves through their association with the Fund.*
>
> *182. Defendants Apex and Mr. Hughes, by failing to and/or intentionally concealing facts that would have revealed the Fraud, despite their obligation to identify and disclose such facts, substantially assisted Mr. Ali and his agents and/or instrumentalities to perpetuate the Fraud.*
>
> *183. Because of the egregious nature of Apex's and Mr. Hughes's tortious, reprehensible, and morally culpable actions, as alleged in this complaint, which are of a malicious, willful and wanton nature, the M3 Fund, for which Plaintiff acts, has suffered and continues to suffer severe harm and is entitled to both actual and punitive damages."*

28. The Complaint pleads causes of action based upon breach of fiduciary duty on the part of Apex and Mr Hughes as follows:

> *"188. Defendants Apex and Mr. Hughes, each failed to act in good faith and with the degree of care of an ordinarily prudent person acting in their capacity*

by intentionally or with reckless disregard failing to disclose material facts that would have disclosed the Fraud."

29. The Complaint also pleads causes of action based upon aiding and abetting breach of fiduciary duties by Mr Ali, ECL, ECML, SRML and SRFL and specifically alleges:

> *"193. Defendants ECL, ECML, SRML, SRFL, Apex and Mr. Hughes were aware, either actually or, in alternative, constructively, of Mr. Ali's intent to misappropriate, and/or of Mr. Ali's actual misappropriation, of the M3 Fund's assets.*
>
> *194. Defendants ECL, ECML, SRML, SRFL, Apex and Mr. Hughes, either by concealing Mr. Ali's actions, or actions taken on his behalf, substantially assisted Mr. Ali's breach of his fiduciary duty to the M3 Fund.*
>
> *195. Because of the egregious nature of Defendants' tortious, reprehensible, and morally culpable actions, as alleged in this complaint, which are of a malicious, willful and wanton nature, the M3 Fund, for which Plaintiff acts, has suffered severe harm and is entitled to both actual and punitive damages."*

30. Finally, the Complaint pleads causes of action based upon negligence and gross negligence on the part of Apex and Mr Hughes and in that respect alleges against them the following:

> *"202. Defendants Apex and Mr. Hughes had actual or constructive notice of Mr. Ali's intent to misappropriate and of his actual misappropriation of the M3 Fund's assets.*
>
> *203. Despite an obligation to do so, at all relevant times, defendants Apex and Peter Hughes, failed to disclose and/or materially omitted facts in statements made to the M3 Fund with reckless disregard for the M3 Fund as to Defendant Mr. Ali's history of untrustworthiness. Defendants' Apex and Mr. Hughes also failed to disclose multiple breaches of the Fund's articles of association and improper transfers of the Funds' assets, which included the M3 Fund's assets and which would have revealed the Fraud. Defendants Apex and Hughes also*

failed to disclose that the Fund administrator's calculation of the Fund's NAV was improperly conducted and falsely reported despite their knowledge of those facts. Apex's and Mr. Hughes's actions represented an extreme departure from the standards of ordinary care to the extent that the danger was either known or so obvious that defendants Apex and Mr. Hughes must have been aware of it.

204. Defendants Apex's and Mr. Hughes's failure to disclose or intentional omission of material facts known to them was grossly negligent and caused harm to the M3 Fund, for which Plaintiff acts."

Issues raised in this application

31. Apex contends that this application by MJM should be dismissed for three separate and independent reasons:

(1) Apex contends that the commencement of these proceedings by MJM which resulted in disclosure of confidential and privileged material belonging to Apex was abusive and a claim founded on breach, and abuse, of another party's rights of privilege and confidentiality is an abuse of process. In the circumstances, Apex contends, MJM's claim should be struck out and dismissed on this basis alone, pursuant to RSC Order 18, rule 19, or pursuant to the Court's inherent jurisdiction;

(2) MJM is in possession of potentially relevant confidential information as a consequence of having acted for Apex previously and in the circumstances the Court should find that there is a risk of disclosure of such information if MJM acts for Mr Clingerman. On the basis that there is a risk of disclosure of confidential and privileged information the Court should not make a declaration that MJM is not prevented from acting for Clingerman in the M3 Fund action;

(3) The Court should decline to make a negative declaration sought by MJM on the grounds that: (i) MJM either deliberately or recklessly breached Apex's rights of privilege and confidentiality by commencing these proceedings; (ii) there is

no evidence that a negative declaration as sought by MJM will serve any useful purpose as there is no evidence that Mr Clingerman intends to progress the Bermuda proceedings against Apex; (iii) the claim for a negative declaration is premature, in circumstances where MJM has failed to address or explain the nature of Mr Clingerman's underlying claims or allegations, or the current procedural status of such matters; and (iv) MJM has not come to Court with "clean hands" on a fully transparent basis, in circumstances where MJM appears to have sought to conceal the fact and or the full extent of its involvement as Mr Clingerman's attorneys.

Alleged abuse of process by MJM by commencing these proceedings

32. Counsel for Apex submits that Apex has done nothing to date to waive its rights of privilege or confidentiality, whether expressly or impliedly. In particular it is submitted on behalf of Apex that, *unless and until* Apex actually commences its own court proceedings (as plaintiff and at the time of its choosing) against MJM, and unless and until Apex (as plaintiff) actually files and serves evidence in an unsealed or publicly accessible form in support of any such proceedings, there can be no possibility of any implied waiver of any such rights by Apex.

33. A review of the authorities referred to by counsel shows that it is certainly the case that if a client commences proceedings against his or her attorney, asserting claims which can only properly be determined by investigating the previous confidential and privileged relationship, then the court will hold that, to the extent necessary, the client has impliedly waived the privilege which otherwise exists. This implied waiver of privilege is based upon the manifest unfairness which would otherwise arise if the attorney was unable to disclose to the court the confidential and privileged material. It is less clear whether the implied waiver of legal privilege is strictly confined to cases where the client has commenced proceedings against his attorney.

34. In *Lillicrap v Nalder & Son (A Firm)* [1983] 1 WLR 94, the plaintiff property developers claimed damages against their former solicitors for negligence in failing to advise them on the rights of way material to the title of the property which they purchased. The solicitors admitted negligence, but denied the plaintiffs' claim that, if they had been correctly advised, they would not have purchased the property. The

solicitors sought leave to add as further particulars of the denial matters relating to the plaintiffs' previous retainers of them in similar transactions when the plaintiffs ignored their advice. The Court of Appeal allowed the solicitors to refer to the previous retainers. Russell LJ explained the position in the following terms:

> *"In my judgment, by bringing civil proceedings against his solicitor, a client impliedly waives privilege in respect of all matters which are relevant to the suit he pursues and, most particularly, where the disclosure of privileged matters is required to enable justice to be done"*

35. *Paragon Finance Plc v Freshfields (a firm)* [1999] 1 WLR 1183, is another case where a client commenced proceedings against his former solicitors for negligence and the issue was whether the defendant solicitors were entitled to disclosure of confidential communications between the plaintiffs and their new solicitors relating to the pursuit and settlement of insurance claims. In holding that they were so entitled Lord Bingham CJ expressed the rationale as follows:

> "*When a client sues a solicitor who has formerly acted for him, complaining that the solicitor has acted negligently, he invites the court to adjudicate on questions directly arising from the confidential relationship which formerly subsisted between them. Since court proceedings are public, the client brings that formerly confidential relationship into the public domain. He thereby waives any right to claim the protection of legal professional privilege in relation to any communication between them so far as necessary for the just determination of his claim; or, putting the same proposition in different terms, he releases the solicitor to that extent from the obligation of confidence by which he was formerly bound. This is an implication of law, the rationale of which is plain. A party cannot deliberately subject a relationship to public scrutiny and at the same time seek to preserve its confidentiality. He cannot pick and choose, disclosing such incidents of the relationship as strengthen his claim for damages and concealing from forensic scrutiny such incidents as weaken it. He cannot attack his former solicitor and deny the solicitor the use of materials relevant to his defence. But, since the implied waiver applies to communications between client and solicitor, it will cover no communication to which the*

solicitor was not privy and so will disclose to the solicitor nothing of which he is not already aware."

36. *Hakendorf v Countess of Rosenborg* [2004] EWHC 2821 (QB), was not a case where the proceedings were commenced by the client against her former solicitor. This was a case where the solicitor commenced proceedings against her former client under the Solicitors Act 1974 and successfully obtained a freezing injunction in aid of the claim for recovery of legal costs. The former client sought to set aside the freezing injunction on the ground, inter alia, that the former solicitor did not seek permission or waiver of legal privilege in the matters which the former solicitor had set out in her affidavit and exhibits in support of the application for the injunction. Tugendhat J. rejected the submission and did so for a number of reasons.

37. First, it is unlikely to be a breach of confidence or privilege if the relevant hearings before the court are held in private:

"74. There is of course no breach of confidence or breach of privilege in a solicitor reminding her client of matters communicated to her by her client. The potential for breach of confidence arises, if at all, when there is disclosure to a third party. Where proceedings are not in public and the dispute is between the solicitor and her former client, the disclosure complained of, if any, must be limited to disclosure to the court and to the former client's new solicitor, if such are instructed. I offered the Wife an opportunity to make an application that the proceedings before me be heard in private, but she did not do so."

38. Second, a communication by an attorney to the court, made for the purpose of proceedings properly brought by the attorney, will not of itself constitute a breach of legal professional privilege. In this regard Tugendhat J. referred to the decision of the Court of Appeal in *Finers v Miro* [1991] 1 WLR 35:

"78. Further, it seems to me that a communication by a solicitor to the court, made for the purpose of proceedings properly brought by the Solicitor, will not of itself constitute a breach of legal professional privilege. That appears to be the assumption in Finers v Miro [1991] 1 WLR 35. That case concerned an

application made by a firm of solicitors to the court for directions in relation to assets that were under the solicitor's legal control and belonged to the Defendant. In particular the solicitors asked whether they should give notice of the proceedings to certain named individuals and companies, and if so what information they should give. After innocently receiving the assets in question the solicitors became aware of grounds for suspecting that they may have been acquired by fraud on the part of the client.

79. In upholding the judge's order that notice of the proceedings should be given to the liquidators of certain companies, Dillon LJ considered, at page 40, that the difficultly about that course was that any communication which gave enough information to be of practicable use would breach the legal professional privilege to which the client was entitled as against the solicitors. No similar concern appears to have been expressed by the Court about the disclosure to the Court itself in the application for directions." (emphasis added).

39. Third, if a former client acts in such a way so as to entitle the attorney to apply for a freezing order that may well be a situation which is analogous to *Paragon Finance:*

> *"81. If I were wrong about that, and if I had to resolve the question of principle, I would also decide that in favour of the Solicitor. If, as happened in this case, a former client acts so as to entitle the Solicitor to relief under section 69, or gives the Solicitor grounds for applying for a Freezing Order, while challenging a bill in whole or in part, it seems to me that there may well be a situation analogous to that in Paragon Finance. In other words the former client cannot put the former solicitor in that position, and at the same time deny the solicitor the use of materials relevant to the action, which the law plainly permits the solicitor to take."*

40. It seems to me whether the action is commenced by the client or whether it is commenced by the attorney should not determine what the attorney is entitled to put before the court. The opening up of the former relationship between the client and his attorney should not be conditional upon the client commencing proceedings against the former attorney. That issue must be determined by reference to the underlying claims which are threatened by the former client.

41. In the present case Apex, in the letter from its attorneys dated 21 December 2018, has taken the position that for MJM to continue to act for Mr Clingerman in the M3 Fund action would be in breach of Rules 22 to 29 of the Barristers' Code of Professional Conduct and that it intended to make a complaint to the Bermuda Bar Council for referral to its Professional Conduct Committee. Apex also took the position that for MJM to continue to represent Mr Clingerman was in breach of their duty of confidentiality owed to Apex and Apex intended to apply to the Supreme Court of Bermuda seeking appropriate injunctive and declaratory relief. The actions threatened by Apex, both in terms of the professional conduct complaint to the Bar Council and the injunction proceedings restraining MJM from acting for Mr Clingerman, clearly open up the former retainer in relation to the Previous Action. The Court is simply unable to determine whether the threatened claims by Apex are valid without considering the precise nature and scope of the previous retainer.

42. In my judgment the actions taken by MJM in seeking declaratory relief from this Court in response to the threatened claims by Apex are perfectly reasonable in the circumstances. Any attorney faced with the allegations by a former client that his continued representation of a particular client would amount to professional misconduct and breach of his duty of confidentiality to a former client would be anxious to have the position clarified. This is particularly so when the former client threatens the attorney with a complaint to the Professional Conduct Committee and an application to the Supreme Court for an injunction restraining the attorney from acting.

43. Counsel for Apex was asked by the Court what other options, other than applying to the Court for declaratory relief, MJM had in light of the threats contained in the letters from Kennedys dated 21 December 2018 and 4 April 2019. As noted, these threats involved a complaint of professional misconduct and an order restraining the firm from continuing to act. Counsel informed the Court that MJM had two options: they could stop acting for Mr Clingerman or, if they were confident of their legal position, they could continue to act for him. I consider this response to be a wholly unrealistic view of the situation in which MJM was placed as a result of the serious allegations of professional misconduct made by Apex in correspondence. Attorneys, when faced with serious complaints of professional misconduct by former clients, like any other person

in Bermuda, are entitled to their right to obtain appropriate relief from the courts. When faced with claims of professional misconduct and breach of confidence, they are entitled to obtain guidance from the Court. This is precisely what MJM have done by seeking declaratory relief. In the circumstances, I reject the submission that the commencement of these proceedings by MJM seeking declaratory relief was in any way an abuse of process.

44. Further, and in any event, at the early stage of these proceedings I ordered, on the joint application of the parties, that these proceedings be held in private. In the circumstances, there is no realistic risk that any of the confidential material exhibited to the affidavits will become public. Even if I had taken the view that the commencement of these proceedings by MJM was in any way abusive, which I do not, I would not have struck out these proceedings on this ground alone.

Conflict of interest

45. The statements of principle in relation to the obligations of an attorney to a former client are set out in the judgment of Lord Millett in *Bolkiah v KPMG* [1999] 2 AC 222:

> " *…it is incumbent on a plaintiff who seeks to restrain his former solicitor from acting in a matter for another client to establish (i) that the solicitor is in possession of information which is confidential to him and to the disclosure of which he has not consented and (ii) that the information is or may be relevant to the new matter in which the interest of the other client is or may be adverse to his own. Although the burden of proof is on the plaintiff, it is not a heavy one. The former may 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".*
>
> *…*
>
> "*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."

…

"Degree of risk

It follows that in the case of a former client there is no basis for granting relief if there is no risk of the disclosure or misuse of confidential information."

…

"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." (emphasis added)

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)

50. The application of the requirement of relevant information is illustrated by the Bermuda Court of Appeal authorities in *Georgia Marshall and Rachel Barritt v A* [2015] CA (Bda) 35 Civ (20 November 2015) and *Mahesh Sannapareddy v The Commissioner of Bermuda Police* Service [Civil Appeal Nos 2 and 6 of 2019].

51. In *Marshall* there was an allegation of conflict of interest on the part of Mrs Marshall, in connection with issues arising in proceedings (the Second Proceedings) taken against the Respondent's current husband by his former wife in relation to certain proceedings between them, with respect to their children. Specifically, the Respondent alleged that as a result of Mrs Marshall having acted for her in her own matrimonial proceedings, at an earlier time, Mrs Marshall was in possession of confidential information about the wife's financial circumstances which could be adverse to the husband's, and hence to her interests, arising in the Second Proceedings. Accordingly, the wife sought an injunction restraining Mrs Marshall from acting any further in the Second Proceedings.

52. In considering the issue of relevance, the trial judge was satisfied that as a result of having read the Consent Order, Mrs Marshall would have been in possession of confidential information that was likely to be relevant to the plaintiff's (the wife's) present financial circumstances. On appeal, Bell JA held that the test was whether the confidential information in Mrs Marshall's possession was or might be relevant to the new matter:

> *"And the answer to this question is, with all respect to Mr Hill, obvious. It clearly was, and is no doubt the reason why the judge felt that he could deal with that aspect of the matters in a single sentence*".

53. In *Sannapareddy*, the Court was presented with an application as 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. As the judgment notes, the Bermuda Police Service ("BPS") had for some time been carrying out an investigation ("the Criminal Investigation") into the medical activities of Dr Mahesh Sannapareddy, Bermuda Healthcare Services Ltd, and Brown Darrell Clinic Limited. The BPS objected to Mr Pettingill and Ms Greening acting for the Intervener in judicial review proceedings in relation to certain aspects of the Criminal Investigation. The BPS

objected on the basis that Mr Pettingill, when 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 the BPS and was shared with Mr Pettingill. In relation to Ms Greening the BPS alleged that she worked alongside another DPP counsel and the police investigation team and was aware of the detailed allegations, data and the evidence involving medical fraud focusing on the activities of Dr Brown and Dr Sannapareddy.

54. Assistant Justice Bell held that, while neither Mr Pettingill nor Ms Greening was significantly involved in the Criminal Investigation, both of them conceded that they were present at briefing meetings discussing the Criminal Investigation. Mr Pettingill for his part has confirmed that he specifically asked for updates on the criminal investigation connected to Dr Brown from time to time. The judge found that they did receive and were in possession of confidential and privileged information from the period 2013 – 2014 (in respect of Mr Pettingill) and 2014 – 2017 (in respect of Ms Greening).

55. 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 the 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. Third, looking at the matter in more general terms, there would seem to be an inherent conflict when Mr Pettingill and Ms

Greening were intent on showing that the actions of the BPS in seeking, obtaining and executing the Special Procedure Warrants were unlawful and a disgrace, in circumstances where Mr Pettingill and Ms Greening, as the judge found, received information in their professional capacity from BPS about the progress of the investigation.

56. Counsel for Apex also referred the Court to 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 act for an opponent of the client, or of a former client, in any case in which his knowledge of the affairs of such client or former client may give him an unfair advantage"* (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 or 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).

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.

58. With this review of the authorities I turn to consider the factual allegations in relation to the allegation of conflict of interest on the part of MJM. In this connection, I propose to consider the confidential information relied upon by Apex and why it is said that the information relied is or may be relevant in relation to the M3 Fund action.

59. Before doing so, it is instructive to keep in mind the particular and detailed issues raised in the M3 Fund action. The alleged fraudulent scheme involved, in January 2013, the trustees of the Prosperity Trust investing $10 million in the M3 Fund. Shortly thereafter, from February 2013 onwards, in a series of unauthorised and dishonest payments, SRML channelled the investment to the defendants ECL, ECML, SRML and SRFL. As a result of the defendants' actions and/or inactions, the entirety of $10 million invested by the trustees into the M3 Fund has been lost. The core allegation against Apex and Mr Hughes is that they did not take any or any adequate steps to reconcile the information provided by ECML and/or ECL with records maintained by the Fund or DBS as custodian or any other counterparty, independent or otherwise, in order to calculate the net asset value of the Participating Shares of the M3 Fund.

60. I dealt with the details of the relevant information acquired by MJM, which is said to be relevant to their representation of Mr Clingerman in the M3 Fund action, in a confidential schedule to this Judgment.

61. I also keep in mind the limited scope of the retainer in the Previous Action. The focus of the retainer was to ensure compliance with the subpoena requiring Apex to produce documents. As the affidavits of Mr Hughes and Mr Mahadeo clearly show, the scope of the retainer was to exhibit the required documents to a brief affidavit. In the circumstances, I accept the evidence of Mr Martin set out in his first affidavit that he attended with Mr Hughes at the Supreme Court to answer the subpoena on 12 May 2016 and on this one occasion they observed the normal courtesies and engaged in polite conversation. In particular, I accept his evidence that they did not at any time discuss any matter concerning the conduct of the business of Apex. Such an assertion is readily understandable given the limited scope of the retainer. In this context I also keep in mind the statement by Lightman J. in *In re A Firm of Solicitors* at 10 H: "*The Court attaches weight to the evidence of the solicitor as to his state of knowledge and whether he has received confidential information, in particular where there is no challenge to his integrity and credibility: see Robinson v Mullett [1817] 4 Pr 353 (solicitor); In re A Solicitor [1987] 131S.J. 1063, per Hoffmann J. and Pavel v Sony Corporation, 12 April 1995 (barrister)".*

62. In all the circumstances, I am satisfied that MJM are not in possession of any information, as a result of their retainer in the Previous Action, which may be relevant to any of the issues and the conduct of the M3 Fund action. Accordingly, I am of the view that there is no risk of any confidential information belonging to Apex being disclosed in the M3 Fund action. Subject to the consideration of whether courts grant negative declarations, I see no reason why MJM should not continue to act for Mr Clingerman in the M3 Fund action if they wish to do so.

The issue of negative declaration

63. Both sides agree that the court has the jurisdiction to grant a negative declaration in an appropriate case. In *Messier- Dowty Ltd v Sabena SA,* [2000] 1 WLR 2040, Lord Woolf give the following guidance in relation its use and appropriateness:

> *"The deployment of negative declarations should be scrutinised and their use rejected where it would serve no useful purpose. However, where a negative declaration would help to ensure that the aims of justice are achieved, the court should not be reluctant to grant such declarations. They can and do assist in achieving justice."* (2050H).

> *"So in my judgment the development of the use of declaratory relief in relation to commercial disputes should not be constrained by artificial limits wrongly related to jurisdiction. It should instead be kept within proper balance by the exercise of the courts' discretion."* (2051C).

64. I accept the submission made on behalf of MJM that there is a real and present dispute between MJM and Apex. Apex claims that MJM is legally prohibited from acting adverse to Apex on behalf of Mr Clingerman. MJM, on the other hand, contends that there is no reason why it should not act. In relation to this dispute Apex has made repeated threats to restrain MJM from acting by obtaining an order from the Supreme Court and to make a professional conduct complaint to the Bermuda Bar Council alleging that by so acting MJM is in breach of various provisions of the Code of Professional Conduct.

65. The grant of the declaration in this case would effectively resolve the present dispute between Apex and MJM. The resolution of this dispute at this time is in accord with the statements made by Apex in interparty correspondence that this dispute should be resolved by the Supreme Court.

66. For the reasons set out above, I do not accept Apex's submission that MJM has either deliberately or recklessly breached Apex's rights of privilege and confidentiality by commencing these proceedings seeking declaratory relief. I do not accept that I should refuse the relief sought on account of this submission.

67. I also do not accept the submission that the Court should not grant declaratory relief because there is no evidence that a negative declaration will serve any useful purpose. There is clearly a dispute between the parties which has resulted in Apex's attorneys threatening to commence proceedings against MJM seeking an injunction restraining them from acting on behalf of Mr Clingerman and to make a professional conduct complaint to the Bermuda Bar Council. In the circumstances, I cannot accept the argument that the Court should refuse relief on the ground that it will serve no useful purpose or that the claim for negative declaration is premature.

68. Finally, counsel for Apex argues that the Court should refuse the grant of declaratory relief on the ground that MJM has not come to Court with "clean hands". Apex contends that MJM appears to have sought to conceal the full extent of its involvement in the M3 Fund Action in the Supreme Court. I do not consider that I should refuse relief on this ground. The position remains that MJM considered that the firm was fully entitled to act for Mr Clingerman in the M3 Fund action. However, given the serious threats made in the letters from Kennedys, it was obviously sensible that they should apply to this Court seeking clarification of the position. In my judgment, as set out above, MJM is entitled to continue to act for Mr Clingerman in the M3 Fund action. In these circumstances it would not be right to refuse to grant a declaration clarifying the parties' position on the alleged ground of "unclean hands".

Conclusion

69. In the circumstances the Court declares that MJM is not prevented by reason of its prior representation of Apex in relation to a *subpoena duces tecum* issued in the Previous Action from acting for Mathew Clingerman in his capacity as a receiver of Silk Road M3 Fund in proceedings commenced against Apex in Civil Action 2019: No. 64.

70. I shall hear the parties in relation to the issue of costs, if they so wish.

Dated this 28th November 2019

NARINDER K HARGUN
CHIEF JUSTICE