COMMONWEALTH OF THE BAHAMAS 2021

IN THE SUPREME COURT CLE/gen/001548

Common Law and Equity Division

IN THE MATTER of the Correctional Services Act 2014 Statute Laws of the Bahamas

IN THE MATTER of the Public Service Commission Regulations 1971

IN THE MATTER of the Constitution of The Commonwealth of The Bahamas

BETWEEN

CHARLES MURPHY

Applicant

AND

THE HONOURABLE WAYNE R. MUNROE
(In His Capacity As Minister of National Security)

First Respondent

AND

MRS. CHERYL DARVILLE
(In Her Capacity As Acting Permanent Secretary Ministry of National Security)

Second Respondent

AND

THE ATTORNEY GENERAL

Third Respondent

Before: The Honorable Madam Carla Card-Stubbs

Appearances: Ramona Farquharson-Seymour - Applicant
Antoine Thompson, Office of the Attorney General - First, Second and Third Respondents

Hearing Date: November 27, 2023

Court's jurisdiction to restrain the Attorney General from representing and/or giving legal advice etc to the Respondents - prohibition of representation - whether a fiduciary duty is owed to the Applicant - whether the court should exercise its inherent supervisory jurisdiction to prohibit the Attorney General from representing the Respondents.

HELD: The application is dismissed. This Applicant has not satisfied the court that this is a case requiring intervention by this court.

There are three bases for invoking the jurisdiction of the court. 1. Where there is a current attorney-client relationship, an existing client may invoke the court's jurisdiction to prevent an attorney-at-law from representing a party that has adverse interests. 2. Where there is a prior relationship, the court is concerned with the protection of confidential information that had passed pursuant to that relationship. In that case, the former client must prove that (i) that the attorney-at-law is in possession of information which was confidential to the former client and (ii) that such information is, or might be, relevant to the matter on which he is instructed by the second client. 3. A court also has an inherent supervisory jurisdiction over its process to protect the administration of justice and over its officers. Attorneys-at law are officers of the court.

RULING

Card-Stubbs, J:

INTRODUCTION

1. This is an application for relief to bar the Office of the Attorney General ("OAG") from acting for the First, Second and Third Respondents in this matter. The full terms of the relief sought are set out below.

2. The Applicant avers that the attorney for the Respondents in this matter had "represented the Applicant by extension" in a previous suit ("the 2019 suit") when his appointment to office was the subject of litigation brought by two persons who questioned his suitability for that position and challenged the process by which he was appointed to office. Since then, the Applicant has been placed on administrative leave. As a result, he has brought the current suit ("the 2021 suit") to challenge that decision to place him on administrative leave. The Applicant now seeks to prevent the OAG from acting for the Respondents in these proceedings and from sharing confidential information etc.

3. On March 13, 2024 this Court delivered an oral ruling dismissing the Application. That ruling and the reasons therefor follow.

BACKGROUND

4. By way of Notice of Application filed November 17, 2023 the Applicant sought the following relief:

> " (i) The Office of The Attorney General be prohibited and/or barred from representing and/or giving legal advice to the First, Second and Third Respondent.

(ii) The Office of the Attorney General be prohibited and/or barred from communicating with the attorneys in the Office of The Attorney General with respect to this matter.

(iii) The First, Second and Third Respondent be prohibited and/or barred from sharing information and/or exchanging documents with the Attorneys in the Office of the Attorney General with respect to this matter."

5. The Notice of Application sets out the grounds in support of the relief as follows:

> "(i) The Office of The Attorney General represented the Applicant by extension in another matter being Doan Cleare and Bernadette Murray v Theresea Deleveaux (Chariman) et al 2019/PUB/jrv/00014.
>
> (ii) The Attorneys of the Office of the Attorney General are aware of confidential and privilege information that was given to them from the Applicant by virtue of their then position of defending the appointment of the Applicant by the Public Service Commission over that of Doan Cleare.
>
> (iii) The First Respondent represented the Applicants in the aforesaid matter and now the First Respondent is the Minister of National Security.
>
> (iv) The First Respondent is and will be aware of confidential and privilege communications between the Applicant and the Attorney General as he is now the Minister of National Security. The Third Respondent will have receive confidential information from the Applicant and can now use such information to fight against him. Their presence/representation of the First and Second Respondent given the issues are similar."

6. In support of the Notice of Application, the Applicant relied upon the Affidavit of Charles Murphy filed November 17 2023.

7. The Respondent in opposition to the application relied upon the Affidavit of Luana Ingraham filed on November 24 2023.

8. It is important that the context of the application is set out. Both the Applicant and Respondents are agreed as to the prior suit ("2019 suit") referred to in the application and the representation of the parties therein.

9. The Affidavit of Charles Murphy shows, in part,:

> 4. On the 10th day of March, A.D., 2020 Mr. Doan Cleare and Mrs. Bernadette Murray filed an action challenging my appointment to the position of Commissioner. Their main claim was that I was not qualified for the position. Notably, the First Respondent represented both parties in the action. (Now produced and shown me is a copy of the Notice of Originating Motion marked as "Exhibit CM-1")

5. During these legal proceedings the Third Respondent represented me and I would have communicated confidential information with the Attorneys in the office, in particular Mr. Kirkland Mackey.

6. The First Respondent at that time in 2020 represented Doan Cleare and Bernadette Murray. He is presently the Minister of National Security.

…

17. To me the similarities and conflict of interest is obvious for instance.

i. Mr. Wayne R. Munroe, KC in his capacity as Defence Counsel represented Don Cleare and Mrs. Murray

ii. The main issue of the suit presented by Mr. Wayne R. Munroe, KC was that I was not qualified for the position of Commissioner of the Prison and that the Public Service Commission acted improperly in appointing/promoting me.

iii. The Third Respondent represented the Commission and by extension defended my appointment. In so doing I met with them and provided information and received legal counsel from the Third Respondent, his Counsels, staff and/or agents.

iv. Mr. Wayne R. Munroe, KC becomes Minister of National Security and has me removed within a week of his appointment and promotes Mr. Don Cleare to the position of Commissioner of the Bahamas Department of Corrections.

v. The Third Respondent now seeks to represent the Respondents in particular, Mr. Wayne R. Munroe, KC in his capacity as Minister and defend his actions of essentially removing me as Commissioner, and/or those similar to what he has advanced when he represented Mr. Cleare and Mrs. Murray.

18. I verily believe that the information I provided to the Third Respondent, his Counsels, staff and/or agents are known in the office of the Third Respondent and can be used to assist the Respondents in an unfair advantage against me.

19. Additionally, the Third Respondent, his Counsels, staff and/or agents did not seek my permission to be released to represent the Respondents in this cause.

20. …

21. I am in need to call Counsels of the Third Respondent and/or evidence adduced in the prior suit in this present claim.

22. I verily believe that the First Respondent will have access to confidential and privilege information that I shared with the Third Respondent when they represented me.

10. Exhibit CM-1 reveals the parties to the the 2019 suit and the nature of that prior action. Doan Cleare and Bernadette Thompson-Murray were the Applicants in the 2019 suit. They sued Five Respondents: (1) Theresa Deleveaux (Chairman), Monsignor Alfred Culmer , Malcolm Adderley and Tonya Adderley (Sued In Their As Chairman And Members Comprising The Public Service Commission) First Respondent, (2) The Attorney General Of The Commonwealth Of The Bahamas (In a representative capacity) Second Respondent, (3) The Honourable Hubert A. Minnis (In His Capacity As Prime Minister) Third Respondent, (4) Mr. Eugene Poitier (In His Capacity As Acting Permanent Secretary, Ministry Of National Security) Fourth Respondent and The Hon. Marvin Dames (In His Capacity As Minister Of National Security) Fifth Respondent. It was a suit for judicial review of the decision to appoint Mr. Murphy as Commissioner of Corrections.

11. The Affidavit of Luana Ingraham avers that a Notice of Discontinuance was filed by the Applicants in the 2019 suit. She avers that "the substantive matter and the issues raised therein by the applicants were never adjudicated before the Honourable Court…"

12. Therefore, the established facts before me are that in the 2019 suit, whilst the Attorney General was named as a party and represented all of the Respondents, the Applicant was never named as a party. The 2019 suit was a judicial review matter concerning the legality of the decision to appoint the Applicant and whether he had the requisite his qualifications for the position. One of the Respondents named then was the Minister of National Security.

13. In the current suit brought by Originating Summons filed December 15, 2021 ("the 2021 suit"), the parties are Charles Murphy, Applicant and The Honourable Wayne R. Munroe (In His Capacity As Minister Of National Security) First Respondent and (2) Mrs. Cheryl Darville (In her capacity as Acting Permanent Secretary, Ministry of National Security) Second Respondent and The Attorney General Third Respondent. The suit is brought by the Applicant to challenge the decision to place him on administrative leave. One of the reliefs sought is an order for reinstatement of the Applicant to his post.

14. Prior to his appointment to a Ministerial post, the current Minister of National Security Minister of National Security, Mr. Munroe KC represented the Applicants in the 2019 suit. He acted in a private capacity then. In his current position he holds public office and is named as a Respondent in the 2021 suit.

15. The OAG would therefore have defended the action brought by Mr. Munroe KC in 2019 in his private capacity when he sued the Attorney General and others on behalf of his clients over the appointment of Mr. Murphy, now Applicant in the 2021 suit.

16. In the 2019 suit, the OAG effectively defended the appointment of Mr. Murphy to a public office and interviewed Mr. Murphy as to same. Mr. Murphy, Applicant, is not currently exercising the functions of public office and is challenging the decision to place him on administrative leave. As it turns out, Mr. Munroe who represented the Applicants in the 2019 matter is the current responsible Minister. The OAG is now on record as representing Mr. Munroe KC in his public capacity in the defence of the 2021 suit brought by Mr. Murphy.

17. In the 2019 matter, Mr. Murphy was not sued. Although the decision to recommend him for appointment as Commissioner was sought to be reviewed by litigation, the decision under challenge was not his but was that of a public body (the Public Service Commission. The representation of the OAG was of the decision-makers as named in the suit – not of Mr. Murphy.

ISSUES

18. The issue before this Court is whether it ought to restrain the OAG from representing and/or giving legal advice etc to the Respondents. The Court will consider

    - whether a fiduciary duty is owed to the Applicant and whether there is a conflict of interest or
    - whether confidential information exists such as to warrant the protection from misuse or
    - whether the court should exercise its inherent supervisory jurisdiction to prohibit the OAG from representing the Respondents.

SUBMISSIONS OF THE PARTIES

APPLICANT'S SUBMISSIONS

19. The Applicant's case, in summary, is that the 2019 and 2021 proceedings "overlap" and that in the 2019 proceedings "the Third Respondent represented the Defendants and "indirectly the Applicant" in those proceedings. As a result, "the Applicant was contacted by the Third Respondent and invited to come in and held private and confidential communications with them in their position as Counsels and Attorneys-at-law." The Applicant posits that the First Respondent [sic] and the Third Respondent would be in possession of "confidential and privilege[sic]

information and/or communications having defended the Applicant's appointment as Commissioner of the Bahamas Department of Corrections" and that such information could be used against the Applicant. The Applicant submits that the Court ought to restrain the Third Respondent in the public interest "to protect the integrity of this matter, and the Administration of Justice" and that the public purse is at the Respondents' disposal to enable them to find other lawyers.

20. Relying on The Bahamas Bar (Code of Professional Conduct) Regulations, Counsel for the Applicant submitted that an Attorney has a duty to hold in strict confidence information receive during the professional relationship between the attorney and the client. That duty includes not disclosing the client's confidential information except in exceptional circumstances. The Applicant also relies on the cases of *Prince Jefri Bolkiah v KPMG (a firm) [1999] 1 All ER 517* and *Parry-Jones v Law Society [1968] 1 All ER 177.* The Applicant contends that the court can restrain an attorney from acting for a client in the public interest and in order to ensure the proper administration of justice per *Smith et al v Dean CLE/GEN/453 of 2007 / BS 2008 SC 78* and that it is in the public interest that persons are assured that their confidential information would not be disclosed without their consent. The Applicant relies on *Halewood International v Addleshaw Booth & Co [1999] Lexis Citation 4162* for that last point. The Applicant submits that the court ought to interfere when it is satisfied that there is a "high probability of mischief" per *Rakusen v Ellis, Munday & Clarke [1912] 1 Ch. 831.*

RESPONDENTS' SUBMISSIONS

21. The Respondents submit that the Attorney-General, is the principal legal advisor to the Government of the Bahamas and is the legal representative for all officers of the Crown in all legal proceedings when legal proceedings are brought against any officer of the State, including a Minister of the Government of The Bahamas. This is so by virtue of The Constitution of the Commonwealth of the Bahamas, The Crown Proceedings Act, and The Commonwealth of the Bahamas General Orders.

22. They submit that the 2019 suit was a judicial review matter that dealt, "firstly, with the decisions of the Public Service Committee, The Minister of National Security, and the Prime Minister to appoint Charles L. Murphy to the post of Commissioner of The Bahamas Department of Correctional Services, and secondly, the decision of the Acting Permanent Secretary in regard refusing to return the Applicants to their substantive duties as Deputy Commissioners at the Bahamas Department of Correctional Services." They state that the matter was discontinued by the Applicants and no arguments were put forward by the Office of the Attorney General in relation to that matter. They note that Counsel in the OAG who handled the 2019 matter is different from Counsel with carriage of the 2021 matter.

23. The Respondents submit that there is no conflict of interest in this case. Relying on the cases of *R.G. Tours & Promotion Ltd v. Greater Moncton Home Builders*

*Assn RG Tours v. Home Builders (1992), 126 N.B.R.(2d) 200 (TD), MacDonald Estate v. Martin and Rossmere Holdings (1970) Ltd. , [1990] 3 S.C.R. 1235; [1991*and *Benchmark Publishing Company Limited v The Attorney General CLE/gen 1264 of 2012,* Counsel for the Respondents submits that the court must balance "three competing values: the maintenance of the high standards of the legal profession and the integrity of the judicial system; the right of litigants not to be deprived of their counsel without good cause; and the desirability of permitting reasonable mobility in the legal profession' in determining whether there is a conflict of interest. They submit that the OAG was bound to represent the Applicant in the 2019 case, that they are bound to represent the officers of the Crown in the 2021 case and that the two matters are "very distinct and different matters". Counsel further submitted that the onus is on the Applicant to demonstrate that there would be not just a "probability of mischief" but a miscarriage of justice if the OAG were to act on behalf of the Respondents.

LAW AND ANALYSIS

1. A Court has jurisdiction to restrain an attorney from acting for a party only in circumscribed conditions. A party has a constitutional right to due process. An important part of accessing the justice system is the right to be represented by an attorney-at-law. In that context, a party is entitled to choose his counsel. Therefore, it is with care that a court should make any determination to intervene in that choice of an attorney-client relationship.

2. The first basis of the jurisdiction of the court to prohibit an attorney from acting for a person has its roots in contract law and the obligations and duty of the attorney-at-law to a client.

3. In *Prince Jefri Bolkiah v KPMG (a Firm)* [1999] 1 All ER 517**,** Lord Hope of Craighead noted at p. 519:

> "The basis of that jurisdiction is to be found in the principles which apply to all forms of employment where the relationship between the client and the person with whom he does business is a confidential one. A solicitor is under a duty not to communicate to others any information in his possession which is confidential to the former client. But the duty extends well beyond that of refraining from deliberate disclosure. It is the solicitor's duty to ensure that the former client is not put at risk that confidential information which the solicitor has obtained from that relationship may be used against him in any circumstances.
>
> Particular care is needed if the solicitor agrees to act for a new client who has, or who may have, an interest which is in conflict with that of the former client. In that situation the former client is entitled to the protection of the court if he can show that his solicitor was in receipt of confidential information which is relevant to a matter for which the solicitor is acting, against the former client's interest, for a new client. He is entitled to insist that measures be taken by the solicitor which will ensure that he is not exposed to the risk of careless, inadvertent or negligent

disclosure of the information to the new client by the solicitor, his partners in the firm, its employees or anyone else for whose acts the solicitor is responsible."

4. And again, Lord Millett at page 526 :

In *Rakusen*'s case the Court of Appeal founded the jurisdiction on the right of the former client to the protection of his confidential information. This was challenged by counsel for Prince Jefri, who contended for an absolute rule, such as that adopted in the United States, which precludes a solicitor or his firm altogether from acting for a client with an interest adverse to that of the former client in the same or a connected matter. In the course of argument, however, he modified his position, accepting that there was no ground on which the court could properly intervene unless two conditions were satisfied: (i) that the solicitor was in possession of information which was confidential to the former client and (ii) that such information was or might be relevant to the matter on which he was instructed by the second client. This makes the possession of relevant confidential information the test of what is comprehended within the expression 'the same or a connected matter'. On this footing the court's intervention is founded not on the avoidance of any perception of possible impropriety but on the protection of confidential information.

My Lords, I would affirm this as the basis of the court's jurisdiction to intervene on behalf of a former client. It is otherwise where the court's intervention is sought by an existing client, for a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation.

This is not to say that such consent is not sometimes forthcoming, or that in some situations it may not be inferred. There is a clear distinction between the position of a solicitor and an auditor. The large accountancy firms commonly carry out the audit of clients who are in competition with one another. The identity of their audit clients is publicly acknowledged. Their clients are taken to consent to their auditors acting for competing clients, though they must of course keep confidential the information obtained from their respective clients. This was the basis on which the Privy Council decided *Kelly v Cooper* [1993] AC 205 in relation to estate agents.

Where the court's intervention is sought by a former client, however, the position is entirely different. The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to the former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of information imparted during its subsistence.

Accordingly, it is incumbent on a plaintiff who seeks to restrain his former solicitor from acting in a matter for another client to establish (i) that the solicitor is in possession of information which is confidential to him and to the disclosure of which he has not consented and (ii) that the information is or may be relevant to

> the new matter in which the interest of the other client is or may be adverse to his own. Although the burden of proof is on the plaintiff, it is not a heavy one. The former may readily be inferred; the latter will often be obvious. I do not think that it is necessary to introduce any presumptions, rebuttable or otherwise, in relation to these two matters. But given the basis on which the jurisdiction is exercised, there is no cause to impute or attribute the knowledge of one partner to his fellow partners. Whether a particular individual is in possession of confidential information is a question of fact which must be proved or inferred from the circumstances of the case.

32. The starting point, and two main bases, for invoking the jurisdiction of the court therefore turns on the contractual relationship of the attorney-at-law and his client and the fiduciary nature of that relationship. In this ruling "attorney", "attorney-at-law" and counsel" will be used interchangeably.

> 1. Where there is a current relationship – In the case of an existing relationship, the client may invoke the court's jurisdiction to prevent an attorney-at-law from representing a party that has adverse interests. "A fiduciary cannot act at the same time both for and against the same client."
>
> 2. Where there is a prior relationship – In the case of a former client, that relationship has terminated and the court is then concerned with the protection of confidential information that had passed pursuant to that relationship. The only standing obligation which rests on an attorney after the client-attorney relationship has ended is the duty of confidentiality. In the case of a former client, the client must prove that (i) that the attorney-at-law is in possession of information which was confidential to the former client and (ii) that such information is, or might be, relevant to the matter on which he is instructed by the second client.

33. There is a third basis for invoking the court's jurisdiction. A court also has an inherent supervisory jurisdiction over its process to protect the administration of justice and over its officers. Attorneys-at law are officers of the court.

34. *In Smith v Dean,* these three bases for the invocation of the Court's jurisdiction were rehearsed by Justice Adderley at paragraph 18:

> The jurisdiction of the Court to restrain an attorney from acting for a party arises under three well established bases; conflict of interest, protection of confidential information, and the Court's inherent supervisory jurisdiction to ensure the proper administration of justice.

Relying on *Prince Jefri Bolkiah v KPMG (a Firm)*, the learned judge confirmed that the conflict of interest ground is invoked only for existing relationships. Justice Adderley noted at paragraphs 20 - 21 that:

According to Bolkiah this jurisdiction only exists in respect of an existing client. A client can apply to the court to have the attorney cease to act for a party adverse to his interest on the ground of conflict of interest. Under this head the Court has no jurisdiction to entertain an application by a former client because once the attorney/client relation ceases the attorney is no longer under a fiduciary duty to the client. This was set out in Bolkiah where Lord Millett delivering the lead judgment at 234 distinguished between the jurisdiction as it relates to a former client and an existing client:

"...It is otherwise where the court's intervention is sought by an existing client, for a fiduciary cannot act at the same time both for and against the same client.... His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation...."

35. *In Smith v Dean,* Justice Adderley confirmed that, in relation to a former client, the court has jurisdiction to "restrain his former attorney from acting or continuing to act for a party with an opposing interest to his former client where that attorney obtained confidential information while acting for his former client and there is a real risk that the confidential information may be used adversely to the former client's interest." (paragraph 24). In reviewing the cases, the learned judge echoed the test set out in Bolkiah and noted its application in the local case of *Raul Alfonso v Mercantile Land Resourses Limited & Southern Ridge Development Company Limited Court of Appeal No. 46 of 2003* ("Alphonso") delivered 15 July 2004. Justice Adderley noted that in that case

"an appeal to set aside an injunction to restrain an attorney of a former client was allowed because there was no evidence that the applicant had condescended to some particularity of confidential information that was acquired by the former attorney. Churaman, J.A. at para. 8-16 stated:

"...The short point in it is that there is absolutely no basis on which relevant evidence was submitted to the learned judge to indicate the nature of any confidential information [my emphasis] that may have been entrusted to Callenders and Company in an action in which Callenders and Company previously represented these respondents, and any possible conflict of interest [my emphasis] which may arise by Callenders and Company representing the present man Raul Alfonso in an action against the respondent in this appeal."

36. The duties and obligations of the attorney-at-law with respect to confidentiality and confidential information are well set out in the canons governing the profession in this jurisdiction. The Bahamas Bar (Code Of Professional Conduct) Regulations, SI 22/1981, Rule IV deals with Confidentiality and provides as follows:

RULE IV - CONFIDENTIALITY

The attorney has a duty to hold in strict confidence all information received in the course of the professional relationship from or concerning his client or his client's affairs which information should not be divulged by the attorney unless he is expressly or impliedly authorized by his client or required by the laws of the Commonwealth of The Bahamas so to do.

Commentary

1. The attorney cannot render effective professional service unless there is full and unreserved communication between him and his client. At the same time the client must feel completely secure and he is entitled to proceed on the basis that without any express request or stipulation on his part matters disclosed to or discussed with his attorney will be held secret and confidential.

2.This ethical rule must be distinguished from the evidentiary rule of lawyer and client privilege with respect to oral or documentary communications passing between the client and his attorney. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.

3. As a general rule the attorney should not disclose that a particular person has consulted or retained him, unless the nature of the matter requires it.

4. The attorney owes the duty of secrecy to every client without exception, regardless of whether he is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the attorney has ceased to act for the client whether or not differences may have arisen between them.

5. The fiduciary relationship between the attorney and his client forbids that the attorney use any confidential information covered by the ethical rule for the benefit of himself or a third person or to the disadvantage of his client. Should the attorney engage in literary works such as his autobiography, memoirs and the like he should avoid disclosure of confidential information.

6. The attorney should take care to avoid disclosure to one client of confidential information concerning or received from another and he should decline employment which might require him to do so.

7. The attorney should avoid indiscreet conversations, even with his spouse or family, about a client or his affairs and he should shun any gossip about such things even though the client is not named or otherwise identified. Likewise the attorney should not repeat any gossip or information about his client's business or affairs that he overhears or that is recounted to him. Apart altogether from ethical considerations or questions of good taste indiscreet shop-talk between attorneys, if overheard by third parties able to identify matter being discussed, can result in prejudice to the client. Moreover the respect of the listener for the attorneys and the legal professional will probably be lessened.

8. The rule may not apply to facts which are public knowledge but nevertheless the attorney should guard against participating in or commenting upon speculation concerning his client's affairs or business.

9. Confidential information may be divulged with the express authority of the client or clients concerned, and, in some situations, the authority of the client to divulge may be implied. For example, some disclosure may be necessary in a pleading or other document delivered in litigation being conducted for the client. Again the attorney may disclose the client's affairs to partners or associates in his firm and, to the extent necessary, to this non-legal staff such as secretaries and filing clerks. But this implied authority to disclose places the attorney under a duty to impress upon his employees, students and associates the importance of non-disclosure (both during their employment and thereafter) and requires him to take reasonable care to prevent their disclosing or using any information which he himself is bound to keep in confidence.

10. Disclosure by the attorney may also be justified in order to establish or collect his fee, or to defend himself or his associates or employees against an allegation of malpractice or misconduct, but only to the extent necessary for such purpose.

11. Disclosure of information necessary to prevent a crime will be justified if the attorney has reasonable grounds for believing that a crime is likely to be committed.

12. When disclosure is required by law or by order of a court of competent jurisdiction, the attorney should always be careful not to divulge more information than is required of him.

37. Specifically, Commentary 4 makes it plain that the duty "survives the professional relationship and continues indefinitely after the attorney has ceased to act for the client".

CONFLICT OF INTEREST

38. The Court exercises its jurisdiction to prevent a conflict of interest where there is an existing attorney-client relationship. In this case, there is no existing relationship between the OAG and the Applicant. The Applicant is not seeking to invoke the court's jurisdiction as pertains to an existing client on the basis of a conflict of interest but on the grounds of the protection of confidential information as afforded to a former client and on the basis of public interest and the proper administration of justice. The submissions of the Respondent relate to conflict of interest and are not immediately relevant or responsive to the Application.

THE COURT'S JURISDICTION TO PROTECT CONFIDENTIAL INFORMATION

39. As noted above, this jurisdiction is invoked to prevent the unwarranted and non-consensual disclosure of confidential information that a former attorney would have come in possession of by way of his contractual relationship with his client.

40. In the case before me, I note the Applicant's submission that "the Third Respondent represented the Defendants and indirectly the Applicant in those proceedings". This begs the question as to whether there was a true client-and attorney relationship that resulted in a fiduciary duty to the Applicant in the first place. I am not convinced that there was.

41. In the 2019 suit, Doan Cleare and Bernadette Thompson-Murray were the Applicants. They sued Five Respondents: (1) Theresa Deleveaux (Chairman), Monsignor Alfred Culmer , Malcolm Adderley and Tonya Adderley (Sued In Their As Chairman And Members Comprising The Public Service Commission) First Respondent, (2) The Attorney General Of The Commonwealth Of The Bahamas (In a representative capacity) Second Respondent, (3) The Honourable Hubert A. Minnis (In His Capacity As Prime Minister) Third Respondent, (4) Mr. Eugene Poitier (In His Capacity As Acting Permanent Secretary, Ministry Of National Security) Fourth Respondent and The Hon. Marvin Dames (In His Capacity As Minister Of National Security) Fifth Respondent. This Applicant was never named in the suit. While the suit concerned a decision that intimately concerned the Applicant, the Applicant was never a party to the suit.

42. The Affidavit of the Applicant indicates that he was invited in to the OAG to give instructions to assist with their defence if the action brought, presumably to defend his appointment to the position. The matter never went to trial. This is not a case where the Applicant had retained the Third Respondent to Defend him and the Third Respondent is now representing a claimant bringing an action against the Applicant.

43. In *Benchmark Publishing Company Limited v The Attorney General CLE/gen 1264 of 2012*, the court found that the lawyer-client cases of no assistance in a case where there was no lawyer-client relationship.

44. In *Benchmark Publishing Company Limited v The Attorney General*, the Attorney General, Respondent, sought the court's intervention to restrain a former Cabinet Minister and Attorney General, Carl Bethel Esq., from proceeding with a suit against the Attorney General once he returned to private practice. The ground was a conflict of interest given his prior involvement in government and that the suit he was engaged in concerned a government contract. In that case the Crown submitted that, "as a member of the Cabinet which approved this contract, Carl Bethel Esq. is placed in a position of conflict of interest and is also a potential witness. Accordingly, he is precluded from representing the plaintiff in this action…" Mr. Bethel's response to the matter was, in part, "particularly I have never

been instructed to appear on behalf of the AG (or any Government agency,) at any time in my career (save that I was once AG) and secondly, I have no personal interest in the subject of the litigation…".

45. After reviewing Rules V, VI, IX XI and the commentary to Rules VI and XI of The Bahamas Bar (Code of Professional Conduct) and several cases, including *Martin v. McDonald Estate (Gray)* 1990 Carswell Mna 233, Stephen G. Isaacs, J came to the following conclusion,

> "There *is nothing in the Williamson Affidavit that suggests that Mr. Bethel acted for either party as Attorney*, nor is there any suggestion that he was exposed to confidential information at the time the contracts were struck.
> *The cases referred to are of no assistance to the Applicant as all of them analyse the relationship of lawyer and client.* As Mr. Foulkes put it a Cabinet Minister does not act for anyone. It was not even suggested that Mr. Bethel was Attorney General when the contracts were agreed, having held that post at one time. Indeed Mr. Bethel was not a Cabinet Minister on 10 August 2011 when the contract was approved.
> Whether the test of "probability of real mischief" or "public perception" is applied, I fail to see from the evidence presented how a reasonably informed person would conclude that confidential information would be used by Mr. Bethel to the disadvantage of the defendant.

46. I pause here to note that the first two bases of the court's jurisdiction arise in the context of the attorney-client relationship. The duty of confidentiality arises in the course of that contractual relationship which is absent here. There is no evidence in this case that this applicant became a client of the OAG or that the AG represented him as a client. The relationship of attorney and client is a special relationship with established rules about how it is formed. By that relationship the attorney takes on, and owes, certain obligations to his client. It is by that relationship that a client enjoys certain benefits. The law accords certain privileges to that relationship and exact certain burdens on that relationship. Usually there is evidence of a retainer to prove the existence if such a relationship.

47. It may be that the Attorney General is a special genus and I accept that it is. The OAG is mandated, as posited by the Respondents, to represent officers of the Crown in legal proceedings. The Attorney General is the principal legal adviser to the Government of the Bahamas. This is a constitutional provision. The provisions of the Commonwealth of the Bahamas General Orders prescribe how Government servants come to be represented by the Attorney General when proceedings are instituted against them in their official position. In that regard, the Respondents provided and relied upon the following relevant provisions.

1. Article 78 of the Constitution of the Commonwealth of the Bahamas provides:

78. Functions of the Attorney-General

(1) The Attorney General shall be the principal legal adviser to the Government of the Bahamas.

(2) The Attorney-General shall be responsible for the administration of legal affairs of The Bahamas and legal proceedings for and against the State shall be taken-

in the case of civil proceedings in the name of the Attorney General:

….

(b) in the case of criminal proceedings in the name of the Director Of Public Prosecutions.

2. Bahamas General Orders, Order 1037 provides, as relevant:

1037. The following procedure will apply in cases where proceedings are instituted against Government servants as a result of their official position, or; of an act done, or; omitted in the course of their official duties:

(1) When a criminal prosecution or civil action is instituted against a Government servant as a result of his official position, or; because of an act done or omitted in the course of his official duties, he will be at liberty to apply through his Head of Department or his Permanent Secretary for assistance in his defence.

(2) If The Permanent Secretary is satisfied that:

(a) the act was done or omitted in good faith in the execution of the official duties of The Government servant concerned, or;

(b) the charge is malicious and is brought solely on account of the official position which The Government servant holds, and;

(c) it is in the public interest that he should be defended, he will forward the case to The Permanent Secretary of The Public Service for the attention of the Attorney General and request that arrangements be made for The Government servant's defence.

(3) If The Attorney General is satisfied that it is proper and just to do so, he will, with the consent of The Government servant concerned, arrange for his defence. The cost of his defence will then be met by Government.

48. It does not escape me that the Applicant was not sued in the 2019 suit. A decision made about him was called into question. The recommendation to appoint him was challenged. Even though he held public office, he was not sued. And he certainly was not sued in his private capacity. If he was treated as a client, or taken on as a client, that evidence is not before me. The Respondents outlined the procedure for a public officer to get legal representation by the Attorney General viz - a public officer against whom legal proceedings are instituted is entitled to ask for the representation of the Attorney General. Approval and consent have to be given for such representation. Did that happen in this case where the Applicant was never sued? Is it the case that a public officer relevant to legal proceedings, but not made a party to the proceedings, and who is invited into the Attorney General's Chambers to provide information, automatically becomes a client of the OAG? Again, there is no evidence in this case that this Applicant ever was a client of the OAG such as to attract the jurisdiction of the Court.

49. What is before me is akin to the situation where his employers were being sued, and he was called in as an employee to provide information in relation to that suit. Again, it is unclear to me, how that turn of events would result in an attorney-client relationship for the purposes of that action, such as to ground the type of application in this matter. In such a scenario, the employee is requested to give information, as per his employment, in order to defend that suit. If the employee later chooses to sue his employer, is he entitled to say that the employer cannot continue to retain the services of his chosen counsel because counsel now had information concerning his employment? I think not. In that case I do not think that an employee would be entitled to claim equal status as a former client so as to prevent the employer from having counsel of his own choosing.

50. I am mindful that one must be careful how one goes about ascribing the term "attorney-client" relationship. There are several important incidents that attach to and arise from that contractual relationship. There are important legal ramifications and consequences. It seems to me that one does not become a client by proximity and, in this case, I'm not satisfied that the applicant enjoyed an attorney-client relationship with the Attorney General or OAG.

51. Nonetheless, there are several relationships known to law where a court may have regard to the same considerations of the protection of confidential information outside of an attorney-client relationship. This was the case in *Prince Jefri Bolkiah v KPMG (a Firm)*, where an accounting firm which had provided support services for litigation and thus came into possession of extensive confidential information were subject to a similar fiduciary duty as the attorneys. In that case, Lord Hope of Craighead said, at page 517,

> "I consider that the nature of the work which a firm of accountants undertakes in the provision of litigation support services requires the court to exercise the same jurisdiction to intervene on behalf of a former client of the firm as it exercises in the case of a solicitor. The basis of that jurisdiction is to be found in the principles which apply to all forms of employment where the relationship between the client and the person with whom he does business is a confidential one."

52. In this case, I will examine this application in the context of a fiduciary relationship since the Applicant had been invited in to the OAG to provide information. I will consider the second jurisdiction of the court which is the protection of confidential information. However, in the absence of evidence before me, I make no finding that this particular relationship between the Applicant and OAG was fiduciary in characteristic.

PROTECTION OF CONFIDENTIAL INFORMATION

53. Even if there could be said to exist a relationship that was fiduciary in nature, given the close proximity of the Applicant to the Third Respondent in the 2019 matter and given that the Applicant provided information to the Third Respondent, the Applicant must demonstrate that i) that the OAG is in possession of information which is confidential to him and (ii) that such information is, or might be, relevant to the matter on which the OAG is being instructed by the current clients.

54. In *Prince Jefri Bolkiah v KPMG (a Firm)*, Lord Millet confirmed that the court would not intervene unless two conditions were satisfied:

> (i) that the solicitor was in possession of information which was confidential to the former client and (ii) that such information was or might be relevant to the matter on which he was instructed by the second client. This makes the possession of relevant confidential information the test of what is comprehended within the expression 'the same or a connected matter'. On this footing the court's intervention is founded not on the avoidance of any perception of possible impropriety but on the protection of confidential information.

55. If the Applicant alleges that the OAG possesses such information, the Applicant must also show its relevance to the matter currently before me.

56. *In Raul Alfonso v Mercantile Land Resourses Limited & Southern Ridge Development Company Limited Court of Appeal No. 46 of 2003* delivered 15 July 2004, Churaman, J.A.in delivering the oral judgment of the court stated:

> *"The short point in it is that there is absolutely no basis on which relevant evidence was submitted to the learned judge to indicate the nature of any confidential information that may have been entrusted to Callenders and Company in an action in which Callenders and Company previously represented these respondents, and any possible conflict of interest which may arise by Callenders and Company representing the present man Raul Alfonso in an action against the respondent in this appeal.*
>
> *Suffice it to say that it appears to us that the present respondents seemed to be labouring under some belief that because Callenders and Company had previously acted for them, whether in one or more than one action, that*

this in itself resulted in Callenders and Company being obliged, for some unimaginable reason, from not accepting a brief against them."

57. *Again, Benchmark Publishing Company Limited v The Attorney General,* Justice Isaacs considered the case of *Martin v. McDonald Estate (Gray)* 1990 Carswell Mna 233 which provides . per Sopinka, J.:

> "Two questions must be answered: (1) Did the lawyer receive confidential information attributable to a solicitor-client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?"

58. The only evidence before me in this case is a bald assertion in the affidavit of the Applicant at the following paragraphs:

> 18. I verily believe that the information I provided to the Third Respondent, his Counsels, staff and/or agents are known in the office of the Third Respondent and can be used to assist the Respondents in an unfair advantage against me.
>
> 19. Additionally, the Third Respondent, his Counsels, staff and/or agents did not seek my permission to be released to represent the Respondents in this cause.
>
> 21. I am in need to call Counsels of the Third Respondent and/or evidence adduced in the prior suit in this present claim.
>
> 22. I verily believe that the First Respondent will have access to confidential and privilege information that I shared with the Third Respondent when they represented me.

59. There is no indication of the nature of the confidential information and what it relates to or how, if it exists, the use or misuse of it will prejudice him.

60. *Adderley J in Smith v Dean*, supra, considered the nature of the evidence in relation to the confidential information that is required and noted at paragraph 27:

> As to the degree of particularity required, in *Halewood International v Addleshaw Booth & Co. [2000] P.N.L.R. 788* Neuberger, J. in considering Bolkiah summarised one of the principles as follows:–
>
> "(f) "The nature of the evidence, sufficient to satisfy the court as to whether the requirements are satisfied, will inevitably depend upon the particular

case, thus in *Re A firm of Solicitors* [[1997] Ch.1], Lightman, J. said this, at page 10:

> "It is in general not sufficient. for the client to make a general allegation that the solicitor is in possession of relevant confidential information if this is in issue. Some particularity as to the confidential information is required ... but the degree of particularity required must depend upon the facts of a particular case, and in many cases identification of the nature of the matter on which the solicitor was instructed, the length of the period of the original retainer, and the date of the proposed fresh retainer and the nature of the subject matter for practical purposes will be sufficient to establish the possession by the solicitor of relevant confidential information."
> .....
> "(g) Once the former client shows that the solicitors have relevant confidential information the evidential burden is on the solicitors to show that they fall within the exception..."

61. In considering the test as laid down in *Prince Jefri Bolkiah v KPMG (a Firm)*, and approved in *Smith v Dean*, the evidence advanced by the Applicant, fails to address the specificity of the confidential information shared with Counsel at the OAG in the 2019 matter. The Applicant must also be able to demonstrate that the confidential information is relevant to the matter which the OAG is now purporting to act on behalf of the Respondents.

62. This general allegation of confidential information as seen in the affidavit, which constitutes the only evidence before this court, does not meet the threshold required to justify the intervention of the court. Some particularity is needed to establish that the information passed from the Applicant to the Attorney General is indeed confidential information and how that information is relevant in this matter so that protection is needed. What is required is not the confidential information but the nature of it. If the Applicant is alleging that the information passed ought to be protected, then there must be more evidence that an assertion that such information exists.

63. No former attorney-client relationship as between the Applicant and the OAG has been proven in this case. And, even so, or if some other fiduciary relationship exists, it is unclear what confidential information the OAG holds that would be detrimental to the Applicant if the OAG is allowed to represent the Respondents in this matter.

COURT'S INHERENT JURISDICTION - PUBLIC INTEREST

64. *Smith v Dean*, supra, is also instructive on the nature of the court's inherent jurisdiction to restrain the attorney from acting.

65. *At paragraph 28, Justice Adderley noted:*

> This jurisdiction is exceptionally used and does not necessarily rely on confidential information. The basis is that as part of the procedural law, Courts may exercise an authority over officers of the Court, including attorneys, as to the propriety of their behaviour to avoid prejudice to the proper. administration of justice. This principle of law has been stated in decisions in various common law jurisdictions including New Zealand, Australia and Canada, as well as in England post Bolkiah in the court of appeal in *Geveran Trading Co Ltd v Skjevesland* [2003] 1 ALL E.R. 1. ("Geveran") approved in the judgment of Isaacs, J. in *Ruth Thackray v Charles Craig Thackray No. 2006/FAM/DIV/00158 delivered 31 March 2008*. In Geveran it was impliedly approved that to invoke this jurisdiction it is sufficient if there is a reasonable lay apprehension that unfairness will result if an attorney were allowed to continue. Lord Justice Arden in delivering the judgment for the Court at 12 para. 42 stated:
>
> "...The judge has to consider the facts of the particular case with care (see the words of Lord Steyn in. *[Man O'War Station Ltd v Auckland City Council* (formerly Walheke CC) [2002] U.K.P.C. 28]...However, it is not necessary for a party objecting to an advocate to show that unfairness will actually result. We accept Mr. Jones' submission that it may be difficult for the party objecting to do so. In many cases it will be sufficient that there is a reasonable lay apprehension that this is the case because as Lord Hewart CJ memorably said in RvSussex, ex p McCartne [1923] All E.R. Rep 233, it is important that justice should not only be done, but seen to be done...."

66. The Applicant submits that this matter is in the public interest and is of public importance because "the public must be assured that communication between them and their attorney is protected and not disclose [sic] to their detriment." It is further submitted that the present involvement of the Third Respondent can give as against Mr. Murphy the perception that the prior allegations advanced by Mr. Munroe where [sic] in fact true, as his Counsels have abandon [sic] him and/or the defence of his appointment. Additionally, it is said that the Applicant "is not comfortable with the Third Respondents representing the 1st and 2nd Respondents having regard to the prior action."

67. It seems to me that this ground is misconceived. While the court's supervisory jurisdiction is invoked to prevent unwarranted disclosure of information garnered by an officer of the court, i.e. an attorney, via an attorney- client relationship, there has to be a basis for the court's intervention. It goes without saying that the attorney has certain duties in relation to confidential information. The court's very affirmation of that may serve to assure the public that the "communication between them and their attorney is protected." However, for a court to take the step being sought in a particular instance which would result in the deprivation of a party of its choice of counsel, an Applicant must show a breach, or likely breach, of that duty. An applicant must show (1) that the duty is owed to him by virtue of a fiduciary

relationship with the attorney and (2) the risk of a breach. That has not been demonstrated here. It seems to me that it is also in the public interest for the public to be assured that their choice of counsel will not be interfered with without good cause.

68. As far as public perception is concerned, it is trite law that judicial review tests the legality of the decision-making process and not the merits of the decision. I accept the Respondents' submission that the OAG is mandated to represent officers of the Crown. As is demonstrated by the background to this application, that representation pays no regard to the actual person holding office or to a particular decision. The mandate is to represent the title holder of officer of the Crown. The argument that to allow the OAG to represent the current Minister (who, in a previous life, had carriage of the 2019 matter and who is now being sued in his public capacity by the Applicant) would give the impression that his private life utterances have merit and that the AG (who is also being sued by the Applicant), has abandoned him in favour of the Minister, is fanciful.

69. Although the Applicant may hold feelings of discomfort, the suggestion of public perception is tenuous and, in any event, is not a sufficient ground to move this Court to exercise its supervisory jurisdiction. The submission is unpersuasive. It is generally public knowledge that the OAG represents officers of the Crown. The mere representation of public officers cannot be elevated to approval or agreement with statements not attributable to the OAG. This would similarly be so in private practice where it is unlikely that the attorney's approval would be inferred if a client were to make utterances not issued by his attorney. The weakness in the argument is also shown in the facts presented to this court. In the 2019 suit, a decision was made by a public body in favour of Mr. Murphy. In 2021, a decision was made by public officers to revisit that decision. On each occasion, the OAG represented the bodies who made the decisions in question.

70. As it relates to the administration of justice, it is an interesting proposition that the Office of the Attorney General ought not to represent the Attorney General. It is not a proposition that this Court will yield to.

71. That the Respondents have the public purse at their disposal and can engage other competent counsel is no justification for barring the OAG from representing the Respondents.

72. In the premises, I am not convinced that this Applicant meets the threshold to qualify for intervention by the Court in the manner sought.

73. Lastly, the Applicant submits that he needs access to certain pleadings and that the Third Respondent should be compelled to provide any and all reasonable facility to the Claimant. It seems to me that such matters can be addressed by way of regular interlocutory applications regarding discovery, if appropriate, and in the

process of case management exercises. Similarly, any specific issues concerning disclosure of confidential or privileged information as evidence in this suit can be addressed in the usual manner by injunctive relief in accordance with the general law of confidentiality. There is no reason advanced to me that persuades me that this is a fit or proper case for a court to restrain the Attorney General from acting for the Respondents in this matter.

CONCLUSION

74. It is my opinion that this case does not rise to the category of cases requiring intervention by the court. In the first instance, there is no evidence of an attorney-client relationship either past or present. The Applicant has not demonstrated that the OAG acted for him in the 2019 matter. When action was taken by the OAG in the 2019 matter, it was to defend Officers of the Crown in the decision to appoint the Applicant. It was not a representation of the Applicant as the Applicant had not been sued or named as a party.

75. Secondly, I am not convinced that there was a true fiduciary relationship. The 2019 suit was, for all intents and purposes, against the Applicant's employer. I ask myself whether it would be reasonable to estop an employer's lawyers from representing the employer in a suit against them because the employer is now being sued by a former employee who had been required, by virtue of his position, to provide information to the employer's lawyer in relation to a previous suit. To do so, in the absence of compelling reasons, would be setting a dangerous precedent and it is not a route conducive to the administration of justice, in my opinion.

76. The Applicant properly assisted the OAG in instructions for their defence of the 2019 suit. Thirdly, even if the Applicant were said to be the beneficiary of a fiduciary relationship with the OAG by virtue of that assistance, what is not before me is the nature of confidential information that the OAG or First Respondent would have obtained from the Applicant such that the OAG should now be estopped from representing the Respondents in the suit that the Applicant has brought against them.

77. In the circumstances, the Application is dismissed.

COSTS

78. Costs in the cause.

ORDER

79. The order and directions of this Court are as follow:

i. The Application to prohibit and/or bar the Office of The Attorney General from representing and/or giving legal advice to the First, Second and Third Respondent is dismissed.

ii. The Application to prohibit and/or bar the Office of The Attorney General from communicating with the attorneys in the Office of The Attorney General with respect to this matter is dismissed.

iii. The Application to prohibit and/or bar the First Respondent, Second Respondent and Third Respondent from sharing information and/or exchanging documents with the Attorneys in the Office of the Attorney General with respect to this matter is dismissed.

iv. Costs in the cause.

Dated this 13th Day March 2024

Carla D. Card-Stubbs J