In The Supreme Court of Bermuda

CIVIL JURISDICTION
2020: No. 237

BETWEEN:

DR. JAY JAY SOARES

First Applicant

THE HAMILTON MEDICAL CENTER LTD.

Second Applicant

- and -

BERMUDA HEALTH COUNCIL

Respondent

RULING

Judicial Review, Duty of Candour, Disclosure

Date of Hearing: **10 February 2021**
Date of Judgment: **17 February 2021**

Appearances: **Kyle Masters, Carey Olsen Bermuda Limited, for the Applicants**

Ben Adamson, Conyers Dill & Pearman Limited, for the Respondent

RULING of Mussenden J

Introduction

1. The Applicants have sought judicial review in respect of a Decision by the Respondent Bermuda Health Council ("the BHC") dated 6 July 2020 refusing the Applicants' appeal against an earlier decision of the Respondent dated 22 January 2020 denying the Applicants' application to provide certain medical services under the Standard Health Benefit.

2. The hearing for the judicial review of the matter is set for 23 February 2021.

3. The Applicants have filed two applications before the Court to be heard today:
    a. A Summons filed 21 October 2020 for leave to amend their Notice of Originating Motion and Notice of Application for Leave to Apply for Judicial Review; and

    b. A Summons dated 9 February 2021 for an Order for disclosure for the Respondent to provide certain information to the Court concerning the exercise of its discretion to approve or refuse applications to provide services under the Standard Health Benefit ("SHB") ("the Disclosure Application')

4. At the start of the hearing today, there was no objection by the Respondent to the application for leave to amend, and accordingly, I granted the application for leave to amend.

5. The Disclosure Application is supported by the First Applicant Dr. Soares' Third Affidavit sworn 23 December 2020 and the First Affidavit of Kyle Masters of Carey Olsen Bermuda Limited sworn on 3 February 2021.

6. The Disclosure Application is opposed in total by the Respondent and is supported by the BHC Chief Executive Officer Dr. Ricky Brathwaite's First Affidavit sworn 1 October 2020 and his Second Affidavit sworn 7 December 2020.

Background to the Application for Disclosure

7. Dr. Soares is a physician and the Second Applicant is the medical practice of which he is the medical director. The Applicants had applied to the Respondent to be approved to offer certain imaging services to patients as a part of the Standard Health Benefit ('SHB"). The BHC rejected the initial application in a decision dated 22 January 2020 ("the SHB Decision") and then a BHC Appeals Panel denied the Applicants' appeal in a decision dated 6 July 2020 ("the First Appeal Decision").

8. As a result of an issue with the constitution of the Appeals Panel in that first appeal hearing, an appeal re-hearing took place on 11 September 2020 with a different constitution of the Appeals Panel. On 29 September 2020, the Appeals Panel issued a decision in respect of the re-hearing of the appeal ("the Second Appeal Decision") accompanied by Minutes of the Appeals Panel meeting dated 23 September 2020 ("the Second Appeal Minutes").

9. Mr. Masters for the Applicants now complains that the Respondent has failed in its duty of candour in that it has not disclosed documents for review that will assist the Court in the upcoming judicial review hearing. That hearing concerns a challenge to the manner in which the BHC has exercised its discretion in determining the Applicants' application for SHB. The Applicants now submit that the Court must be placed in possession of the information requested in the Disclosure Application in order to properly determine whether or not the Respondent properly exercised its discretion with respect to the Applicants' application for SHB.

10. The documents sought are listed as follows:
    a. A list of every applicant approved by the Respondent to provide X-ray, MRI, CT-Scan, Mammography, Bone densitometry, Cardiac Investigations and Ultrasound

Services (Imaging Services) as at 1 April 2019 together with the date upon which each applicant's approval was granted;

b. A list of each applicant who submitted an application to the Respondent seeking approval to provide any of the Imaging Services under SHB prior to 1 July 2019 for consideration for the year 2020 (Full Year Applicants);
c. A list of each applicant who submitted an application for approval to provide any of the Imaging Services under SHB for consideration and approval after 1 July 2019 and prior to 1 April 2020 (Mid-Year Applicants);
d. A list of each Full Year Applicant approved by the Respondents to provide any of the Imaging Services under SHB and the dates each of those Full-Year Applicants received SHB approval or rejection together with the conditions (if any) of such approvals;
e. The names of each Mid-Year Applicant approved by the Respondent to provide any of the Imaging Services under SHB and the dates each of those Mid-Year Applicants received SHB approval or rejection together with the conditions (if any) of such approvals; and
f. Copies of every Mid-Year and Full Year Application received by the Respondent as described under paragraph (a) and (b) above.

Bermuda Healthcare System Infrastructure

11. From the outset, it is clear that an understanding of the infrastructure of the healthcare system in Bermuda is required to address this application and in due course the judicial review. In the First Affidavit of Dr. Brathwaite sworn 1 October 2020 he sets out the infrastructure of the healthcare system in Bermuda and states that it is currently going through a complex and lengthy reform. I have set out some key aspects of the infrastructure in the following paragraphs from his affidavit.

12. Healthcare in Bermuda is founded on the Standard Health Benefit ("SHB") which is a mandated form of health benefits which must be covered by registered insurers and Government programs. It is not available to purchase in isolation. Insurers provide SHB

cover and then provide additional coverage which is referred to as 'supplemental benefits'[1]. Most of the costs of SHB cover are met by insurers charging what is called the Standard Premium Rate ("SPR"), however Government bears most or all SHB hospital costs for children and seniors. The SPR is charged for each SHB policy and is set by the Minister pursuant to the Health Insurance (Standard Health Benefit) Regulations 1971 ("the Regulations"). The SPR is used for several purposes including a part is kept by insurers to pay eligible SHB claims and a part is paid over to Government to help fund the Bermuda Hospital and other healthcare programmes.[2]

13. The SPR is set by the Minister with a major part of the BHC's work committed to providing such advice. The SPR is set every year based on actuarial modelling for the year ahead as part of an expensive and very detailed 40 step process. There are many dependencies that must be considered on a tight timeline so as to ensure that the expected spend on SHB services match the budget applied for and allocated to it.[3] The aim of the process is to achieve a 'loss ratio of 100%' meaning for the SPR to cover the costs of the SHB without any surplus or deficit. When there is a budget shortfall there are various negative impacts which include the need for additional funds, potential risks to the resources of the Health Insurance Department which cares for the most vulnerable people and services to insured persons may have to be restricted.[4]

14. Each year, the BHC calculates the likely cost of the SHB and advises the Minister on the level of SPR to meet the projected costs, a process involving a great deal of consultation with stakeholders.[5] The Minister then determines the budget based on what services will comprise the SHB, what level of utilization is expected and the rates that will be set for those services[6].

[1] First Affidavit of Dr. Brathwaite para 6
[2] First Affidavit of Dr. Brathwaite para 7
[3] First Affidavit of Dr. Brathwaite para 8
[4] First Affidavit of Dr. Brathwaite para 9
[5] First Affidavit of Dr. Brathwaite para 10
[6] First Affidavit of Dr. Brathwaite para 11

15. In light of the above circumstances, the BHC has a lengthy process for approving new services and service providers into the SHB system. Any new service will impact the costs of the SHB and could knock the budget off kilter. The BHC has issued a Guidance ("the Guidance") which provides for two kind of applications.[7]

16. First, the Full Year Application – the applicants must apply prior to July of each year for their services to be considered for approval for introduction into the SHB system in the following year. Also, the applications are considered when submitting the budget for the following year.[8]

17. Second – the Mid-Year Application[9] – The application is submitted during the BHC's financial year and therefore after the SPR has been seen set as of the previous 1 April. Any services introduced mid-cycle risk endangering the budget for the SHB and therefore the Guidance states that such applications will only be accepted if it can clearly be shown that there would be no negative impact. The Guidance states:

> "8.2 Applications may be considered mid-year if there is documented evidence that they (1) will not have a negative impact on the cost of SHB (Standard Premium Rate (SPR)) loss ratios, (2) will reduce cost to the system and (3) will not impact utilization of SHB"

18. The requirements for approval of a mid-year application are more stringent because the budget has already been set for the year. Prior to the October 2018 introduction of the mid-year application, once budgets were set, there was no procedure for changing the SHB. However flexibility was required to introduce changes if, for example, it was clear that a new service was urgently required and clearly would not impact the budget.[10]

[7] First Affidavit of Dr. Brathwaite para 13
[8] First Affidavit of Dr. Brathwaite para 13 & 15
[9] First Affidavit of Dr. Brathwaite para 18
[10] First Affidavit of Dr. Brathwaite para 19

The Applicants' Factual Basis for the Application for Information

19. The current issue about the Applicants' unsuccessful application, the duty of candour and the subsequent request for further information has its genesis in the very recent history in respect of the annual process of setting the SPR as set out above. It appears that the annual process of setting the SPR has not been conducted, and consequently there is a knock-on effect for submitted applications by potential new providers.

20. In the Third Affidavit of Dr. Soares[11] he makes reference to the Second affidavit of Dr. Brathwaite wherein Dr. Brathwaite states that (a) the Minister has not rebased the budget for the 2020 year and that will likely remain the same for 2021; (b) since the SPR is based on the services which were in place in 2019, the BHC needs to be careful about adding new services which would add to the costs since these would not be budgeted; and (c) BHC does require current SHB providers to re-apply annually, and that this means that BHC can "keep providers of SHB services under review'.

21. Dr. Soares also states that (a) the BHC appears to be filtering SHB applications whereby the starting point is that the Standard Premium Rate (SPR) budget for 2019 has taken into account those SHB providers providing services in 2019 or before, but not after; (b) providers applying for permission to provide SHB services after 2019 have not been budgeted for because there has been no rebasing of the SPR; (c) these providers, according to the BHC, must demonstrate how their services will not negatively impact the SPR; (d) because there has been no rebasing since 2019, this criteria applies whether they are making a mid-year or full year application; (e) this way of approaching the allocation of the SPR budget assumes the new provider cannot provide SHB services in place of a current provider and, places current (i.e. 2019 SHB providers) at a clear advantage.

[11] Para 14

22. Mr. Masters in his Affidavit sworn on 3 February 2021 exhibits his law firm Carey Olsen Bermuda Limited's letter dated 2 February 2021 ("the Carey Olsen letter") to BHC's counsel Conyers, Dill & Pearman Limited ('Conyers') notifying Conyers of the application for disclosure and explaining the reasons for it. The complaint concerns BHC's failure to consider the Applicants application for SHB on a full-year basis. He submits that BHC's evidence suggests that the criteria being applied for applications for SHB who have not provided such services prior to 2019 is different from the criteria being applied to those who have been approved for SHB prior to 2019. He states that the Court will need to be provided with information, including which of the SHB applicants have been provided SHB approval by the BHC prior to 2019, which have been approved for the 2020 SHB year and what criteria those applicants were required to meet prior to being approved for SHB.

23. In that same letter, Carey Olsen makes statements (a) about the duty of candour; (b) about the principles of judicial review; (c) about the BHC's failure to exercise its discretion in determining the Applicants' application on a mid-year basis when it had been made in time to be considered on a full year basis; (d) that Dr. Brathwaite in his First Affidavit suggested that as a result of there being no rebasing of the SHB since 2019, "… no applications could have been or can currently be considered on a full year basis" and he stated "It is correct that the Council requires SHB providers to apply every year. Those applications are not of course mid-year applications."; (e) that Dr. Brathwaite in his Second Affidavit stated "Since the SPR is based on the services which were in place in 2019, the Council needs to be careful about adding costs since these would not be budgeted.'; (f) that the BHC appears to be allowing full year applications to be made by current SHB providers whilst requiring new applicants to meet some other criteria; (g) therefore, the Court will be required to assess the merits of the exercise of the Respondent's discretion in that regard"; and (h) the letter then set out the information that should be provided to the Court as set out in the Summons.

24. Mr. Masters in his submissions invited the Court to review the Conyers letter dated 4 February 2021 ("the Conyers Letter") to Carey Olsen. That letter makes statements (a) that

the BHC is aware of its duty of candour to the Court; (b) that the Court will need to determine whether the unsuccessful mid-year application should have been treated as a full year application; (c) that as the decision under review is the decision to refuse the Applicants' mid-year application, disclosure of different applications, namely full year applications are unlikely to assist; (d) that the BHC has been entirely transparent about the fact that and the reasons why, applications for new services are being considered carefully during the Reform, adding that there was a general moratorium on such applications as Dr. Soares has pointed out in his First Affidavit; (e) that approved SHB providers are required to apply for re-approval each year, but such applications are by definition not for new services - therefore not covered by the Moratorium and are, or would be, treated differently; and (f) that having taken instructions, there are no further documents that could possibly assist the Court, stating further:

a. The BHC has not dealt with any mid-year SHB applications for new services under the Moratorium (other than the Applicants' unsuccessful application);
b. The BHC has not dealt with any full year SHB applications for new services since the Moratorium (other than the Applicants' full year application, about which no decision has been made); and
c. The BHC has not (yet) dealt with any renewal application from current SHB providers since the Moratorium. This is because repeated extensions have been granted due to the Covid-19 crisis.

25. Mr. Masters submits that the Conyers Letter:

a. confirms that no mid-year or full year applications for 'new services' have been dealt with by the BHC since March 2019 but does not provide any confirmation about 'existing services'. However, he argues that the Applicant's application was for 'existing services', not 'new services'; and
b. shows a contradiction in that it states that the BHC has not dealt with any renewal applications from current SHB providers since the Moratorium despite Dr. Brathwaite stating in his First Affidavit that the BHC has had to deny "multiple applications … for SHB coverage" within the "last 18 months".

26. In respect of the potential disclosure of each document in the Annex to the Summons as listed above, Mr. Masters submitted that the BHC has the information and could provide it to the Court. He highlighted that the Guide sets out that the applications are blind reviewed before the Health Technology Review Committee ("HTRC") and the SHB Review Committee ("SRC"). Therefore, the documents exist in a redacted form already. Mr. Masters also stated that Mr. Adamson has responded in correspondence in respect of two items on the list (2nd and 3rd) of requested information that there were no applications for (a) full year applicants for Imaging Services prior to April 2019 for consideration for the 2020 year and (b) mid-year applicants for Imaging Services submitted after 1 July 2019 and prior to 1 April 2020.

The Respondent's Factual Basis in Response to the Request for Further Information

27. Mr. Adamson for the BHC in his submissions relied on Dr. Brathwaite's First and Second Affidavits to provide the factual basis for not having to provide further information. He highlighted that (a) applicants seeking approval from the BHC must apply by way of standard forms; (b) there is the Guidance available on how to navigate the process and it differentiates between mid-year and full year applications; (c) that there has been a moratorium at all relevant times on applications for new services, but an exception was made for the Applicants; (d) the Applicants made a mid-year application for a new service which did not meet the Guidance and was refused; and (e) the Applicants have now made a full year application which is still going through the BHC's processes.

28. Mr. Adamson submits that the dispute is because of the finding that the Applicants' mid-year application did not meet the Guidance. As a result of such disappointment, the Applicants now wish to see every other application for approval made by other SHB applicants – whether for a new service or for an existing service, whether for a mid-year or a full year. Further, Mr. Adamson: (a) claims this is a classic fishing expedition as well as a waste of time; (b) claims that the Conyers Letter explains that there have been no applications for new services (whether mid-year of full year) since the moratorium was announced in 2019 due to current health reforms; (c) questions the relevance of the

Applicants' request to see applications for new services pre-dating the moratorium as those applications could not have been relevant to the refusal of the Applicants' application since they didn't play any part in the decision making, and it would be a false comparison since those applications pre-date the Reform and involve different services; (d) submits that the Applicants cannot show that the BHC's evidence is inaccurate or incomplete; and (e) submits that the Applicants fail to have regard to the express statutory prohibition on disclosure contained in the BHC's governing statute.

29. Mr. Adamson also submitted that compiling all the information, if ordered, would cause undue delay in the hearing of the judicial review which would have to be adjourned to a later date allowing time for any order for disclosure to be performed.

30. Mr. Adamson referred to the amended pleaded case – that is that the BHC's decision to consider the application on a mid-year application basis is irrational and that the BHC had fettered its discretion in some ways [12]. He argued that on the basis that the complaint is in effect 'why did the Applicants have to meet the more stringent test for the mid-year application process when the incumbents did not have to do so?', then the critical question in the current application is 'why do the Applicants or the Court need to have the requested information?'. He submitted that there was no need for further information for the Applicants to establish various points that had already been conceded or admitted by the BHC. These points include (a) that incumbent providers go through a different process; (b) it was not contentious that incumbents have an advantage because they keep being renewed with different criteria; (c) incumbent providers do not go through the mid-year application process; (d) whether the process is fair or not; (e) during the Covid-19 pandemic incumbent providers have been extended; and (d) it is difficult for new players to be approved. He submits that all these points can be argued in the hearing for judicial review and that the further information of every application received is not necessary to establish a fact pattern in the above circumstances.

[12] Amended Notice of Application for Leave to Apply for Judicial Review Statement of Grounds 4(d) and (e)

The Law on the Duty of Candour and Disclosure in Judicial Review Cases

31. The Courts have long recognized the principle of the 'duty of candour'. In the Judicial Review Handbook[13], it stated:

> *"A defendant public authority and its lawyers owe a vital duty to make full and fair disclosure of relevant material. That should include: (1) due diligence in investigating what material is available; (2) disclosure which is relevant or assists the claimant, including on some as yet unpleaded ground; and (3) disclosure at the permission stage if permission is resisted. An interested party is also under a duty of candour. A main reason why disclosure is not ordered in judicial review is because Courts trust public authorities to discharge this self-policing duty, which is why such anxious concern is expressed where it transpires that they have not done so."*

32. The principle of duty of candour has been applied in a line of cases. In *Secretary of State for Foreign & Commonwealth Affairs v Quark Fishing Ltd* [2002] EWCA Civ 1409 it states that in judicial review proceedings, the defendant simply owes a duty of candour to give a "true and comprehensive" account of the decision-making process.

33. In *Graham v Police Service Commission and the Attorney General of Trinidad & Tobago* [2011] UKPC 46 at [18] Sir John Laws stated:

> *"18. It is well established that a public authority, impleaded as respondent in judicial review proceedings, owes a duty of candour to disclose materials which are reasonably required for the Court to arrive at an accurate decision. In R v Lancashire CC ex p. Huddleston [1986] 2 AER 941 (to which Jamadar JA referred*

[13] Sixth Edition, Michael Fordham QC at 10.4 Defendant/interested party's duty of candour

at paragraphs 18 – 19 of his judgment in the present case) Lord Donaldson MR stated at 945c that the modern development of judicial review had created

> *"a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration"."*

34. In respect of the duty of candour and the judicial review process being conducted 'with all the cards face upwards on the table' in *Larry Winslow Marshall and others v Deputy Governor of Bermuda and Others [2010] UKPC 9* Lord Phillips stated*:*

> *"27. Mr Crow has attacked the findings of fact of the lower courts by contending that they had failed to apply an important principle, which he describes as "the duty of candour". He submits that where a person brings public law proceedings challenging the conduct of a public authority, the defendant is under a duty of candour to explain to the court exactly what has happened and why. He has referred the Board to this passage in the judgment of Sir John Donaldson MR in R v Lancashire CC, Ex P Huddleston [1986] 2 All ER 941 at p 945.*
>
> > *"This development has created a new relationship between the courts and those who derive their authority from the public law, one of partnership based on a common aim, namely the maintenance of the highest standards of public administration … The analogy is not exact, but just as the judges of the inferior courts when challenged on the exercise of their jurisdiction traditionally explain fully what they have done and why they have done it, but are not partisan in their own defence, so should be the public authorities. It is not discreditable to get it wrong. What is discreditable is a reluctance to explain fully what has occurred and why … Certainly it is for the applicant to satisfy the court of his entitlement to judicial review and it is for the respondent to resist his application, if it considers it to be unjustified. <u>But it is a process which falls to be conducted with all the cards</u>*

> *face upwards on the table and the vast majority of the cards will start in the authority's hands*[14]*."*

> *28. Lord Donaldson reverted to this theme in R v Civil Service Appeal Board, Ex P Cunningham [1992] ICR 816, 822-824. He stated that the fact that leave to apply for judicial review has been granted called for some reply from the respondent. Once a public law court had concluded that there was an arguable case that a decision was unlawful, the court was entitled to be given the reasons for the decision. Lord Donaldson drew a distinction between the legal duty on a public authority to provide an individual with reasons for a decision and the duty to provide a court with reasons for the authority's conduct. Breach of the former duty can lead to the quashing of the decision without more. Failure to observe the latter can lead to the court drawing inferences adverse to the public authority, but it will not necessarily do so.*

> *29. Each of the cases in which Lord Donaldson made these statements involved a decision taken by a public authority that related to and adversely affected an individual. Care must be taken when applying Lord Donaldson's statements to judicial review proceedings in relation to acts of public authorities that do not involve any exercise of discretion. Furthermore those statements apply to the situation where it is not possible for the court to assess the merits of an issue that has been raised unless the public authority against whom the claim is brought furnishes the court with information which it alone is in a position to provide. They should not be relied upon to transfer to the respondent the onus of proving matters which a claimant is under a duty and in a position to prove.*

35. In respect of disclosure in judicial review cases, in *R v Secretary of State for Foreign Affairs, ex p The World Development Movement Ltd* [1994] EWHC Admin 1 it states that orders for specific discovery can be made – but only if the applicant can show that the defendant's evidence is inaccurate, inconsistent or incomplete.

[14] Underline emphasis by the Court

36. Further, in respect of disclosure, in *Tweed v Parades Commission of Northern Ireland* [2006] UKHL 53 in the All England reports (18 April 2007) - the case headnote stated:

> *"Held – The rule that before disclosure would be ordered in proceedings for judicial review there had to be a demonstrable contradiction or inconsistency or incompleteness in the affidavits of the a respondent should no longer be applied; a more flexible and less prescriptive principle should apply, which judged the need for disclosure in accordance with the requirements of the particular case, taking into account the facts and circumstances. Taking into account the factor of proportionality, the need for disclosure was greater than in judicial review applications where it did not apply. However, there was no general proposition that disclosure of documents referred to in an affidavit should always take place where proportionality was in issue; the proportionality issue formed part of the context in which the court had to consider whether it was necessary for fairly disposing of the case to order disclosure of such documents. Disclosure orders were likely to remain exceptional in judicial review proceedings, even in proportionality cases. In the instant case there was force in the view that, however carefully and faithfully a summary was compiled, it was not always possible to obtain the full flavor of the contents of the documents such as those in question from a summary so that in order to assess the difficult issues of proportionality the court should have access as far as possible to the original documents from which the commission had received information and advice. Accordingly, the documents should be disclosed to the judge. If he concluded that realistically their disclosure could not affect the outcome of the proportionality challenge he would dismiss the application for inspection; if he reached the contrary conclusion he would need to consider the question of reaction and might need to determine the commission's public interest immunity claim.*

37. In further reference to disclosure in judicial review proceedings in *Tweed* Lord Bingham of Cornhill stated:

> *"1. My Lords, As explained by my noble and learned friends Lord Carswell and Lord Brown of Eaton-under-Heywood (to whom I am indebted for their exposition of the relevant facts, the history of the proceedings, the relevant legislation and rules and the authorities), the issue in this appeal is whether discovery of five documents held by the Parades Commission should be ordered for purposes of Mr Tweed's application for judicial review, to the extent that such application turns on a proportionality argument under the Human Rights Act 1998 and the European Convention on Human Rights.*
>
> *2. The disclosure of documents in civil litigation has been recognised throughout the common law world as a valuable means of eliciting the truth and thus of enabling courts to base their decisions on a sure foundation of fact. But the process of disclosure can be costly, time-consuming, oppressive and unnecessary, and neither in Northern Ireland nor in England and Wales have the general rules governing disclosure been applied to applications for judicial review. Such applications, characteristically, raise an issue of law, the facts being common ground or relevant only to show how the issue arises. So disclosure of documents has usually been regarded as unnecessary, and that remains the position.*
>
> *3. In the minority of judicial review applications in which the precise facts are significant, procedures exist in both jurisdictions, as my noble and learned friends explain, for disclosure of specific documents to be sought and ordered. Such applications are likely to increase in frequency, since human rights decisions under the Convention tend to be very fact-specific and any judgment on the proportionality of a public authority's interference with a protected Convention right is likely to call for a careful and accurate evaluation of the facts. But even in these cases, orders for disclosure should not be automatic. <u>The test will always be</u>*

> *whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly.*[15]
>
> *4. Where a public authority relies on a document as significant to its decision, it is ordinarily good practice to exhibit it as the primary evidence. Any summary, however conscientiously and skilfully made, may distort. But where the authority's deponent chooses to summarise the effect of a document it should not be necessary for the applicant, seeking sight of the document, to suggest some inaccuracy or incompleteness in the summary, usually an impossible task without sight of the document. It is enough that the document itself is the best evidence of what it says. There may, however, be reasons (arising, for example, from confidentiality, or the volume of the material in question) why the document should or need not be exhibited. The judge to whom application for disclosure is made must then rule on whether, and to what extent, disclosure should be made."*

38. Lord Bingham gave further insight about disclosure orders remaining exceptional in judicial review proceedings, avoiding fishing expeditions and adopting a more flexible approach as follows:

> *"56. This then is the general framework within which applications for disclosure in judicial review should be considered. In my judgment disclosure orders are likely to remain exceptional in judicial review proceedings, even in proportionality cases, and the courts should continue to guard against what appear to be merely "fishing expeditions" for adventitious further grounds of challenge. It is not helpful, and is often both expensive and time-consuming, to flood the court with needless paper*[16]*. I share, however, Lord Carswell's (and, indeed, the Law Commission's) view that the time has come to do away with the rule that there must be a demonstrable contradiction or inconsistency or incompleteness in the respondent's affidavits before disclosure will be ordered. In future, as Lord Carswell puts it, "a more*

[15] Underline emphasis by the Court
[16] Underline emphasis by the Court

> *flexible and less prescriptive principle" should apply, leaving the judges to decide upon the need for disclosure depending on the facts of each individual case.*
>
> *57. On this approach the courts may be expected to show a somewhat greater readiness than hitherto to order disclosure of the main documents underlying proportionality decisions, particularly in cases where only a comparatively narrow margin of discretion falls to be accorded to the decision-maker (a fortiori the main documents underlying decisions challenged on the ground that they violate an unqualified Convention right, for example under article 3). That said, such occasions are likely to remain infrequent: respondent authorities under existing practices routinely exhibit such documents to their affidavits (and, indeed, should be readier to do so whenever proportionality is in issue). Take this very case. But for the important matter of confidentiality arising in respect of these particular documents, it seems to me almost inevitable that they would have been exhibited, not least because that would have been simpler than summarising them. Without his having seen them, however, one can readily understand the appellant's concern that their effect may have been unwittingly distorted."*

Analysis of the Issues in Respect of Disclosure of Information

39. I have given consideration to whether the BHC has met its duty of candour in this matter. Mr. Masters relied on *Larry Winslow Marshall and Others* to highlight the duty of the BHC to have and meet its duty of candour in disclosure especially where the BHC are in possession of information he stated would assist the Court. The starting point for this application for disclosure is to accept the principles in the *Larry Winslow Marshall* case which is binding on this Court and the approach of Lord Donaldson in various cases that requests for further disclosure applies to cases where the judicial review concerns the exercise of a discretion by a public body. It is without dispute in this case that the issue before the Court in the judicial review is about how the BHC exercised its discretion to consider the Applicants application on a mid-year application basis. The Applicants'

contend amongst other issues that the decision was irrational and the BHC had fettered its discretion.

40. Following *Larry Winslow Marshall and Others*, it is also without dispute that the information that the Applicants seek is information that is solely in the possession of the BHC as they received applications over time from various applicants who were either incumbent providers or who were new applicants for SHB.

41. Mr. Masters also relied on *Larry Winslow Marshall and Others* to support his argument that the BHC had not conducted the proceedings with all the cards face upwards on the table. On this point the case refers to the judicial review process being one which "*falls to be conducted with all the cards face upwards on the table and the vast majority of the cards will start in the authority's hands*". Lord Donaldson also stated that "*It is not discreditable to get it [the decision] wrong. What is discreditable is a reluctance to explain fully what has occurred and why".* I have considered the factual information that has been provided in this case. In my view I consider it to be an abundance of information which satisfies the requirements of a full explanation with all the cards face upwards for several reasons.

42. First, the BHC, in respect of the Applicants' application, has provided several documents consisting of 'decisions' and/or 'reasons' of the BHC or its sub-committees or Appeal Panels, namely the original SHB Decision dated 22 January 2020, the First Appeal Decision dated 6 July 2020, the Second Appeal Decision dated 29 September 2020 and the Second Appeal Minutes dated 23 September 2020. In my view, for a judicial review application, the Applicants would be hard pressed to receive any other specific documents arising out of the application other than the original decision and the appeal decision, in this case, the two appeal decisions. In my judgment, these documents are of assistance to the Court in determining the merits of the issues in the judicial review.

43. Second, the BHC has provided the First and Second Affidavits of Dr. Brathwaite. In my view, Dr. Brathwaite's affidavit evidence is very detailed and informative of the processes involved and the factors that must be taken into account in respect of applications to be approved as a provider of services under SHB. I have noted the exhibited documents in

particular the SPR and BHB Funding 2019 Fact Sheet, the Checklist for establishing the annual SPR; the Guidance, which sets out in great detail the process for SHB; the BHC Governance Policy; the Government of Bermuda Ministerial article - Bermuda Health Plan Proposes Savings for Residents; various Minutes and other guidelines. In my judgment, these documents are of assistance to the Court in determining the merits of the issues in the judicial review.

44. Mr. Masters relied on *Larry Winslow Marshall and Others* to drive home the point that in the absence of the requested information, the Court will not know what criteria the BHC is considering in respect of incumbents and new applicants and in respect of full year applicants and mid-year applicants. He submits that from *Larry Winslow Marshall and Others*, the Court must be convinced that: (i) the exercise of the Respondent's discretion is the subject of the application; (ii) the information sought will assist the Court in assessing the merits of an issue in the JR application; (iii) it is not possible for the Court to assess the merits of that issue without the information being sought; and (iv) the Respondent alone is in a position to provide the information sought. I have already found that the issue is about the exercise of discretion and that the BHC alone is in a position to provide the information sought.

45. Mr. Masters submits that in respect of the second limb, the merits can only be properly assessed if the Court knows the criteria the BHC was applying to the incumbent SHB providers. He argues that this criteria has not yet been provided to the Applicants or the Court. Mr. Masters also submits that in respect of the third limb, the information sought will place the Court in a position to assess the merits of the issues. He submits that the Court will only know that the BHC treats renewal SHB applications differently than applications by new providers, despite the fact that such applications are for the same existing services. If the Court does not know the criteria then it will not be in a position to assess the merits of the issues in the application. I do not agree with Mr. Masters on these points for several reasons.

46. First, the judicial review with the amended grounds is a full frontal attack on the various decisions and processes used by the BHC in considering the Applicants' application. It

includes a focus on whether the exercise of the discretion by the BHC was irrational and whether the BHC had fettered its discretion in certain ways. In my view, based on Mr. Adamson submission on the factual points, it seems quite likely that the Court will be in a position to determine how the discretion was exercised by the BHC in dealing with the Applicants' application.

47. Second, in my view, I fail to see how lists of other applicants and their applications in various categories and their results will assist the Court. This is particularly so when consideration is given to stated facts, concessions or inferences in the matter, for example that incumbents are treated differently from new applicants; there is a more stringent test for mid-year applications; that the SPR has not been restated on an annual basis as it should have been per the guidance; and that incumbents are being extended or renewed without a full year application process. In my view, whilst the Applicants complain that the Courts will not know the criteria in how the BHC deals with matters, it appears to me that the Court would be properly assisted in discerning the criteria based on the documents, the evidence and the exhibits already before the Court.

48. In light of the above reasoning, I am also satisfied that per *Quark Fishing Ltd* the BHC has satisfied its duty of candour in giving a true and comprehensive account of the decision making process, even when BHC has shown that there had to be a second appeal hearing when they conceded that there were adverse issues of their own making with the first appeal hearing.

49. Both Mr. Masters and Mr. Adamson rely on *Tweed v Parades Commission of Northern Ireland* [2006] UKHL 53 for their submissions. Mr. Masters relied on the case to underscore that the discretion to order disclosure in judicial review cases although rare was fact based and the facts in the present case supported further disclosure. Mr. Adamson posed the question as to whether more disclosure was called for, stating that the test was to be found in *Tweed v Parades Commission of Northern Ireland* which he described as the locus classicus in judicial review disclosure.

50. I have given consideration to the case of *Tweed v Parades Commission of Northern Ireland* in respect of the information being sought. In my judgment, the facts in the case do not lend any support to the Applicants' case for further information for several reasons.

51. First, *Tweed v Parades Commission of Northern Ireland* gave support to disclosure where summaries or extracts did not capture the flavor of the decision, where disclosure was necessary to determine proportionality issues, and where it made sense to disclose the documents rather than make any attempts to summarize a document. Therefore, disclosure orders in judicial review were for disclosure of documents referred to or relied on in the decision. In my view of the facts, the information requested was not information or documents referred to in the decisions and reasons provided to the Applicants on their unsuccessful application or appeals. It is information about other applicants and their applications. As I have already stated, the information sought is unlikely to assist the Court in determining the issues of the judicial review.

52. Second, my finding above leads me to the view that the application for information is a 'fishing expedition' about other applicants and their applications which are not relevant to the present application.

53. Third, I am cognizant of the test[17] stated in *Tweed v Parades Commission of Northern Ireland* as to "*whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly."* I am inclined to restate my finding above that in my view, I fail to see how lists of other applicants and their applications in various categories and their results will assist the Court, or resolve the matter fairly and justly. In my view, the requested information is not necessary to resolve the matter. Similarly, I accept Mr. Adamson's submission that there was no need for further information for the Applicants to establish various points that had already been conceded or admitted by the BHC.

54. Fourth, I am also alert to the submission by Mr. Adamson that any order for information will delay the hearing of the substantive matter in order to compile the information. *Tweed v Parades Commission of Northern Ireland* states that '*the process of disclosure can be*

[17] Para 3 of Lord Bingham's Judgment as stated and underlined above

costly, time-consuming, oppressive and unnecessary'[18]. Although Mr. Masters submits that some of the information must already exist in redacted form, it seems apparent that much effort will have to go into compiling the requested information in a ready state for disclosure whilst respecting confidentiality of other applicants. In my view, efforts to provide the requested information will incur costs and will be time consuming and thus I am reluctant to order such disclosure. Further, in a small medical services community, it would not be difficult for the Applicants to determine the identity of the other applicants.

55. Mr. Adamson highlighted that in the Bermuda Health Council Act 2004 ("the Act") there is an express statutory provision of confidentiality in section 18 with criminal sanctions for breach of the provision. He submitted that the BHC was prohibited from disclosing the information as requested to the Applicants. Upon review of the Act, there are summary prosecutions with fines up to $10,000 and six months imprisonment and prosecution on indictment with fines up to $25,000 two years imprisonment. The criminal sanction is directed towards "any member, officer or servant or the council" who in general "communicates any matter relating to the affairs of the council …." or "permits any unauthorized person to have access any books, papers or other records relating to the Council". In section 18(3) there is a carve out for the purpose of enabling or assisting the Minister to exercise his functions under the Act or where the information is or has been available to the public from other sources. In section 18(4) there is carve out for when a court makes a direction. I accept that the section 18(4) carve out will likely provide protection to the BHC if I made any orders for disclosure.

56. However, I am of the view that such an express provision with penalties underscored the seriousness of Parliament in protecting the affairs of the BHC and by extension the information provided to it by its applicants who have in most cases invested significant time and resources in their medical business operations. In light of those circumstances and for my other reasons explained earlier, I am loathe to order disclosure of application information to the Applicants in what is a small medical services community because (a) it is reasonable to accept that the other applicants would have submitted their applications

[18] Para 56 of Lord Bingham's Judgment as stated and underlined above

in the comfort that they would be treated confidentially per the Act; (b) the Applicants and other applicants are generally competitors in the medical services field; and (c) it would be improper and unfair to hand over to the Applicants all the confidential applications from other applicants. In my view, they have no right to those applications submitted in confidence to the BHC.

Conclusion

57. In light of the above reasons, I refuse the Applicants' application for further disclosure of the information as requested in their Summons.

58. At the start of the hearing, I granted the application for leave to amend.

59. Either party may be heard on the issue of costs of this application upon filing a Form 31TC within 7 days of the date of this Ruling.

Dated 17 February 2021

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HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT