In The Supreme Court of Bermuda

CIVIL JURISDICTION

2017: No. 051

BETWEEN:

MAHESH SANNAPAREDDY	1st Applicant
BERMUDA HEALTHCARE SERVICES LIMITED	2nd Applicant
BROWN DARRELL CLINIC LIMITED	3rd Applicant
WF (ANONYMIZED)	Intervener Applicant
-and-	
THE COMMISSIONER OF BERMUDA POLICE SERVICE	1st Respondent
THE SENIOR MAGISTRATE	2nd Respondent

Before: **Hon. Assistant Justice Bell**

Appearances: **Mr Mark Pettingill and Ms Victoria Greening, Chancery Legal Limited, for the Intervener Applicant**
Mr Mark Diel and Mr Dantae Williams, Marshall Diel & Myers Limited, for the First Respondent
Mr Delroy Duncan, Trott & Duncan Limited, for the First – Third Applicants (On Notice)
Non-Appearance – Second Respondent (Not Served)

Date of Hearing: **16 April 2019**

Date of Judgment: **2 May 2019**

JUDGMENT

Confidential Information – Bolkiah v. KPMG– Barristers' Code of Professional Conduct 1981 rule 24 , 24A, 101 – conflicts of interest – deemed or inferred consent – former

Introduction

1. The First Respondent by Summons dated 18 March 2019, (the "Conflict Summons") seeks an order "*to remove Chancery Legal from being Counsel of Record for the Intervener*". The application was supported by the Third Affidavit of John Briggs, the First Affidavit of Loxly Ricketts, and in reply, the Fourth Affidavit of John Briggs. Counsel for the Intervener relies on the First Affidavit of Mark Pettingill and the First Affidavit of Victoria Greening.

2. The application is based on allegations of conflict of interest and the applicant relies both on the Barristers' Code of Professional Conduct 1981, (the "Code of Conduct") and the common law on conflicts of interest and the duty to protect confidential information.

3. Counsel provided a paginated and tabbed hearing bundle, ("HB") for the hearing on 16 April and references to pleadings or correspondence are references to documents in the hearing bundle.

The Applicable Test – Duty to Protect Confidential Information

4. The Code of Conduct provides, inter alia, that a barrister cannot act for an opponent of a 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 (Rule 24).

5. The common law test and statement of principles on the duty to protect confidential information is found in the judgment of Lord Millett in the leading House of Lords decision of *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 be readily inferred; the latter will often be obvious" (p. 235 D)

"*It is in any case difficult to discern any justification in principle for a rule which exposes a former client without his consent to any avoidable risk, however slight, that information which he has imparted in confidence during the course of a fiduciary relationship may come into the possession of a third party and be used to his disadvantage. Where in addition the information in question is not only confidential but also privileged, the case for a strict approach is unanswerable. Anything less fails to give effect to the policy on which legal professional privilege is based. It is of overriding importance for the proper administration of justice that a client should be able to have complete confidence that what he tells his lawyer will remain secret. This is a matter of perception as well as substance. …Many different tests have been proposed in the authorities … I prefer simply to say that the court should intervene unless it is satisfied that there is no risk of disclosure".* (p 236F-237A)

6. The Supreme Court of Canada in *MacDonald Estate v Martin* [1990] 3 SCR 235, put the test in the following terms on the equivalent Canadian professional conduct rule and duty of confidentiality:

"*Once it is shown by the client there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfied the court that no information was imparted which could be relevant. The degree of satisfaction must withstand the scrutiny of the reasonably informed member of the public. This will be a difficult burden to discharge*." (p. 1236, D) (Emphasis added)

7. In summary, the burden is on the party seeking to restrain the barrister or law firm from continuing to act to establish (1) that the lawyer or firm is in possession of information which is confidential to him and to the disclosure of which he has not consented, and (2) that the information is or may be relevant to the new matter in which the interest of the other part is or may be adverse to his own. The burden of proof on the party complaining is not a heavy one.

8. If these facts are established, the evidentiary burden then shifts to the lawyer or law firm to show that even so there is no risk that confidential information will be disclosed. This is a difficult burden to meet. The Court will intervene unless there is no risk of disclosure of confidential information.

Factual Background

9. The application is based on an alleged conflicts of interest arising in connection with two attorneys with the firm Chancery Legal. Mr Pettingill is Senior Counsel and Director of Chancery Legal, and served as the Attorney-General for Bermuda between 2012 and 2014. Ms Greening is a new associate with Chancery Legal and was employed as Crown Counsel with the Department of Public Prosecution ("DPP") between April 2014 and April 2017. Ms Greening joined the firm on 7 January 2019 having worked elsewhere in private practice during the intervening period. Both attorneys are actively engaged in representing the Intervener in this matter.

10. The main litigation between the Applicants and the Respondents arises out of the execution of two Special Procedure Search Warrants, ("SPW's") on the Second and Third Applicant in connection with an ongoing criminal investigation, (the "Criminal Investigation"). The Criminal Investigation is an ongoing investigation into allegations of fraudulent medical practices connected to the alleged ordering of unnecessary diagnostic tests for patients for personal financial gain. The SPW's were executed on the Applicants to seize the medical records of certain patients who appeared to have received a disproportionate number of diagnostic tests during a particular time frame. The investigation covers the medical practices of the First Applicant, Second and Third Applicants (the medical clinics

overseen by the First Applicant). The scope of the investigation includes the activities of the beneficial and/or legal owners of the Second and Third Applicants, Dr Ewart Brown and his wife, Wanda Brown.

11. The Applicants filed an application for leave to pursue judicial review in connection with the decision to issue the SPW's on 13 February 2017. Leave was granted on 15 June 2017. The Intervener is a patient of the Applicants who, in September 2018, sought to intervene in the judicial review proceedings. The Intervener is representing herself as well as a certain group of patients whose medical records were seized pursuant to the execution of the SPW's.

12. So far as the Intervener and Chancery Legal's involvement in this matter, there was initial limited correspondence in February/March 2017 shortly after the execution of the SPW's. Mr Shawn Crockwell of Chancery Legal wrote to the First Respondent on 16 February 2017 on behalf of a patient of the First and Second Applicant. (HB Tab 4) He raised concerns about "*a breach of her confidentiality and violation of her right to privacy*". Certain questions were asked and counsel for the First Respondent replied on 1 March 2017 advising that the medical files are "*subject to a protocol that the Bermuda Police Service has put in place to protect any concerns as to maintaining her confidentiality…. Contents of … medical file have not been reviewed by the Bermuda Police Service and her file has been sealed pending further order….*" (HB Tab 6) There was no further correspondence between them.

13. Chancery Legal had no role in the judicial review proceedings until 17 September 2018 when the firm filed the affidavit of the Intervener Applicant who sought to intervene in the action "*on behalf of a large group of patients*". (HB Tab 11 paragraph 4) A Summons was subsequently filed by the Intervener on 26 September 2018 seeking leave to intervene in the judicial review proceedings. The grounds for the application were based on concerns connected to patient privacy and protecting confidential information in connection with the seized medical records. (HB Tab 13) The Order granting the Intervener leave to intervene in the action was granted on 22 November 2018. (HB Tab 21)

14. The Judicial Review proceedings since February 2017 have been subject to a number of interlocutory applications and orders, including interlocutory hearings concerning a protocol to enable access to the seized material for the purposes of the Criminal Investigation. On 14 January 2019, Chancery Legal wrote to counsel for the First Respondent stating, inter alia, as follows (HB tab 24):

> *"Please allow us to be utterly pellucid: we oppose any use of our client's files for any purpose, we will not agree, nor sanction any attempt by you to use them, period. These files belong to our clients, it is our view that you came by them illegally and we want them back. We have no confidence in the integrity of the police in this regard…"*
>
> *"We have reason to believe that the material, the subject of the warrants, has already been accessed by your officers and this protocol exercise is no more than an attempt by your clients to now try to legitimize its use".*

15. Chancery Legal filed a Summons seeking a Contempt of Court Order against the First Respondent on 25 January 2019. (HB Tab 27) That Summons together with the First Respondent's Summons seeking to restrain Chancery Legal from continuing to act were both heard at the hearing of the 16 April 2019, and the former is the subject of a separate ruling.

The Duty of Confidentiality – Mr Pettingill and Ms Greening

16. It is not in dispute that the SPW's were issued in connection with the Criminal Investigation. The duty of confidentiality arises in connection with any confidential and privileged information related to the Criminal Investigation and the Bermuda Police Service (BPS) that Mr Pettingill and Ms Greening may have received in their former capacities as Attorney-General and Crown Counsel respectively.

17. It is not in dispute that the Criminal Investigation was on-going at the time that both attorneys were acting as Attorney-General and Crown Counsel. It is also not disputed that disclosures and discussions related to the Criminal Investigation

with either lawyer by or with the investigating team would not only be confidential but privileged.

The Evidence

18. Counsel for the parties chose not to cross-examine and relied on their affidavits.

19. Mr Briggs swore two affidavits (the Briggs 3rd and 4th Affidavits at HB Tab 39 and HB Tab 44). Mr Briggs is a Senior Investigator working with the BPS with over 40 years policing experience and direct knowledge of the Criminal Investigation which gave rise to the SPW's.

20. Mr Briggs states that the First Respondent became aware of Chancery Legal's and Mr Pettingill's involvement following the Summons filed to intervene in the judicial review proceedings in September 2018. (HB 39 paragraph 6) The fact that Ms Greening had joined Chancery Legal was not known until she was the author of letters sent to counsel for the First Respondent dated 5th, 6th, 8th and 11th February 2019. (HB 39 Paragraph 7)

Ms Greening

21. The First Respondent raised the concern about Ms Greening's involvement shortly after they became aware that she had joined Chancery Legal. The first time the conflict was raised was on 12 February 2019 (in counsel to counsel conversation in Court) and shortly thereafter by formal letter on 19 February 2019. (HB Tab 34 and paragraphs 8 and 9 Briggs 3rd Affidavit, Tab 39).

22. Mr Briggs' evidence is that he has been engaged in the Criminal Investigation since February 2013. (Paragraph 11) He states that in 2013 the then DPP appointed Senior Crown Counsel Garret Byrne to be the designated lawyer attached to the Criminal Investigation. He states, "*As a result of this and in order to reflect the specific and ongoing involvement in the investigation by the DPP, the investigation team was re-designated the "Joint Investigation and Prosecution Team" (JIPT*)". (Paragraph 13)

23. Mr Briggs' evidence is that shortly after Ms Greening joined the DPP, "*the DPP (Mr Field) increased the legal commitment to the investigation to include Ms Greening, working under the direction of Mr Byrne. In order to function as an effective member of the team she was given a series of briefing documents and personal briefings by the SIO Chief Inspector Ian Tomkins and me, which outlined the allegations and the current position of the investigations*". (Paragraph 14)

24. It was also asserted that there were regular and informal meetings and briefings which included the investigating officer and Byrne/Greening. (Paragraph 14)

25. Mr Ricketts, Crown Counsel in the DPP Chambers, swore an Affidavit which corroborates Mr Briggs' recollection so far as Ms Greening's presence at one meeting. He states that he joined the DPP as Crown Counsel in November 2013 and was also assigned to the Specialist Team (which I understand to be the JIPT referred to by Mr Briggs) under the supervision of Mr Byrne. (HB Tab 40 Paragraph 3) He recalls (as is confirmed by Ms Greening) that she was assigned to the Specialist Team in 2014.

26. Mr Ricketts specifically recalled a meeting in late 2014 at which Ms Greening was present, when (I paraphrase), *"the investigative team fully briefed them on the origin of the Criminal Investigation, the evidence gathered, the strategic decisions, the intended direction and aspects of the investigation which might require legal advice support".* (HB Tab 40 Paragraph 7)

27. Mr Ricketts recalls:

> "*The meeting was held at the offices of the police as there was a need for confidentiality and that was emphasized with both me and Victoria Greening given the nature of the investigation. The offices themselves were designated as a sterile area that was accessible only by the few officers on the investigating team and the specifically identified members of our department that were given clearance, viz Garrett Byrne, Victoria Greening and myself*". (Paragraph 8)

"*Subsequent to that meeting, Garrett Byrne then assigned separate tasks to me and Victoria Greening, but I would not personally know the details of his instructions to her. However, I am aware that Victoria Greening had continued interaction with the investigative team*". (Paragraph 9)

"*it is the view of the department that Victoria Greening would be in a clear conflict of interest with Chancery Legal representing the Intervener given the confidential information to which she was privy. As such we support the request that Chancery Legal be removed as attorneys of record for the Intervener*". (Paragraph 11)

28. Ms Greening for her part confirms that she was assigned to the Specialist Team supervised by Mr Byrne. (HB Tab 41 Paragraph 4) She confirmed her recollection of a meeting sometime in 2014 with the then DPP on whether she would be interested in assisting Mr Byrne and the police with the Criminal Investigation. (paragraph 5) She describes the meeting with the DPP as a "*casual meeting*" and recites certain (possibly confidential and privileged) elements of that conversation as to what gave rise to the investigation, but nothing of substance connected to the Criminal Investigation itself.

29. Ms Greening takes issue with certain aspects of Mr Briggs' evidence going so far as to say:

"*In reference to paragraphs 14 and 15 of John Briggs affidavit, it is absolutely not the case that "I worked from an office adjoining that of the SIO and the Deputy" … To say that I was working in that office and on the investigation or was privy to any of information (sic) is a complete and utter fabrication. At no time did I have access to, review or was I in possession of any material in relation to the investigation. I put him to strict proof to say where I was supposedly working in the office and what I was working on*." (Paragraph 7)

30. She does not, however, challenge Mr Ricketts' evidence.

31. So far as her evidence of what work she did on the Specialist Team she states as follows:

> "*I was initially assigned to the Specialist Team. The Specialist Team was supervised at that time by Senior Crown Counsel Mr Garrett Byrne. The idea was for the five (5) or so Crown Counsel in the Specialist Team to be assigned to less mainstream prosecutions, such as money laundering cases, but in reality the court schedule was so demanding that all Crown Counsel in the DPP, including myself, were assigned to and prosecuted all types of cases.*" (Paragraph 4)
>
> "*Shortly after I commenced employment at the DPP I was asked by the then Director of the DPP, Mr Rory Field if I would be interested in assisting Mr Byrne and the police with an ongoing investigation in relation to Dr Ewart Brown and others, the other names I have no recollection of whatsoever. I was advised by Mr Field in a casual meeting in his office sometime in 2014 that the police were investigating Dr Brown and others..." (Paragraph 5)*
>
> "*Despite being told at that meeting that Mr Field intended on me assisting Mr Byrne, I was never asked to do anything. I was certainly never in possession of any confidential material in relation to this matter*." (Paragraph 6)
>
> *"I was aware that the investigation was to be held in even more confidence than the usual work at the DPP's office, to the extent that the police and Mr Byrne, when he was working on this investigation, worked from a separate office with a door locked by security code." (Paragraph 6)*
>
> "*When Larry Mussenden became the Director of the DPP in April 2016, Mr Byrne had left the DPP to join the BMA. I believe Mr Mussenden assigned Crown Counsel Loxly Ricketts to assist the police with the investigation. Whilst the investigation was never mentioned to me again, I also did not mention it again.*" (Paragraph 9)

32. On her knowledge of the Criminal Investigation, she states:

> "*My older brother, who was a cameraman at VSB TV before it closed a few years ago (and regular listener to the Sherri-J radio show), told me everything I knew about the investigation until I commenced employment with Chancery Legal on 7 January 2019.*" (Paragraph 12)

33. Mr Briggs replies to Ms Greening's evidence in his Fourth Affidavit as follows:

> *"Ms Greening does not dispute the fact that DPP Field appointed her to work on the investigation under Mr Byrne. Ms Greening spent a considerable period of time with Mr Byrne in the adjoining office to ours. In reference to paragraphs 6 and 7 of Ms Greening's Affidavit, I am aware of the fact that Ms Greening worked in a secure office specifically established for Mr Byrne and her. The secure office was within a suite of offices in Global House occupied by us. There was no lock between the office for the legal team and our offices with the only security on the exterior door. The setup of this office remains the same to this date*."(Paragraph 17, Briggs 4th Affidavit)

34. So far as the separate meeting attested to by Mr Ricketts, Ms Greening states that, "*I had no recollection of it until I read that in Loxly's affidavit. I now have a vague recollection of being at a meeting with Loxly Ricketts and now Chief Inspector Ian Tomkins, but I have no recollection whatsoever of anything discussed at that meeting.*" (Paragraph 11)

35. There is divergence between the recollection of Mr Briggs and the recollection of Ms Greening in connection to how much exposure Ms Greening had to the Criminal Investigation. However, the collective evidence of Mr Briggs, Ms Greening and Mr Ricketts is consistent with a finding that Ms Greening did have knowledge, was exposed to, and did have discussions about the Criminal Investigation in her capacity as Crown Counsel. It is also clear that she worked in close proximity to the relevant personnel who were substantially involved in the Criminal Investigation. Ms Greening has acknowledged that she did have briefing meetings with the investigating team on the Criminal Investigation even if, as she

now states, she has limited recall and did not engage substantively thereafter on this particular investigation.

36. The SPW's were executed in February 2017. Ms Greening left the DPP in April 2017. When Ms Greening joined Chancery Legal in January 2019, no application was made to the Bar Council for exemption to the Code of Conduct rule 24 A. Chancery Legal did not reach out to counsel for the First Respondent in regard to their future hire of Ms Greening and intention to assign her to this case. Mr Pettingill in his affidavit evidence confirmed that, "*I enquired whether she had had any involvement with the matter relating to the Patients or other clients we represent during her time at the DPP office or her previous chambers Wakefield Quin and she advised me that she had not and that there was no conflict*". (HB Tab 42 Paragraph 5) In the course of oral submissions, Mr Pettingill confirmed that he had taken the view there was no conflict and therefore no need to make an application to Bar Council for exemption under the Code of Conduct.

Mr Pettingill

37. Mr Briggs states:

> *"Mark Pettingill, as the former Attorney General of Bermuda, was briefed by me on all aspects of the BPS investigation into Dr Brown and regularly requested and received updates."* (HB Tab 39 Paragraph 17)
>
> "*Mr Pettingill was the A-G from 2012 to 2014. During this timeframe certain intelligence came to the attention of the BPS concerning Dr Brown. The intelligence information was shared with the Attorney General's Office*." (Paragraph 17)
>
> "*I attended multiple meetings with SIO Tomkins, SCC Byrne, and Mark Pettingill to discuss evidence pertaining to the ongoing criminal investigation.*" (Paragraph 18)

"*I am certain that the information shared with Mr Pettingill during these briefings was highly confidential and concerned strategy operations of the BPS that would give the intervener an unfair advantage.*" (Paragraph 19)

38. Mr Pettingill, for his part, states

"I have known John Briggs for a number of years in a professional capacity and always found him to be an individual of truth and integrity." (Paragraph 2)

"*I do not take issue with the truth of any of the matters that [Mr Briggs] raises in relation to me…*" (Paragraph 2)

"*I have never been in possession of information that would have been relevant to disclose in relation to the current matter but in any event, I have simply not disclosed any information to the patients or Dr Brown that Detective Briggs raises in his affidavit i.e. the civil recovery consideration which I address below. All of which would be irrelevant to the issues in this case.*" (Paragraph 2)

"*I do not take any real issue with the Affidavit of John Briggs other than to highlight the following facts to the Court…"* (Paragraph 6)

39. So far as the facts that Mr Pettingill wishes to highlight, these are:

"I am unequivocally not in possession or have knowledge of any information related to any police investigation… that would place me in a position of conflict in this matter representing the Intervener." (Paragraph 6)

"I did on a few occasions discuss various aspects of a BPS investigation in relation to Dr Brown but that I do not recall anything that was of a particularly specific evidential nature." (Paragraph 7)

"In relation to paragraph 17 of Detective Briggs' *affidavit I have absolutely no recollection of what this "intelligence" was other than to say I am certain it had nothing to do with an investigation into the operation of Bermuda Health Care Services or Dr Reddy…." (Paragraph 7)*

"I have no recollection of taking part in a meeting which involved Senior Crown Counsel…but I do not deny it could have been the case." (Paragraph 8)

"I can certainly state that no such meeting related to any investigation whatsoever in relation to the current matter nor can I recall any information that would give me or my current client any advantage in the current proceedings." (Paragraph 8)

"I have no idea what information I could possibly have that would give the intervener any advantage to their files being unlawfully seized by the BPS in 2017 and as relates "to strategy" other than my assessment that the a (sic) certain contingent of the BPS were obsessed with endeavoring to find any evidence they could to prosecute Dr Brown…." (Paragraph 9)

"It is a fact with which I fully agree…that I the Attorney-General was considering and did in fact set up a Civil Recovery office to consider civil actions against a number of individuals." (Paragraph 10)

"I agree I may have been in possession of some information related to allegations against Dr Brown but candidly to my mind not anything more than the Country was aware of through extensive media coverage and leaks related to an investigation. I did have a significant concern, and it was certainly a reason that I made inquiry from time to time, as to how any investigation was proceeding because of the time delay and the fact it was costing the GOB an exorbitant amount of money…." (Paragraph 11)

40. Mr Briggs, in his Reply Affidavit, takes issue with Mr Pettingill on paragraph 2 and paragraph 10 of his affidavit on the question of whether he has ever been in possession of relevant information in connection to the aspects of the Criminal Investigation connected to the medical irregularities. He states:

> *"Dr Brown is one of the patients who are represented by [WF]. Thus, Chancery Legal is representing Dr Brown's interest in its application."* (Paragraph 13)
>
> "*the information shared with Mr Pettingill related to information concerning whether Bermuda Healthcare Services were over scanning patients and then charging insurers. Four of the insurance entities responsible for paying the medical bills for these scans were government entities. The GOB would be entitled to bring a civil recovery action… Mr Pettingill had knowledge of this part of the investigation and this alone should have been enough for him to have realized that he is possession of confidential information and should not involve himself in claims asserting that the scans were necessary."* (Paragraph 13)

41. Mr Pettingill's appointment as Attorney-General ended in 2014. It is clear from Mr Pettingill's evidence that he is not suggesting that he has no recollection of the discussions with the investigating team. His position is that what he does recall is, in his subjective view, of limited relevance to Chancery Legal's current engagement for the Intervener and/or no longer confidential information given the facts now in the public domain.

Discussion

42. The legal profession in Bermuda is regulated by the Bermuda Bar Council and the Code of Conduct makes specific provisions for the conduct of barristers and attorneys to ensure barrister's impartiality and to prevent disclosure of confidential and privileged information.

43. Rule 24 of the Code of Conduct provides:

> *"A barrister shall not act for an opponent of a 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."*

44. Rule 24A provides:

> *"Where a barrister or a member of his staff who has acted on behalf of a client in a matter, irrespective of the nature of the matter, subsequently joins another firm ("the new firm") which acts or has the opportunity of acting for a party with interests adverse to those of the former client, he or that staff member and the new firm should cease or decline to act in the matter if he or the staff member is by virtue of his former capacity in possession of material information which would not properly have become available to him in his new capacity:*
>
> *Provided that the Bar Council may, after ascertaining the views of the former client, exempt a barrister or a member of his staff from the above requirement."*

45. Rule 101, also relied upon by the First Respondent, provides:

> *"A barrister should not represent in the same or any related matter any persons or interests with whom he has been concerned in an official capacity. Likewise, he should not advise upon a ruling of an official body of which he is a member or of which he was a member at the time the ruling was made."*

46. Counsel for the First Respondent directed the Court to two local authorities. The first, *Georgia Marshall and Rachael Barritt v. A* [2015] Bda LR 101, is a Bermuda Court of Appeal authority concerning an allegation of conflict of interest arising out of matrimonial proceedings.

47. The Court of Appeal referred to and relied upon the statement of principle from *Bolkiah v. KPMG* [1999] 2 AC 222, where Lord Millett held:

> *"Accordingly, it is incumbent on a plaintiff who seeks to restrain his former solicitor from acting in a matter for another client to establish (1) 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."*

48. The *Marshall* case concerned two matrimonial proceedings which intersected through the wife in the first proceedings, who was by then the new wife of the husband in the second proceedings. In the first matrimonial proceedings, Mrs Marshall's firm had acted for his second wife (in her divorce from her former husband). In the second matrimonial proceedings, Mrs Marshall was acting for his first wife. The husband's current wife alleged that Mrs Marshall was in possession of her confidential information which related to her financial circumstances which could be adverse to her husband and hence to her interests arising in the second matrimonial proceedings. A review of time sheets showed that of 147.7 hours on the first matrimonial proceedings, only 5.5 hours had been recorded by Mrs Marshall. The first instance judge found that Mrs Marshall had not had day to day conduct of the matter, but that she had prepared for and attended a hearing connected to Rule 77 of the Matimonial Causes Act. The judge granted the injunction restraining Mrs Marshall and her colleague from acting any further in the second proceedings. This decision was appealed and upheld by the Court of Appeal.

49. The second Bermuda case, *the Queen v. Romano Mills* [2017] SC (Bda) 93 Crim, concerned a conflict of interest arising when a Crown Counsel in the DPP's office had left the DPP and become defence counsel. The Crown made an application that she be removed as defence counsel on the basis that in her capacity as Crown Counsel she had knowledge of the case and there was a conflict of interest resulting in a breach of the Code of Conduct, in particular rules 24, 24A, 25, 101 and 126. In that case, it was clear that the relevant counsel had substantial

knowledge from her position as Crown Counsel to give not only an unfair advantage against the crown, but also against a co-defendant in the criminal trial. Accordingly, the Court ordered that the counsel withdraw as counsel for Mr Mills.

50. The learned Judge summarized following general principles:

    a. The Code of Conduct was patterned after the equivalent Canadian Code of Conduct, and Canadian legal authorities are relevant; (Paragraph 12)
    b. "*The court should infer that by reason of that previous relationship she possessed confidential information. The burden to disprove that rests upon her*." (Paragraph 19)
    c. Rule 101 "*prohibits a counsel from representing any person or interest in the same or a related matter with whom he had been concerned in an official capacity*." (Paragraph 15)
    d. Relying on *R. v. Mandamin* 2017 ONSC 418, "*the principles may apply to crown prosecutors as they apply to defence counsel where a defence counsel subsequently joins a prosecutions office*." (paragraph 20)

Delay, Implied Waiver, Deemed Consent, Acquiesence

51. Chancery Legal, in Mr Pettingill's affidavit asserted that, "*Having had independent Counsel and only just deciding to raise this as an issue after two years certainly must surely in my respectful view amount to an implied waiver on the part of BPS that they did not have an issue with any conflict as related to my involvement for the patients as Counsel*." (Paragraph 4)

52. Chancery Legal did not advance their argument about implied waiver, delay or acquiescence in their written skeleton argument. However, in oral submissions it was argued that the First Respondent has '*fully acquiesced to our involvement and substantial involvement in this case'*.

53. Chancery Legal relied on an extract from Conflicts of Interest, 5th ed, (Sweet & Maxwell), "Deemed or Inferred Consent" paragraphs 4-019-4-022, which included discussion of the judgment of Lord Millett in *Bolkiah* at p. 237E.

54. The extract is taken from the chapter "Managing Conflicts by Contract" and focusses on the controversial Privy Council decision of *Kelly v. Cooper*, itself on appeal from the Bermuda Court of Appeal.

55. The paragraph particularly relied upon by Chancery Legal is paragraph 4-022. The editors write:

> *"Kelly cannot really be explained as a consent case. There is nothing which could be regarded as a contractual agreement. It seems artificial to say in circumstances where the client did not know about the particular conflict, signed no agreement authorizing it and objected strongly to it, that he has consented. To the extent that a rationale can fairly be provided for Kelly, it is better explained as a "deemed consent" case. There will be cases where it would be wrong to state that the client had expressly consented, but where it cannot be right that he is entitled to complain that the professional acts for more than one client at the same time.*
>
> *This form of inferred or implied consent should arise where the client instructs the professional knowing facts which, in the circumstances, preclude him from complaining that the professional has accepted instructions for a competing client. Consideration of the facts of Bolkiah makes the point clear. KPMG were auditors and longstanding clients of BIA. … Lord Millett said there was no balancing exercise; the point was as Lord Millett put it, in the circumstances did Prince Jefri give inferred consent to KPMG acting in the circumstances which arose by instructing them himself with knowledge of their position as auditors and accounts for BIA. On the facts the House of Lords held that prince Jefri did give inferred consent to KPMG accepting instructions from BIA on matters that, whilst not a part of their role as auditors arouse out of their role as auditors."*

56. The passage is not authority for the proposition contended for by Chancery Legal. The editors are describing circumstances where conflicts can be managed by contract or agreement, when the professional acts for more than one client at

the same time. The editors make this clear in their summary of the principle of deemed or inferred consent immediately following the extract relied upon:

> *"the principle comes into play through the combination of two factors. First, the knowledge of the client, secondly, the instruction of the professional with that knowledge. Where the client instructs the professional with knowledge which makes it unconscionable or inequitable for him to be heard to complain about the double employment, the court will treat the matter as one of inferred, implied or deemed consent." (Para 4-022)*

57. The principle of deemed consent simply does not arise in this case.

58. Chancery Legal in their oral argument also argue that a plethora of issues have been raised by Chancery Legal since September 2018 with regard to the patients' interest in the seizure of their files. They assert that it is too late to raise a conflict now.

59. The First Respondent for their part, argue that they raised their concern about Ms Greening shortly after her employment with Chancery Legal. *(*See letter 19 February 2019 HB Tab 24)

60. So far as the delay in objecting to the involvement of Chancery Legal generally, in light of Mr Pettingill's involvement, they state that initially they took the view that the firm was engaged on the limited issue of protecting patient confidentiality, not challenging the legality of the SPW's themselves.

61. The evidence of Mr Briggs (HB Tab 44 paragraph 8) is that:

> *"it was not until 14 January 2019, through correspondence… that the First Respondent became aware that the Intervener sought the return of the files and would not agree or sanction the BPS attempts to use the medical files. It was at this stage that it became clear that a conflict arose with Chancery Legal's representation of the Intervener. Shortly thereafter*

MDM communicated to Senior Counsel for the Intervener, Jerome Lynch QC, in February 2019, that given Chancery Legal's challenge to the legality of the SPW's and the overall hostility towards the First Respondent … Chancery Legal has taken a position that is adverse to the interests of the First Respondent and should withdraw from the record."

62. So far as the contention that the First Respondent has waived its rights to complain given delay, I find that there has been no delay in raising the conflict connected to Ms Greening and no waiver of any right to complain of Chancery Legal's continued involvement upon her joining the firm.

63. Furthermore, any delay in asserting a conflict of interest arising in one capacity cannot serve to bar a former client from raising a concern with regard to a different conflict when it arises.

64. I further find that the delay of five months in objecting to the firm's representation of the patients in light of Mr Pettingill's involvement, does not bar the First Respondent from raising the concern about his conflict and duty of confidentiality now. This is particularly the case when the scope of the engagement has recently expanded materially and Mr Pettingill's knowledge of the Criminal Investigation is increasingly relevant.

65. While it may be that the First Respondent should have considered the possibility that the interest of the Intervener patients might expand from protecting their confidential medical information to a more adversarial position attacking the Criminal Investigation as a whole and the foundation for the SPW's, this is not such an inordinate delay so as to deprive the First Respondent of their right to be protected from the risk that their confidential information may be disclosed.

66. So far as the one letter written by Mr Crockwell for Chancery Legal in 2017, I do not take the view that First Respondent is now precluded from raising the conflict because of delay from this date. This was isolated correspondence, more than 18 months prior to the filing of the Intervener Summons.

Findings

Is Chancery Legal in possession of information confidential to the First Respondent?

67. I find that the evidence establishes that both Mr Pettingill and Ms Greening had privileged and confidential discussions in connection with the Criminal Investigation and other matters confidential to the First Respondent.

68. I find that the confidential information included strategy discussions around the Criminal Investigation, the evidence, the lines of enquiry and other aspects on which legal advice, support or direction might be required.

69. While neither Mr Pettingill nor Ms Greening were significantly involved in the Criminal Investigation both of them have 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. (HB Tab 42 paragraph 11)

70. Therefore I do find that they did receive and are in possession of confidential and privileged information so far as Mr Pettingill from the period of 2013-2014 and Ms Greening from 2014 – 2017.

71. So far as their evidence that they either do not now recall the detail of those discussions and/or what they recall is in the public domain, I consider this in the context of the risk of disclosure below.

Has the First Respondent consented to the disclosure of their confidential information to the Interveners?

72. It is not disputed that the First Respondent has not expressly consented to any disclosure of confidential information. The principle of 'deemed or inferred' consent for the reasons I have stated in paragraphs 56 and 57 does not apply in this case.

73. I have further found that the first Respondent has not waived the right to protect their confidential information or to object to the conflict.

Is the confidential information relevant or possibly relevant to the new matter in which the interest of the other client (the Intervener) may be adverse to the interests of the 1st Respondent?

74. I repeat my finding in paragraph 68 above. I am satisfied that the confidential information received from the First Respondent and the BPS by the two attorneys in their respective capacities of Attorney General and Crown Counsel, is sufficiently related to the judicial review proceedings and the execution of the SPW's to be relevant and certainly possibly relevant. I am also satisfied that any disclosure of confidential information would be adverse to the interests of the First Respondent.

75. Furthermore, a patient who is or may be the subject of the Criminal Investigation and other investigations is also represented by Chancery Legal in the Intervener action. The confidential information of the First Respondent and the BPS disclosed to Mr Pettingill and Ms Greening is clearly relevant to that client whose interest in this action goes beyond patient confidentiality.

76. Finally, it is a concern that both attorneys have passed comments, stated extraneous facts or expressed opinions about the First Respondent, the DPP, and the BPS which appear to be based on knowledge obtained in their capacity as Attorney-General and Crown Counsel respectively. In this regard, confidential and privileged information may already have been used by them in a manner adverse to the interests of the First Respondent. (HB Tab 41 paragraphs 5 and 10; HB Tab 42 paragraphs 9 and 11).

Risk of Disclosure

77. The court must then consider the risk of disclosure and if there is a risk, even a very slight risk, the Court should intervene. Lord Millett in *Bolkiah* puts it

succinctly, "*the court should intervene unless it is satisfied that there is no risk of disclosure*." (at p. 237) (Emphasis added)

78. Chancery Legal argue that there is no real risk that any confidential information that may have been shared with them will be disclosed because, they say, they don't specifically recall anything that they think is relevant or material to the patients in this particular case.

79. Mr Pettingill, notwithstanding the longer passage of time since his service as Attorney-General, has the better recollection of his briefings and discussions. He asked for updates on the Criminal Investigation from time to time. He states, "*I agree I may have been in possession of some information related to allegations against Dr Brown but candidly to my mind not anything more than the Country was aware of through extensive media coverage and leaks related to an investigation."* (HB Tab 42 Paragraph 11)

80. Both Mr Pettingill and Ms Greening make reference to the media interest, speculation and reporting around the Criminal Investigation. The suggestion appears to be that this lessens the risk of disclosure of confidential information given what is already in the public domain.

81. I disagree. The acknowledgement by Mr Pettingill that he thinks his knowledge is no more than what the country knows given the media coverage is tantamount to an admission that he has difficulty recalling what he learned in an official capacity as Attorney-General versus what he knows from media reports.

82. I also have to give weight to the evidence of Mr Briggs and Mr Ricketts, who both remember and have given evidence of substantive meetings and discussions with the attorneys concerned on matters discussing the strategy and scope of the Criminal Investigation. Neither Mr Pettingill nor Ms Greening dispute that these meetings took place, they simply assert they cannot remember much, or at least nothing they think is relevant.

83. Cases of conflict of interest cannot turn on an attorney's subjective assertion that they do not recall anything and/or that what they do recall is not relevant. It is, as was stated by Lord Millett in B*olkiah*, "*of overriding importance for the proper administration of justice that a client should be able to have complete confidence that what he tells his lawyer will remain secret.*" (p.236)

84. Furthermore, as stated in paragraph 76 above, some breaches of the duty may already have occurred when the attorneys passed comment and stated opinions in relation to privileged conversations, the inner workings of the DPP, the Criminal Investigation and the investigative team (paragraphs 5 and 10 Greening Affidavit, paragraphs 9 and 11 of Pettingill Affidavit). That these comments may not be material or particularly relevant does not take away from the breach of duty in making them at all. Indeed, this aptly illustrates why the approach of the court must be strict so far as protecting confidential and privileged information.

85. Chancery Legal relied upon the case of *Re T and A (Children)* [2000] 1 FLR 859, a case where the issue of lack of recollection of a prior engagement was one of the factors that the Court relied upon to be satisfied there was no risk of disclosure of confidential information. This was a Family Court matter where the lawyer concerned was acting for the guardian ad litem. It transpired that the lawyer had represented the father some 13 years before, when he was a juvenile, in a criminal proceeding which resulted in a conviction. Neither the lawyer nor the complaining father could recall any detail about the representation at all. The judge held, "*It follows that if the information imparted to Miss Naylor is no longer recallable, then she is no longer in possession of it, and I am entirely satisfied there is no risk of disclosure in that respect. Further, that information in my view would not be of any great relevance, given the passage of time. Insofar as the conviction itself, that information is before the Court*." (p.864)

86. This case did not turn solely on the issue of the memory of the lawyer and is distinguishable from this case in any event. First, there were other factors including the determination that the earlier representation was not of any great relevance. In this case, as I have already found, the attorneys received confidential

and relevant information. The evidence also establishes that both have some memory of these discussions.

87. It is of the highest importance to the administration of justice that a barrister who has confidential and privileged information should not act in any way that puts that information at risk of coming into the hands of someone with an adverse interest. Confidential information which is also privileged is subject to a "*strict approach*" and as Lord Millett put it, "*Anything less fails to give effect to the policy on which legal professional privilege is based*". (p. 236G)

88. In the circumstances, I am not satisfied that there is no risk of disclosure of confidential and privileged information.

Rule 24

89. On the basis of the above, I find that Chancery Legal and Mr Pettingill and Ms Greening, do have knowledge of the affairs of the First Respondent which might give them an unfair advantage – and Rule 24 provides that they shall not act for another client in such circumstances. Rule 24 is a strict rule – any lawyer who has relevant confidential information is automatically disqualified from acting against the client or former client.

Rule 24A

90. I find that so far as Rule 24A, Ms Greening, in her capacity as Crown Counsel, worked with the First Respondent and on behalf of the First Respondent, both in connection to the Criminal Investigation and other matters. I find she has subsequently joined Chancery Legal which, in acting for the Interveners, has expressed interests adverse to the interests of First Respondent. Rule 24A requires that Ms Greening and Chancery Legal, "*should cease or decline to act in the matter if [she is] by virtue of [her] former capacity in possession of material information which would not properly have become available to [her] in [her] new capacity*." For the reasons stated above, I find that she, and the firm, is in

possession of material information, which information she has solely by virtue of her role as Crown Counsel.

91. In such circumstances, I find that Chancery Legal should cease to act for the Interveners pursuant to the provisions of Rule 24A.

Rule 101

92. Rule 101 provides:

> "*A barrister should not represent in the same or any related matter, any persons or interests with whom he has been concerned in an official capacity. Likewise, he should not advise upon a ruling of an official body of which he is a member or of which he was a member at the time the ruling was made."*

93. We are concerned in this instance only with the first part of the Rule and in light of the findings above I make this finding only for completeness.

94. I find that a conflict does arise under Rule 101 in connection with the representation by Chancery Legal of one of the patient's in the Intervener action. Rule 101 is engaged given the fact that Dr Brown, who is represented by Chancery Legal in the Intervener action as a patient, is also a subject of the Criminal Investigation. This, it seems to me, engages Rule 101 particularly given Mr Pettingill's evidence as to his knowledge of the investigations connected to Dr Brown (paragraph 9 and 11 of Pettingill Affidavit) and given that this is clearly an action which is related to the Criminal Investigation. The Rule also applies to Ms Greening, notwithstanding her limited recall of relevant discussions.

Decision

95. For the reasons stated above, I find Chancery Legal, through Mr Pettingill and Ms Greening, have received confidential and relevant information of the First Respondent and the BPS attributable to their lawyer/client relationship arising

from their positions as Attorney-General and Crown Counsel. I am not satisfied that there is no risk of disclosure of this confidential and privileged information and any disclosure would be adverse to the interests of the First Respondent and the BPS. In the circumstances, Chancery Legal is restrained from acting for the Intervener and the patients.

96. For clarity, the Court notes Jerome Lynch QC does not fall within the scope of this injunction and is not restrained from acting for the Intervener. The Court understands Mr Lynch to have been seconded or otherwise assigned from the firm which holds his practicing certificate (Trott & Duncan) to work with Chancery Legal on this matter. He may continue to act for the Intervener in conjunction with any non-conflicted successor firm.

97. Unless either party seeks within 7 days to be heard on costs, costs on a standard basis is granted to the 1st Respondent to be taxed if not agreed.

Dated 2nd May 2019

KIERNAN BELL
ASSISTANT JUSTICE