

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

GRENADA

GDAHCVAP2021/0024

BETWEEN:

AUGUSTINE PASCALL

Appellant

and

PUBLIC SERVICE COMMISSION

Respondent

Before:

The Hon. Mde. Vicki-Ann Ellis
The Hon. Mr. Paul Webster
The Hon. Mr. Gerard St. C. Farara

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Dr. Francis Alexis, KC with him Ms. Olabisi Clouden for the Appellant.
Ms. Karen Samuel for the Respondent.

2023: July 5;
2024: May 22.

Civil appeal – Ethics and advocacy – Legal practitioners – Application to restrain an attorney from acting for a client – Court’s supervisory role – Power of the court to restrain a legal practitioner from acting for a party to litigation – The court’s inherent jurisdiction to supervise its officers and to protect the administration of justice – Exceptional jurisdiction – Test – Perception of the fair-minded and reasonably informed member of the public – Perception of a real risk that the administration of justice would be adversely affected – Whether the judge erred in the exercise of her discretion by restraining counsel from acting for the appellant in the lower court proceedings – Whether a conflict of interest arises outside of the legal practitioner-client relationship – Confidentiality – Whether the duty of confidentiality extended beyond the legal practitioner-client relationship – Whether there was a real risk of misuse of the confidential information obtained by a legal practitioner who served as

chairman of the PSC – Whether the judge failed to determine whether any other lawyer in the firm could have represented Mr. Pascall

Mr. Augustine Pascall (“the appellant” or “Mr. Pascall”) filed a fixed date claim for judicial review against the Public Service Commission (the “PSC” or “the respondent”) seeking an order of certiorari to quash the decision made on 28th September 2020 terminating his acting appointment as Technical Officer in the Ministry of Tourism and Civil Aviation (“the Ministry”), a position he acted in for over 9 years. Mr. Pascall also sought an order of mandamus directing the PSC to confirm his appointment as Technical Officer. The PSC contended that the substantive post of Technical Officer was held by Mr. Francis Robertson (“Mr. Robertson”) and thus the post was not vacant to enable Mr. Pascall to be confirmed in that post.

By notice of application filed on 18th June 2021, the PSC sought an order that the Law Firm of Derick F. Sylvester & Associates be recused as legal practitioners for Mr. Pascall (“the Application”). The Application was premised on the ground that Mr. Derick F. Sylvester (“Mr. Sylvester”), attorney-at-law and principal of the Law Firm of Derick F. Sylvester & Associates, held the position of chairman of the PSC during the years 2013 to 2018.

The PSC contended that between 2013 and 2018, Mr. Sylvester would have had unrestricted access to PSC’s files and would have participated in decisions affecting the matter in dispute. They further argued that the proceedings of the PSC were confidential and that Mr. Sylvester’s first-hand knowledge of matters pertaining to the claim would have an impact on the manner in which the claim would have been prosecuted on Mr. Pascall’s behalf, thereby giving him an unfair advantage. The PSC also submitted that there was a risk that the administration of justice would be adversely affected as justice may not appear to be done if Mr. Sylvester and his firm were allowed to continue to represent Mr. Pascall.

In a written judgment dated 24th August 2021, the learned judge granted the Application and ordered that the Law Firm of Derick F. Sylvester & Associates, be recused as legal practitioners for Mr. Pascall. The judge found that a reasonable and fair-minded person, informed of all the relevant facts, would form the view that the proper administration of justice requires that the law firm of Derick F. Sylvester & Associates be restrained from acting. The judge determined that Mr. Derick Sylvester, having served as chairman of the PSC, and having been integrally involved in the decisions and deliberations which affected the substantive post-holder and went to the core of the PSC defence that the post was not vacant, was required to preserve the confidentiality of such deliberations and information of the PSC acquired during his tenure as chairman.

Being dissatisfied with the judge’s ruling, the appellant appealed. The appellant filed 10 grounds of appeal. Under grounds 1 and 2 the appellant contended that the judge erred in failing to give any or any sufficient consideration to the fact that the respondent was obliged, in law, to voluntarily disclose to the appellant the information requested by the appellant because of the duty of candour which arises in judicial review proceedings. Grounds 3-6 centred on the obligation of confidentiality. The appellant contended that the judge failed to hold that no confidential information arose or may arise in the judicial review proceedings. He further submitted that the judge failed to appreciate that the rationale for the respondent

reverting the appellant to his substantive post is not confidential. In grounds 7-8, the appellant contended that the judge failed to consider that Mr. Sylvester had no involvement in the deliberation or decision to appoint the appellant to act in the higher office or to revert him to his substantive office and the judge failed to acknowledge that no question of considering the deliberations of the respondent arise or may arise in the judicial review proceedings. Ground 9 alleged that the judge erred in applying the principles of bias when it was clear that Mr. Sylvester was not a decision maker in the judicial review proceedings. Finally, ground 10 contended that the judge erred by failing to give sufficient consideration to whether any lawyer in the law firm of Derick F. Sylvester & Associates other than Mr. Sylvester might properly have carriage of the judicial review proceedings.

Held: dismissing the appeal, affirming the judgment of the judge in the court below, discharging the stay of execution granted on 6th April 2022 and continued on 20th February 2023 by this Court, and ordering that the appellant pay the respondent's costs of the appeal to be assessed, if not agreed by the parties within 21 days of this judgment, that:

1. The court has an inherent jurisdiction to restrain an attorney from representing a litigant in order to protect the integrity of its processes and the administration of justice. In the exercise of this jurisdiction, it is the duty of the court to ensure that justice is not only done but that it is seen to be done. The power to exercise this inherent jurisdiction enables the court to preserve public confidence in the judicial system and derives from the court's supervisory jurisdiction over its officers. The power is an exceptional one and consequently, judicial restraint is imperative as litigants should not be deprived of their choice of representation without good cause.

Honourable Guy Joseph v The Constituency Boundaries Commission et al SLUHCVAP2015/0013 (delivered 6th April 2016, unreported) followed; **Holborow and Others v MacDonald Rudder** [2002] WASC 265 applied; **Kallinicos and Another v Hunt and Others** [2005] NSWSC 1181 applied; **Premier Capital (China) Ltd v Sandhurst Trustees Ltd** [2012] VSC 611 applied.

2. Where it is necessary for a court to intervene to restrain an attorney, the power of the court will be exercised where a fair-minded and reasonably informed member of the public would conclude that the proper administration of justice requires that the attorney be prevented from acting for a client. The test is an objective one based on what the general public could expect of the administration of justice. As the determination of whether or not an attorney should be restrained involves an exercise of judicial discretion, an appellate court would not intervene unless the trial judge's decision exceeded the general ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong. On the facts, the learned judge correctly identified the test and there was no error on her part in this regard.

Honourable Guy Joseph v The Constituency Boundaries Commission et al SLUHCVAP2015/0013 (delivered 6th April 2016, unreported) followed; **Dufour and Others v Helenair Corporation Ltd and Others** (1996) 52 WIR 188 followed.

3. In the appeal, the appellant contended that the judge failed to give sufficient consideration to the fact that the PSC was obliged to voluntarily disclose the information requested by the appellant owing to the duty of candour falling on public authorities in judicial review proceedings. However, contrary to the appellant's assertions, the judge's reasons demonstrate an acceptance that the PSC had a duty of candour in the proceedings. The judge nevertheless had to consider whether the PSC's duty negated the attorney's obligations such that a court should not restrain the attorney from acting. Ultimately, the judge concluded that it did not, and the Court found that she did not err in this regard. The fact that the PSC has a duty of candour would not mean that the information gleaned by Mr. Sylvester in his role as chairman was not confidential. It was therefore no answer to a restraint application to suggest that the applicant was required to disclose information to the court in any event. The judge therefore did not err in her reasoning and grounds 1 and 2 of the appeal were dismissed.

Spector v Ageda [1973] Ch 30 considered; **R v Lancashire County Council ex p Huddleston** [1986] 2 All E.R. 941 considered.

4. It is well-established that an attorney owes a duty of confidentiality to his clients and ought to avoid situations which conflict with this duty. The principle of avoiding this conflict of duty is broader than the attorney-client relationship and protects quasi-clients or indeed any person who gave information to an attorney which was capable of being used to the giver's detriment. Once a relationship of trust and confidence is established an attorney can be restrained so as to protect confidential information given in trust. A court will only restrain an attorney if a reasonable observer, informed of the facts might reasonably anticipate a danger of misuse of confidential information and there is a real and sensible possibility that the interest of the lawyer in advancing the case might conflict with that lawyer's duty to keep that information confidential. This risk must be a real one and not merely fanciful. On the facts, it was evident that the judge was fully seised of these basic principles, and it was entirely appropriate for her to apply these principles to the factual context which obtained in the appeal.

Mytton's Ltd v Phillips Fox (a firm) (delivered 23rd September 1997, unreported, Supreme Court of Victoria) applied; **Macquarie Bank Ltd v Myer and others; Toycorp Ltd (Receivers and Managers Appointed) v Myer and others** [1994] VR 350 applied; **Prince Jefri Bolkiah v KPMG (a firm)** [1999] 2 AC 222 applied.

5. It is a necessary precursor to invoking the **Bolkiah** jurisdiction to establish that an attorney had been in possession of information confidential to the applicant and that the applicant had not consented to its disclosure. The burden is on the applicant to identify the confidential information and to prove, on a balance of probabilities, that the attorney was in possession of same and was intending to represent a client with an adverse interest in a matter to which the information might be relevant. Once established, the burden then shifts to the attorney to prove the existence of effective measures to ensure there was no risk of disclosure or misuse of the confidential information. On the facts, it was not disputed that Mr. Sylvester would have presided

over meetings in which matters concerning the substantive post and the post-holder Mr. Robertson, would have been discussed. The judge was satisfied that although the public decisions of the PSC were not confidential, the internal deliberations were. She was further satisfied that the internal and undisclosed deliberations of the PSC relative to the post of Technical Officer would have constituted the confidential information at risk of being misused. This confidential information would have been relevant to matters in dispute in the proceedings and would have been communicated to Mr. Sylvester during his tenure as chairman. The judge was correct to find that the appellant failed to show that there was no real risk of misuse of the confidential information. The Court therefore found that there was no error on the judge's part in her reasoning and there was no basis upon which the Court could interfere.

Prince Jefri Bolkiah v KPMG (a firm) [1999] 2 AC 222 applied; **Re A Firm of Solicitors** [1997] Ch 1 applied.

6. Where an application seeking to restrain an attorney concerns a former client or otherwise, it is clear that there must be a connection between the two underlying matters. They must be the same or closely related. Moreover, the parties' interests must be adverse to each other before a court can exercise its jurisdiction to restrain an attorney. On the facts, in the proceedings below, Mr. Sylvester now acted for Mr. Pascall, a client with interests adverse to the PSC, a commission in which he served as chairman. Whilst there was no evidence that Mr. Sylvester had any direct dealings with decisions affecting Mr. Pascall, there is evidence which reflected his dealing with matters concerning the substantive post holder. The judge therefore was correct to isolate the critical issue arising from the parties' opposing pleadings (that is, the availability of the post) and the judge was also correct to hold that PSC's deliberations during the material period relative to the substantive post, would be materially connected to an important issue in the proceedings. The judge therefore did not err and grounds 7 – 8 of the appeal were dismissed.

Re A Firm of Solicitors [1997] Ch 1 applied; **Marks & Spencer plc v Freshfields Bruckhaus Deringer** [2004] 3 All E.R. 773 applied; **Boyce t/as Hunt And Hunt Lawyers v Goodyear Australia Ltd.** [1996] NSWCA 63 applied.

7. As to the appellant's argument under ground 9 that the judge erred in applying the principles regarding the rule against bias to Mr. Sylvester, there was never any suggestion either by the PSC or the judge that Mr. Sylvester was the decision maker in the claim. The question of bias therefore had no relevance in deciding whether or not an attorney should be restrained from acting for a client. At its highest, the judge's comments at paragraph 40 of her judgment were no more than a cautionary commentary about the potential degree of reputational harm to the PSC, if its former chairman was perceived as being capable of using knowledge gained in his capacity as chairman to later advance his client's case. In this light, the judge's observation did not carry the import ascribed by the appellant and ground 9 of the appeal was dismissed.

8. Unless satisfied on the basis of cogent evidence that reasonable measures have been taken to ensure that no disclosure of a client's confidential information will occur, a court will restrain a lawyer from so acting. On the facts, there was no cogent evidence put before the judge below by the appellant that any other attorney could have had carriage of the matter and that sufficient measures were in place to ensure no disclosure of the client's confidential information. It was for the appellant to put this evidence before the judge and this was not done. Having not advanced any evidence or submissions on the issue in the court below, the Court was of the view that ground 10 of the appeal should also fail.

Davies v Clough (1837) 8 Sim 262 considered; **Supasave Retail Ltd v Coward Chance (a firm)**; **David Lee & Co (Lincoln) Ltd v Coward Chance (a firm)** [1991] Ch 259 considered; **Prince Jefri Bolkiah v KPMG (a firm)** [1999] 2 AC 222 considered; **Re A Firm of Solicitors** [1992] QB 959 considered; **MacDonald Estate v Martin** [1990] 3 SCR 1235 considered.

JUDGMENT

- [1] **Ellis JA:** Before the Court was an appeal against the trial judge's decision to grant the respondent's application to recuse counsel for the appellant as acting for the appellant.

General Background

- [2] In the lower court, Mr. Augustine Pascall ("the appellant" or "Mr. Pascall") filed a fixed date claim for judicial review against the Public Service Commission ("PSC" or "the respondent") seeking an order of certiorari to quash the decision made on 28th September 2020 terminating his acting appointment as Technical Officer in the Ministry of Tourism and Civil Aviation ("the Ministry"), a position he acted in for over 9 years. Mr. Pascall also sought an order of mandamus directing the PSC to confirm his appointment as Technical Officer. The PSC contends that the substantive post of Technical Officer was held by Mr. Francis Robertson ("Mr. Robertson") and thus the post was not vacant to enable Mr. Pascall to be confirmed in that post.
- [3] By notice of application filed on 18th June 2021, the PSC sought an order that the Law Firm of Derick F. Sylvester & Associates be recused as legal practitioners for Mr. Pascall ("the Application"). The Application was premised on the ground that Mr. Derick F. Sylvester ("Mr. Sylvester"), attorney-at-law and principal of Derick F.

Sylvester & Associates, held the position of chairman of the PSC during the years 2013 to 2018.

- [4] The PSC contended that between 2013 and 2018, Mr. Sylvester would have had unrestricted access to PSC's files and would have participated in decisions affecting the matter in dispute. They further argued that the proceedings of the PSC were confidential and that Mr. Sylvester's first-hand knowledge of matters pertaining to the claim would have an impact on the manner in which the claim would have been prosecuted on Mr. Pascall's behalf, thereby giving him an unfair advantage. The PSC also submitted that there was a risk that the administration of justice would be adversely affected, as justice may not appear to be done if Mr. Sylvester and his firm were allowed to continue to represent Mr. Pascall.
- [5] In a written judgment dated 24th August 2021, the learned judge granted the Application and made the following orders:
- “(1) The application for the Law Firm, Derick F. Sylvester and Associates, be recused as legal practitioners for the claimant [Mr. Pascall] is granted.
 - (2) The Law Firm Derick F. Sylvester & Associates, is hereby restrained from further acting and is hereby removed from the record as the Legal Practitioners for the claimant, Augustine Pascall, in these proceedings.
 - (3) The Law Firm, Derick F. Sylvester & Associates, shall pay costs to the Applicant, Public Service Commission, in the sum of \$750.00 within twenty-one (21) days of today's date.
 - (4) The matter shall be listed for further hearing and to enable the claimant to retain new counsel on a date to be arranged and notified by the court office.”
- [6] The judge found that the minutes of the PSC meetings showed that Mr. Sylvester, as chairman, had deliberated and made decisions on issues pertaining to Mr. Robertson (the substantive post-holder), including his transfer, terms and conditions of his transfer, and emolument of the substantive post in dispute. The judge also found that Mr. Sylvester's firm, in their request for information to the PSC, requested precise information on the substantive post holder. She found that this would have

been information Mr. Sylvester would have deliberated upon and which would now be relevant to Mr. Pascall's case. Whilst accepting that: (i) the PSC had a duty of candour to the court; (ii) the information requested by Mr. Sylvester was relevant information which the PSC should have placed before the court; and (iii) there was no evidence that Mr. Sylvester made any decisions in relation to Mr. Pascall; the judge found that the deliberations in relation to Mr. Robertson went to the core of PSC's defence that the post was not vacant and Mr. Sylvester, as chairman, was required to preserve the confidentiality of all information and deliberations obtained during his tenure from 2013-2018.

[7] The judge held that there was compelling evidence to restrain Mr. Sylvester from continuing to represent Mr. Pascall since, as former chairman of the PSC, he was privy to confidential information in the decision-making process and had acquired personal knowledge of the substantive post of Technical Officer, now in dispute. Although the judge acknowledged that PSC decisions were public, she ruled that the deliberations and rationale leading to final decisions were not. The learned judge found that a reasonable, fair-minded person, sitting in court and informed of all the relevant facts, would form a view that there was reasonable suspicion that Mr. Sylvester, as former PSC chairman, having full knowledge as to whether or not the post of Technical Officer was vacant and being integrally involved in decisions affecting the substantive post-holder, could use such information to advance his client's claim against the PSC.

[8] Being dissatisfied with the judge's decision, the appellant sought leave to appeal by application filed on 7th September 2021. The appellant, by application filed on 20th September 2021, also sought a stay of execution of the judgment pending the determination of the appeal. On 6th April 2022, both applications came on for hearing before the Court of Appeal. The Court granted the stay of execution and also determined that leave to appeal was not required in accordance with section 33(2)(g)(ii) of the **West Indies Associated States (Supreme Court) (Grenada)**

Act.¹ By order dated 20th February 2023, the Court of Appeal further deemed the application for leave to appeal as the notice of appeal.

The jurisdiction of a court in restraint applications

- [9] In the court below, the PSC sought an order that the law firm of Derick F. Sylvester & Associates be recused as legal practitioners for the appellant, Mr. Pascall. Although the wording of the order sought is unfortunate, it is clear that the respondent was actually seeking to have the court restrain the law firm of Derick F. Sylvester & Associates from acting as counsel for the appellant in the underlying legal proceedings. When faced with an application seeking to restrain a legal practitioner from acting for a client, a court must first consider the jurisdictional basis for the exercise of its power and secondly, the principles of law which condition the discharge of the court's power.
- [10] In regard to the former, there can be no doubt that the power of a court to restrain a legal practitioner from acting for their client in the interests of protecting the integrity of the judicial process and the due administration of justice, is regarded as an exceptional one. This 'power' derives from the court's supervisory jurisdiction over its officers and is premised on wide ranging duties owed by legal practitioners under the common law and under statute.²
- [11] A legal practitioner's status as an officer of the court serves to distinguish a lawyer from the ordinary fiduciary. This distinction is reflected in the importance courts attach to the legal profession's propriety. High standards of propriety enhance public confidence in the administration of justice. The public derives, in part, its confidence in the administration of justice from proper fulfilment of these duties and it is for this reason that courts have required high standards of propriety from a lawyer. The following passage in the judgment of Lord Hope of Craighead in the case of **Arthur**

¹ Cap. 336 of the Laws of Grenada.

² See the Legal Profession Act ("the LPA") Chap. 167A of the Laws of Grenada and the Legal Profession Code of Ethics (Third Schedule to the LPA).

J S Hall & Co (a firm) v Simons; Barratt v Ansell (trading as Woolf Seddon (a firm)); Harris v Scholfield Roberts & Hill (a firm) is instructive:³

“But it remains the case that duty [sic] which the advocate undertakes to his client when he accepts the client’s instructions is one in which both the court and the public have an interest. While the advocate owes a duty to his client, he is also under a duty to assist the administration of justice. The measure of his duty to his client is that which applies in every case where a departure from ordinary professional practice is alleged. His duty in the conduct of his professional duties is to do that which an advocate of ordinary skill would have done if he had been acting with ordinary care. On the other hand his duty to the court and to the public requires that he must be free, in the conduct of his client’s case at all times, to exercise his independent judgment as to what is required to serve the interests of justice.”

[12] These tenets have been wholly applied by the Court of Appeal most recently in its judgment in **Honourable Guy Joseph v The Constituency Boundaries Commission et al**⁴ where at paragraphs 13, 14 and 16, Thom JA observed:

“[13] ...It is common ground that the court has an inherent jurisdiction to restrain an attorney from representing a litigant in order to protect the interest of the administration of justice....”

“[14] The court has an inherent jurisdiction to protect the integrity of its processes and the administration of justice from the breach of this duty by attorneys. In the exercise of this jurisdiction the court may restrain an attorney from appearing for a client in a matter....”

“[16] This inherent jurisdiction enables the court to preserve public confidence in the judicial system. In the exercise of this jurisdiction it is the duty of the court to ensure not only that justice is done but as is often said that justice should be manifestly and undoubtedly be seen to be done. As the Ontario Full Court of Canada puts it in *Everingham v Ontario*: ‘The public interest in the administration of justice requires an unqualified perception of its fairness in the eyes of the general public’.”

[13] Applying the Australian authorities of **Holborow and Others v MacDonald Rudder**⁵ and **Kallinicos and Another v Hunt and Others**,⁶ the nature of the court’s

³ [2002] 1 AC 615 at 726.

⁴ SLUHCVP2015/0013 (delivered 6th April 2016, unreported).

⁵ [2002] WASC 265.

⁶ [2005] NSWSC 1181.

jurisdiction was summarized in the headnote of the Court of Appeal's decision in **Guy Joseph** in the following terms:

"The court always has an inherent jurisdiction to restrain solicitors from acting in a particular case, as an incident of its inherent jurisdiction over its officers and to control its process in aid of the administration of justice. If there are circumstances which are likely to imperil the discharge of these duties to a court by a legal practitioner acting in a cause, whether because of some prior association with one or more of the parties against whom the practitioner is then to act, or because of some conduct by the practitioner, whether arising from associations with the client or a close interest which gives rise to the fair and reasonable perception that the practitioner may not exercise the necessary independent judgment, a court may conclude that the lawyer should be restrained from acting, even for a client who desires to continue his service."

- [14] Case law has repeatedly emphasised the exceptional nature of this power and the need for the court to approach applications seeking to invoke their supervisory jurisdiction with caution, giving due regard to the public interest in a party not being deprived of the lawyer of their choice without due cause. The basis for the judicial restraint which must be applied in exercising this supervisory jurisdiction was noted by Pagone J in **Premier Capital (China) Ltd v Sandhurst Trustees Ltd**:⁷

"Care must be taken to ensure that applications for removal of practitioners do not become a means by which opposing parties obtain forensic advantages which detract from, rather than advance, the policy for which the jurisdiction is properly to be exercised. It is, therefore, essential that an injunction to restrain a practitioner from acting on behalf of a client be firmly based upon the need for that to occur in the administration of justice."

- [15] It follows that, whilst litigants should not be deprived of their choice of representation without good cause, the public's interest in the administration of justice and the need to ensure that the public's confidence in the legal profession is not undermined may override that right of legal representation and compel a court to intervene. Where it becomes necessary to so intervene, the power of the court will be exercised where a fair minded reasonably informed member of the public would conclude that the proper administration of justice requires that the legal practitioner be prevented from acting for a client.

⁷ [2012] VSC 611 at para. [2].

[16] The test is an objective one based on what the general public could expect of the administration of justice. The Court of Appeal in **Guy Joseph** confirmed this at paragraph [57] when it made clear that the test to be applied in the exercise of the court's inherent jurisdiction is the test outlined in the case of **Kallinicos v Hunt** and noted at paragraph 2 of the headnote:

"The test to be applied in this inherent jurisdiction is whether a fair minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice. The jurisdiction is to be regarded as exceptional and is to be exercised with caution. Due weight should be given to the public interest in a litigant not being deprived of the lawyer of his or her choice without due cause."

[17] I am satisfied that the learned judge in her reasoning correctly identified this test as the relevant one to be applied. At paragraphs 16 and 17 of the judgment, she noted:

"The test to be applied whether a legal practitioner should be refrained from acting was restated by Thom JA in the Court of Appeal decision in *Honourable Guy Joseph v The Constituency Boundaries Commission et al* above. The test is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice.

The question is whether, having regard to the relationship existing between Mr Derick Sylvester as legal practitioner for the claimant and as former chairman of the PSC, there is a real and appreciable risk that the fair-minded and reasonably informed member of the public would conclude that Mr Derick Sylvester and/or his firm should be restrained from continuing to act in the interest of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice."

[18] The appellant herein contends that the learned judge, in applying the test in the exercise of the court's jurisdiction, misdirected herself in several respects and he submits that this Court must consequently act to set aside the learned judge's decision. I remind myself that in this case, the court's inherent jurisdiction is discretionary. The learned judge, having exercised her discretion, it is settled law

that an appellate court will not lightly interfere with the exercise of a judge's discretion and will not substitute its own discretion in place of the discretion already exercised by the judge merely because they would have exercised the original discretion differently.

- [19] The principles which guide appellate interference in appeals such as this have been restated countless times in various decisions of this Court, most notably in **Dufour and Others v Helenair Corporation Ltd and Others**⁸ where it was stated:

“Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.”

- [20] The onus is therefore on the appellant to show that the learned judge erred in the exercise of her discretion.

Court's analysis

- [21] Turning now to the appellant's grounds of appeal, I note that there are 10 grounds of appeal outlined as follows:

“(1) The learned trial judge erred in law in failing to give any, or any sufficient, consideration to the fact that the respondent/defendant was obliged in law to voluntarily disclose to the applicant/claimant the information requested by the applicant/claimant because of the duty of candor falling upon the respondent/defendant applicable to judicial review proceedings.

(2) The learned trial judge erred in law in failing properly, or at all, to acknowledge that the rationale for the respondent/defendant reverting the applicant/claimant to his substantive office in the public service of Grenada after he had acted continuously in a higher office in the public service of Grenada for some nine (9) years, is to be disclosed by the respondent/defendant under the said duty of candor and is a matter over which the court trying the substantive matter has jurisdiction.

⁸ (1996) 52 WIR 188.

(3) The learned trial judge erred in law in failing to hold that no confidential information arises, or may arise, in the substantive matter.

(4) The learned trial judge erred in failing to hold that the respondent/defendant did not show what information was being urged by the respondent/defendant as being confidential.

(5) The learned judge erred in law in failing to distinguish between the deliberations of the respondent/defendant being confidential and the fact that the applicant/claimant being reverted to his substantive office is not confidential but rather is a matter over which the court trying the substantive matter has jurisdiction.

(6) The learned trial judge erred in law in failing to appreciate properly, or at all, that the rationale for the respondent/defendant's reverting the applicant/claimant to his substantive office in the relevant circumstances is not confidential.

(7) The learned trial judge erred in law in failing to give any, or any sufficient, consideration to the circumstance that Derick F. Sylvester had no involvement at all in any deliberation or decision of the respondent/defendant about appointing the applicant/claimant to act in the higher office or to revert him to his substantive office.

(8) The learned trial judge erred in law in failing properly, or at all, to acknowledge that no question of considering the deliberations of the respondent/defendant arises or may arise in the substantive matter.

(9) The learned trial judge erred in law in applying principles regarding the rule against bias to Derick F. Sylvester since Derick F. Sylvester is no decision maker in the substantive matter.

(10) The learned trial judge erred in law in failing to give any, or any sufficient, consideration to the matter whether any lawyer in the Law Firm of Derick F. Sylvester & Associates other than Derick F. Sylvester might properly have carriage of the substantive matter."

[22] The issues which arise from the appellant's grounds of appeal concern the proper discharge of the judge's power to restrain counsel for the appellant from acting as counsel in the proceedings below.

[23] In my judgment, these issues can only be properly considered and determined once the factual and legal context are accurately articulated and fully appreciated.

- (a) The respondent is a body established by section 83 of the **Constitution of Grenada**⁹ (the “**Constitution**”) and empowered to appoint persons to hold or act in offices in the public service (including the power to confirm appointments), the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office.
- (b) Derick Sylvester is a legal practitioner admitted to practise in Grenada and is the principal of the law firm Derick F. Sylvester & Associates. Mr. Sylvester held the post of chairman of the PSC during the years 2013 – 2018.
- (c) With effect from 21st October 2011, the PSC appointed Mr. Pascall to act in the office of Technical Officer at the Ministry.
- (d) By letter dated 28th September 2020, the PSC informed Mr. Pascall that, effective 9th October 2020, his acting appointment would be terminated, and he would be reverted to his substantive office.
- (e) Mr. Pascall then instructed Derick F. Sylvester & Associates to write to the PSC on 14th October 2020, requesting that he be confirmed in the higher office within 28 days of the receipt of the letter.
- (f) On 12th February 2021, Mr. Pascall, by his lawyers, filed a fixed date claim against the PSC seeking judicial review of the PSC’s decision to revert him to his substantive office after his continuous acting in the higher office for almost nine (9) years.
- (g) In its defence filed on 31st March 2021, the PSC responded that “it did revert the Claimant to his substantive post upon and in anticipation of his retirement, as it was entitled to do...”. The PSC also said in paragraph 4 of its defence that “...the Claimant admittedly made

⁹ Schedule to the Grenada Constitution Act Chap. 128A of the Laws of Grenada.

requests for promotion, but owing to the lack of any vacancy, no such appointment was forthcoming.”

(h) By letter dated 12th April 2021, Derick F. Sylvester & Associates made the following requests for information including “i. Whether there was any written communication to me that my appointment was acting and temporary and not intended to be substantive; and if so for the information to be provided to me; ii. Who was the substantive post holder and what were the full particulars of his alleged assignment including where assigned to, for how long, on what terms, when was he due to return and when did he in fact return; iii. When is the substantive post holder due to retire; iv. Details as to my pension and NIS benefits in the position that I was reverted to (Grade F) and the benefits that I would have obtained had I been confirmed in the substantive post; and v. Whether my appointed position as Statistical Officer remained vacant or was filled after I was made to act in the post of Technical Officer.”

(i) The PSC responded to the request for information in an answer which contained evidence of the decisions of the PSC taken in relation to Mr Robertson, the substantive holder of the post of Technical Officer. The answer included minutes of meetings of the PSC including:

“(i) 20th January 2014 - Transfer of Mr. Francis Robertson, Technical Officer, Ministry of Tourism to act in the office of Policy Development Officer, Cabinet Secretary, Office of Prime Minister with effect from 3rd February 2014.

(ii) 5th January 2015 - payment of salary at a higher point in Grade K to Mr. Francis Robertson, Policy Development Officer (Ag) - PSC rescinded decision of 20th January 2014 (above) and as a special case appointed Mr. Francis Robertson to act at a specified approved rate from 3rd February 2014 until further notice.

(iii) 4th September 2017 - Request for release of Mr. Francis Robertson to the OECS Tourism Competitiveness Project - PSC terminated the acting appointment of Mr.

Robertson Ministry in the Office of Policy Development, Cabinet Secretariat and reverted him to his substantive office of Technical Officer, Ministry of Tourism, Civil Aviation, Culture and Cooperatives from 31st August 2017. Mr. Robertson was released as Technical Officer to take up an assignment with the World Bank funded OECS Tourism Competitiveness Project with effect from 1st September, for a period of two years in the first instance.”

- (ii) In all these meetings Mr. Sylvester is recorded as the chairman of PSC.
- (iii) Both parties later filed witness statements in the substantive matter. The appellant filed a witness statement from Mr. Robertson.
- (iv) Counsel for the PSC, Ms. Samuel, wrote to Mr. Sylvester’s law firm in which she objected to his representing the appellant on the basis that he is in a position of conflict of interest arising out of his past tenure as chairman of the PSC from 2013 - 2018.
- (v) Mr. Sylvester replied to Ms. Samuel by email of 28th May 2021, saying that he had “no recollection of my interaction with this file.”
- (vi) Counsel for the PSC later responded to Mr. Sylvester by email saying that: “My understanding is that the conflict arises further to the request for information placed by you concerning the holder of the substantive post... Subsequent thereto, I note the service of a witness statement for him....It is my instructions that your duties involved interaction with the file of Mr. Robertson.”
- (vii) On 18th June 2021, the PSC filed the Application seeking to have Derick F. Sylvester & Associates removed as counsel for the appellant.

[24] The factual matrix here is not typical of such applications. The vast majority of the case law involving the power of the court to restrain a legal practitioner from acting

concern attempts to prevent a legal practitioner from acting against former clients. This is not the case here. In this matrix, the legal practitioner quite laudably served in the office of chairman of the PSC. In that capacity he would have headed a public body which was constitutionally vested with the power to appoint persons to hold or act in offices in the public service (including the power to confirm appointments), the power to exercise disciplinary control over persons holding or acting in such offices and the power to remove such persons from office and the power to grant leave. From all accounts, Mr. Sylvester would have served as a member of that august body between 2013 and 2018.

[25] In that capacity, Mr. Sylvester would not have acted as legal counsel for the PSC but rather as its chairman. This distinction is important because issues of jurisdiction and proper discharge of power to restraint are often determined by the nature of the conflict of interest which is at issue. In this case it is common ground between the parties that in the court below, Mr. Sylvester (the former chairman of the PSC) and his law firm now purport to represent the appellant in legal proceedings which he has brought against the PSC. In these proceedings, the appellant seeks an order of *certiorari* to quash the PSC's decision made on 28th September 2020 terminating his acting appointment as Technical Officer in the Ministry. The court below would therefore have had to contend with the question – whether a legal practitioner who previously held office in a constitutional body (in this case the PSC) is disqualified from acting in legal proceedings which involved that body?

[26] The appellant's position is categorical. While counsel for the appellant conceded that a court has an inherent jurisdiction to restrain a legal practitioner from continuing to act in proceedings, he submitted that it is wholly outrageous for the PSC to assert that Mr. Sylvester is in a position of conflict which may lead to a breach of ethics. First, counsel pointed out that the cases referenced by the judge were not on point because Mr. Sylvester never acted as a legal practitioner for the PSC.

- [27] Moreover, counsel submitted that the PSC's reliance on Rules 71 and 72 of the Grenada **Legal Profession Code of Ethics**¹⁰ (the "**Code of Ethics**") is misplaced because it cannot be said that Mr. Sylvester (in his capacity as chairman of the PSC) held a public office because under sections 111(1) and (2) of the Grenada **Constitution** the term "public office" is defined as an "any office of emolument in the public service." He further submitted that the expression "public employment" in Rule 72 can only mean the same thing as "public office" given in sections 83(3) and 111(1) and (2) of the Grenada **Constitution** because the **Code of Ethics** must be read in manner consistent with the **Constitution**.
- [28] Regarding the PSC's contention that while Mr. Sylvester was not in "employment" in the strict sense of the word, he was in service to the State of Grenada through his appointment as chairman of the PSC, counsel for the appellant submitted that the PSC cannot circumvent the terms "public office" and "public employment" used in Rules 71 and 72 of the **Code of Ethics** and substitute its own notion of "service to the state of Grenada". Counsel made equally short shrift of the PSC's submission that the PSC has a quasi-judicial function in order to fit the PSC into the provisions of Rule 72 of the **Code of Ethics**.
- [29] There can be no doubt that a legal practitioner who serves as a public official is required to avoid a conflict between the duty he owes to the public and his own interest or that of a client. Rule 71 of the **Code of Ethics** set out in the Third Schedule of the Grenada **Legal Profession Act**¹¹ (the "**LPA**") makes clear that a legal practitioner who holds public office shall not use his public position to influence, or attempt to influence, a tribunal to act in favour of himself or of a client. The **Code of Ethics** also prohibits a legal practitioner from accepting private employment in a matter upon the merits of which he previously acted in a judicial capacity, or for which he had any responsibility while he was in public employment.¹²

¹⁰ Third Schedule to the Legal Profession Act Chap. 167A of the Laws of Grenada.

¹¹ Chap. 167A of the Laws of Grenada.

¹² Rules 70 and 71 of the Legal Profession Code of Ethics – Third Schedule of the Legal Profession Act.

[30] In my view the appellant's arguments in this regard have little merit. First, the appellant's reliance on sections 111(1) and (2) is misplaced because these interpretation sections make clear that definitions only apply when the terms are referenced in the **Constitution**. Instead, I am satisfied that the usual principles of statutory interpretation which prescribe that the **Interpretation and General Provisions Act**¹³ (the "**Interpretation Act**") is the appropriate reference for determining the definition of specific words and expressions which are used in every written law, enacted, made or issued before the commencement of the **Interpretation Act** should be applied except where there is something in the subject or context repugnant to or inconsistent with such construction or interpretation.¹⁴

[31] Secondly, section 33(3) of the **LPA** makes it clear that as regards the rules which govern the professional practice of legal practitioners, the provisions of the **LPA** are not exhaustive.¹⁵ Rules 1(2) and (3) also provide as follows:

"(2) These Rules shall not be construed as a denial of the existence of other duties and rules of professional conduct, which are in keeping with the traditions of the legal profession, though not specifically mentioned herein.

(3) Where in any particular matter, explicit ethical guidance does not exist, an attorney-at-law shall determine his conduct, by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system, and the legal profession."

[32] While there may be a general dearth of judicial authorities in this area, there can be no doubt that a legal practitioner must decline to act where a potential conflict of interest or duty arises in whatever form that may manifest. I am satisfied that a legal practitioner must disqualify himself or herself and not participate in a matter or decline to accept a legal matter where the legal practitioner previously was

¹³ Chap. 153 of the Laws of Grenada.

¹⁴ Section 3 of the Interpretation and General Provisions Act Chap. 153 of the Laws of Grenada.

¹⁵ Section 33(3) of the LPA provides that – "Where no provision is made by the rules in respect of any matter, the rules and practice of the legal profession which before the commencement of this Act governed the particular matter, shall apply in so far as is practicable."

personally and substantially involved in the matter when holding a prior office. He must also decline to act where in his previous office he learned damaging confidential information about a person (who has interests adverse to the new client) that will be materially damaging to that person in the new matter or where his acting would involve the revelation of information that all legal practitioners are prohibited from disclosing.

[33] In my view it matters not whether the office which the legal practitioner held could be said to be a “public office” or a “constitutional office” or whether he was in “public employment”. In practical terms, when deciding whether a conflict exists that precludes representation in a matter a court must first examine whether the legal practitioner was personally or substantially involved in the same matter while he was an office holder. The court must next examine whether, as a former office holder, the legal practitioner learned confidential information that could be used to damage a person in the matter. If the answer to all these inquiries is “no,” the legal practitioner likely is free to represent the client. If however, the answer is yes, then the court should exercise its power to restrain the legal practitioner from acting in that litigation.

[34] Legal practitioners have a fiduciary obligation to avoid conflicts of duty. In my view the common law system of justice could not function without it because the public in part, derives its confidence in the administration of justice from the high standards of propriety required of its legal practitioners. Conflicts of duty pose a clear threat to these standards and the court has a very important role in this regard. That role was succinctly summarised by Lord Wright in **Myers v Elman**:¹⁶

“...the [c]ourt has a right and duty to supervise the conduct of its [lawyers], and visit with penalties any conduct of a [lawyer] which is of such a nature as to tend to defeat justice in the very cause in which he is engaged professionally....”

¹⁶ [1940] AC 282 at 319.

[35] It is uncontroversial that the members of the legal profession must diligently avoid all potential conflicts, however they may arise. What is also clear is that courts have made it plain that the principle of avoiding conflict of duty may be broader than the lawyer-client relationship so as to protect quasi-clients or indeed any person or entity from which the legal practitioner would have learned confidential information.¹⁷ Ultimately, the court must return to and apply the relevant test and consider whether there is a real and appreciable risk that a fair minded and reasonably informed member of the public would conclude that the proper administration of justice requires that the legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice.

[36] If there are circumstances where this test is satisfied whether because of some prior association with one or more of the parties against whom the legal practitioner is then to act, or because of some conduct by the legal practitioner, whether arising from associations with the client or other close interest, the court may properly conclude that the legal practitioner should be restrained from acting.

[37] In dealing with the appellant's grounds of appeal I have grouped and categorised them (although not *in seriatim*) for ease of disposal.

Grounds 7 to 8 - Direct Involvement or Close Connection

[38] It is also common ground between the parties that the decision in question on judicial review would have been taken after Mr. Sylvester would have demitted office and that he would not have had any direct dealings or involvement with any decisions affecting the appellant. At paragraph 32 of her judgment, the learned judge accepted this premise.

¹⁷ See *Mytton's Ltd v Phillips Fox* (a firm) (delivered 23rd September 1997, unreported, Supreme Court of Victoria) per Coldrey J. In *Re a Firm of Solicitors* [1992] QB 959 at 970, it was regarded as encompassing persons who might be regarded as 'informal or quasi-clients'.

“...It is accepted that there is no evidence of Mr. Sylvester making decisions in relation to the claimant, Mr. Pascall....”

- [39] In their submissions before this Court, the appellant has placed emphasis on this fact no doubt in support of his contention that it is impossible to conclude that a conflict could have arisen in these circumstances. The Court is therefore confronted with a question of whether there is a requirement on the one hand that the matters must be the ‘same’ (absent a requirement that they be ‘related’) or on the other hand, whether it is sufficient that the matters merely have ‘relevance’ to one another.
- [40] Ultimately, whether the application seeking to restrain a legal practitioner concerns a former client conflict or otherwise, it is clear that the matters which underlie the application must be the same or closely related and that the parties must have adverse interests.
- [41] In **Re A Firm of Solicitors**,¹⁸ a case which involved a former client relationship, Lightman J described the connecting factors as ‘acting against the interests’ of the other client and that the subject matter of each retainer must have ‘relevan[ce]’ to the other. In **Marks & Spencer plc v Freshfields Bruckhaus Deringer**,¹⁹ Lawrence Collins J in rejecting the argument that the dicta in **Prince Jefri Bolkiah v KPMG (a firm)**²⁰ should be read as limited to where the conflict related to the “same matter”, observed as follows:
- “I accept there must be some reasonable relationship between the two matters, but they do not, in my judgment, have to be the same.”
- [42] Indeed, this authority reinforces, the consistently held view that there must be a connection between the two underlying matters (they must be either the same or closely related); and that the parties’ interests must be adverse to each other, before a court should exercise its jurisdiction to restrain a lawyer from acting.

¹⁸ [1997] Ch 1 at pages 9 -10.

¹⁹ [2004] 3 All ER 773 at page 777.

²⁰ [1999] 2 AC 222 per Lord Millett.

- [43] In **Yunghanns v Elfic Pty Ltd**,²¹ a decision of the Supreme Court in Victoria, Australia, Gillard J observed that the earlier matters were ‘relevant to an essential background’ to the matter in which the firm was seeking to act.
- [44] It goes without saying that in the proceedings below, Mr. Sylvester now acts for the appellant, a client who has an obvious interest adverse to that of the PSC. However, counsel for the appellant has robustly reminded this Court that Mr. Sylvester never handled any file or participated in any discussion or was party to any decision concerning Mr. Pascall, and he reiterated the PSC’s evidence in this regard.²² Ultimately however, whether the matters are closely related will boil down to a question of fact and degree and will require a court to carefully examine the actual substance of the relationship and the issues which are at play.²³
- [45] At paragraph 32 of her judgment, the learned judge continued in the following terms:
- “However, the deliberations taken with respect to Mr. Francis Robertson go to the core of the PSC defence that the substantive post held by Mr. Robertson was not vacant to afford the claimant’s (Mr. Pascall) confirmation in the post.”
- [46] In this latter sentence, the learned judge identifies the critical factor which informed her *ratio decidendi*. While there is no evidence that Mr. Sylvester had any direct dealings affecting the appellant, there is evidence which reflects Mr. Sylvester’s dealing with matters related to Mr. Robertson who is the holder of the substantive post in which the appellant acted for 9 years. This is important because it is the PSC’s defence that the substantive post was not vacant as it was held by Mr. Robertson.
- [47] At paragraph 24 of her judgment the judge noted that the minutes of the PSC meetings reveal that Mr. Sylvester would have been chairman when decisions in

²¹ (delivered 3rd July 1998, unreported, Supreme Court of Victoria) per Gillard J.

²² Affidavit of Ms. Naomi Jeremiah at para. 6.

²³ See *Village Roadshow Ltd v Blake Dawson Waldron* [2004] Aust Torts Reports 81-726 at 65-339.

relation to the “transfer of Mr. Robertson, terms and conditions of his transfer and emolument of the substantive post in dispute” would have been taken.

[48] The appellant has completely discounted the importance of this and submitted that ‘the matters pertaining to Francis Robertson are wholly irrelevant, immaterial and extraneous to the main claim herein, which touches and concerns, not Francis Robertson in any way at all, but Augustine Pascall.’ The PSC, on the other hand, contend that the deliberations taken with respect to Mr. Robertson go to the core of the PSC’s defence that the substantive post held by Mr. Robertson was not vacant such as to afford the appellant confirmation in the post of Technical Officer. Moreover, it is apparent that the PSC would have been quite concerned about the fact that Mr. Sylvester would have made a request for information in which he very pointedly sought information concerning Mr. Robertson including the full particulars of his assignment, (including where he was assigned, for how long, on what terms, when was he due to return and when did he in fact return) and when he was due to retire. These concerns clearly informed the learned judge’s reasoning and conclusions at paragraphs 24, 40 and 41 of her judgment.

[49] Having considered the documents which form the record of appeal, I find it difficult to agree with the appellant’s submission. Sometimes no conflict may be apparent at the outset of legal proceedings, but as a result of some subsequent pleadings, a conflict becomes evident. In this appeal the connection would have been cemented once the core of the PSC’s defence would have been revealed.

[50] While it is quite true that there is no evidence that Mr. Sylvester made any direct decisions relative to Mr. Pascall’s employment, it is equally true that the subject matter of Mr. Pascall’s suit concerns the failure to confirm him in the post of Technical Officer in the Ministry – a post which, in their defence, the PSC contends was not vacant (available) for that purpose.

[51] From the evidence before the learned judge, it is quite clear that Mr. Sylvester would have been well aware of the status of that post of Technical Officer because he would have presided in decision making which concerned that post. In my judgment, the learned judge was quite correct in isolating a critical issue which arises from the parties' opposing pleadings (i.e. the availability of the post of Technical Officer) and was equally correct in holding that the PSC's deliberations and decision making during the material period relative to this post would be materially connected to an important matter in issue in the pending litigation.

[52] In arriving at this conclusion, I have considered and applied the dicta in the New South Wales Court of Appeal decision in **Boyce t/as Hunt & Hunt Lawyers v Goodyear Australia Ltd.**²⁴ In that case Priestley AP observed as follows:

“In general where a solicitor has acted for a client in a matter, the solicitor should not act against that client in a later matter involving a factual substratum having any significant overlap with the factual substratum in the earlier matter. The generality of this rule is subject to agreement to the contrary between the client and the solicitor and to the detail of the facts of particular cases.”

[53] I am satisfied that there is an obvious overlap at play here. It was clear that the learned judge gave appropriate consideration to the fact that Mr. Sylvester had no direct involvement in the decision to revert the appellant to his substantive post rather than confirming him in his acting post. But that is not the end. While it is useful to demonstrate that the matters are not the same, it is also enough for the applicant seeking to restrain the legal practitioner to demonstrate the presence of connecting factors which may make it untenable for the legal practitioner to act. I am satisfied that the learned judge was correct in her assessment of the evidence and for the reasons indicated, I am unable to find any basis to interfere with the judge's findings on this issue. Accordingly, I would dismiss grounds 7 – 8 of this appeal.

²⁴ [1996] NSWCA 63.

Ground 9 – Bias

- [54] Counsel for the appellant further argued that the judge erred in applying the principles regarding the rule against bias to Mr. Sylvester since Mr. Sylvester was not the decision maker in the substantive matter. Counsel highlighted that Mr. Sylvester would no longer be deciding anything in relation to the office of chairman of the PSC, nor is he involved in decision making in these proceedings. Counsel further pointed out that Mr. Sylvester is also not giving binding legal advice to the court nor is he conducting a commission of inquiry. Instead, Mr. Sylvester would merely be making submissions on behalf of Mr. Pascall to a judge of the High Court who would ultimately determine the matters in issue. In these premises, counsel submitted that there was no question of any bias or unethical conduct on his part. No fair fair-minded and informed observer would conclude that there was a real possibility of bias on Mr. Sylvester's part in representing Mr. Pascall because Mr. Sylvester is not part of the tribunal in these proceedings.
- [55] While I agree with how counsel for the appellant has described the role of Mr. Sylvester in these proceedings, having reviewed the learned judge's reasoning, I am satisfied that this ground of appeal has no merit. The respondent has submitted (and I agree) that there was never any suggestion, either by the PSC or by the learned judge, that Mr. Sylvester was the decision-maker in the claim. The question of bias could have no relevance in deciding whether a legal practitioner should be restrained from representing a client in legal proceedings because in doing so the legal practitioner is clearly not a decision maker. I am not satisfied that the judge concluded that it did. In my judgment, at its highest, the judge's comment at paragraph 40 of her judgment was no more than a cautionary commentary about the potential degree of reputational harm to the PSC, if its former chairman, having been integral in decision-making, is perceived as being capable of using knowledge gained in his capacity as chairman to later advance a client's case. The judge concluded that this could erode public confidence in the PSC.

- [56] Viewed in this light, I am not satisfied that the judge's observation carried the import ascribed by the appellant and I am further satisfied that this ground should be dismissed.

Grounds 3 to 6 – Confidentiality

- [57] It is undisputed that legal practitioners owe a duty of confidentiality to their clients. Rule 65 of the Grenada **Code of Ethics** provides that:

“An attorney-at-law shall never disclose, unless lawfully ordered to do so by the Court or required by statute, what has been communicated to him in his capacity as an attorney-at-law by his client, and this duty not to disclose extends to his partners, to junior attorneys-at-law assisting him, and to his employees, provided however, that an attorney-at-law may reveal confidences or secrets necessary to establish or collect his fee, or to defend himself or his employees or associates, against an accusation of wrongful conduct.”

- [58] However, as in this appeal, there may be situations where a legal practitioner will have a conflict of interest in acting against a party from whom he or she would have obtained confidential information arising from a relationship other than a legal practitioner/client relationship. This relationship may not have been a professional one or it may have arisen in a professional capacity (an element of trust and confidentiality) but not involving a legal practitioner/client relationship. The courts have recognised this and have indicated that they are prepared to apply the same obligations when considering restraint applications outside the typical legal practitioner-client relationship.

- [59] In **Mytton's Ltd v Phillips Fox (a firm)**²⁵ the Supreme Court of Victoria (Australia) observed that authorities in England and Australia suggested that the principle of avoiding a conflict of duty may be broader than the lawyer–client relationship, so as to protect ‘quasi-clients’ or indeed any person who gave information to a lawyer which was capable of being used to the giver's detriment.

²⁵ (delivered 23rd September 1997, unreported, Supreme Court of Victoria) per Coldrey J.

[60] In arriving at its conclusions, the court in **Mytton's Ltd v Phillips Fox** relied on the Victoria case of **Macquarie Bank Ltd v Myer and others; Toycorp Ltd (Receivers and Managers Appointed) v Myer and others**²⁶ but also on the English judgment in **Re A Firm of Solicitors**.²⁷ The facts in the latter case while not directly on point are instructive. In the course of acting for a company, the law firm received confidential information from its client's associated companies. Subsequently, the law firm was instructed to act for a defendant in another litigation brought by the said associated companies. Parker LJ preferred and applied the test as set out by Buckley LJ in **Rakusen v Ellis, Munday & Clarke**²⁸ - that is "whether there is or is not a reasonable anticipation of mischief". At page 970 of **Re A Firm of Solicitors**,²⁹ the court recited the following excerpt from Law Society's "Guide to the Professional Conduct of Solicitors 1990" and observed:

"Paragraph 1 of the commentary which follows is:

"Any knowledge acquired by a solicitor whilst acting for the former client is confidential and cannot be disclosed without that client's consent. (See Principle 12.01.) However, a solicitor is under a duty to his present client to inform him of all matters which are material to his retainer. (See Principle 12.07.) Consequently, a solicitor in possession of knowledge concerning his former client which is, or might be relevant, is put in an impossible position and he cannot act against that client. Moreover, if a solicitor would feel embarrassed in acting against his former client, he should not act."

Since the plaintiff companies were at no time clients of the firm this is not directly applicable. For my part, however, I consider that the principle is one which the court should enforce for the reasons set out in paragraph 1 of the commentary. It is to be observed that the principle is absolute in the case of relevant knowledge and applies whether as in **Rakusen's** case [1912] 1 Ch. 831 the matter concerned is the same as or different from the matter in which the solicitor acted for the former client. This is clearly necessary. When acting for a former client a solicitor may for example have acquired knowledge relevant to [a] totally different matter in which he seeks to act for another client against his former client."

²⁶ [1994] 1 VR 350 at 351.

²⁷ [1992] QB 959 at 970.

²⁸ [1912] 1 Ch 831.

²⁹ Supra n. 27.

[61] In **Macquarie Bank v Myer**,³⁰ the parties seeking to restrain the solicitors were former directors of a company who were being sued for having aided and abetted in the alleged misrepresentation of the company's financial position thereby allegedly causing Macquarie Bank to allow the company to continue to draw down funds and increase its indebtedness when it was already insolvent and for having continued to incur debts without any reasonable prospect of seeing them paid contrary to section 556 of the Companies Code. The company itself also sued the former directors for having continued to trade the company when it was insolvent. There were four sets of proceedings in all of which the solicitors had acted and the former directors complained about the solicitors continuing to act in the current proceedings because they had interviewed the former directors after obtaining permission from their own solicitors. There was apparently dispute as to whether or not any confidential information was imparted. The court took the view that there was no solicitor/client relationship between the solicitors and the former directors at the time because they were at that stage no longer directors of the company. The application to restrain was initially upheld but refused by the Appeal Division. However, the comments of Marks J are instructive and indicative of the approach to be adopted. After noting that "there must be something in the communication between a solicitor and the person seeking restraint which gives rise to trust or to stamp it with confidentiality", Marks J went on to say:

"The principal task of the Court is to ensure that information given on trust in that way is not used in breach of that trust. What is at stake is the administration of justice. As a general rule, it might be expected that this kind of communication will occur where there exists a relationship of solicitor and client. It is not necessary here to say that it cannot otherwise occur and that it cannot otherwise occur when a solicitor has a communication with the person who is not strictly the client of that solicitor. But it is necessary, in my opinion, that there be something in the relationship or nature of the communication or something which arises in the course of either which attracts that element of trust which requires protection and the Court will be slow to interfere with the prima facie right of a litigant to choose his, her or its solicitors. If the Court is to interfere, it is only to protect the undue risk of unfairness or disadvantage which the circumstances might reveal to exist."

³⁰ Supra n. 26.

[62] The courts have identified the key interest as the protection of confidential information. In **Re A Firm of Solicitors**,³¹ the claimants retained a firm to act for them in a litigation matter. Subsequently, a partner to the firm not involved in the matter left to join another firm who was later retained to act for the defendants to the litigation matter. The claimants applied to restrain the said partner from acting against them. Lightman J, after considering the authorities, stated (at page 9) that:

“... (1) The basis of the courts’ intervention is not a possible perception of impropriety: it is the protection of confidential information: see **Rakusen v. Ellis, Munday & Clarke** [1912] 1 Ch. 831, 845, per Buckley L.J.; **David Lee & Co. (Lincoln) Ltd. v. Coward Chance** [1991] Ch. 259, 268A-C, per Sir Nicolas Browne-Wilkinson V.-C.; and In **re A Firm of Solicitors** [1992] Q.B. 959, 974, per Staughton L.J.”

[63] There is therefore some scope, for non-clients (such as the PSC) with adverse interests to bring an application seeking to restrain a legal practitioner from acting. By way of illustration, in the Australian case of **Bowen v Stott**³² a non-client sought to restrain a lawyer from acting because the lawyer was seeking to plead that the non-client’s claim had been settled. The lawyer had apparently been involved in drafting and negotiating the terms of settlement. Concluding that it was irrelevant that the party bringing the application was a non-client with an adverse interest, Hasluck J held that it was undesirable that the lawyer continue to act as he was likely to be called to give evidence. At paragraph 65 of the judgment he concluded:

“I accede to the line of argument put to me by counsel for the plaintiff that there is an objective test to be applied. The circumstances might suggest to a fair minded, reasonably informed member of the public that, if evidence is given of the kind which is likely to be given by the legal practitioners involved in the negotiations, a conflict of interest will arise which might interfere with the proper administration of justice. The practitioners might not be able to conduct themselves with proper objectivity. For that reason, I consider that the principles I have described should be applied as a basis for making the orders sought.”

³¹ [1997] Ch 1.

³² [2004] WASC 94 at paras. [1]–[2], [9]–[21], [62] and [65].

[64] The principal task of the court in conflicts of duty cases is to ensure that information given on trust is not used in breach of that trust. While this kind of communication will occur where there exists a relationship of legal practitioner and client it is clear that the concept is a broader one. I am further satisfied that once the relationship of trust and confidence is established and where (as in this case) no issue is taken as regards the applicant's standing to bring the application to restrain a legal practitioner from acting, it is clear that the principles of law which go to the jurisdiction and discharge of the power by the court are not affected by the status of the party bringing the application.

[65] I am therefore satisfied that in the same way that a legal practitioner who has served in a constitutional or public office cannot ethically represent a private client in any matter in which he previously participated as an official, where the circumstances warrant, a legal practitioner may also be obliged to keep confidential (unless lawfully ordered to do so by the court or required by statute) what has been communicated to him in confidence while serving in that official capacity.

[66] Having concluded that Mr. Sylvester (in his capacity as chairman of the PSC) is required to preserve the confidentiality of all information and deliberations during his tenure, at paragraph 38 - 41 of her judgment, the learned judge concluded that:

"[38] ...this court is of the view there is compelling evidence before this court to restrain Mr. Derick Sylvester from continuing to represent the claimant in the substantive claim. **As chairman of the Public Service Commission, he was privy to confidential information in the decision making process and had acquired personal knowledge of the status of the substantive post of the Technical Officer now in dispute.**

[39] The court has a duty to maintain and instill public confidence in administration of justice. The harm that may be brought to the reputation of a highly constitutional body in that of the Public Service Commission cannot be disregarded, in that its chairman having been integral in the decision-making process **would use his knowledge to advance his client's case against the same Public Service Commission. This, in my view, would erode public confidence in the Public Service Commission and in the administration of justice.**

[40] It has been said that the disqualification is not only granted where there is a pecuniary interest, but where **it connects the individual in a substantial and meaningful way with the issues in dispute**. The chairman of the PSC entrusted to decide the fate of public servants must under the rule of reticence avoid the appearance of bias. **It would ruin the integrity of the Public Service Commission to allow the perception that a former chairman can use information that became known to him as chairman to advance his client's claim.**

[41] The court is of the view that a reasonable fair-minded person sitting in court and informed of all the relevant facts would from an outward view conclude that **there is a reasonable suspicion that Mr. Derick Sylvester having been the chairman of the Public Service Commission and integrally involved in the decisions affecting the substantive holder had full knowledge as to whether or not the post was vacant**. The court is of the view that the firm of Derick F. Sylvester and Associates should not continue to act on behalf of the claimant in the interest of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice.” (Emphasis added)

[67] The appellant has challenged these findings on several bases. Citing the decision in **Glencairn IP Holdings Ltd and another company v Product Specialties Inc. (trading as Final Touch) and another company**,³³ counsel for the appellant noted that although a court had the power to restrain improper disclosure from an attorney of any information obtained by him in confidence from a client, he asserted that the PSC could not prove that any confidential information was at risk of being disclosed or that the PSC was at risk of suffering prejudice. Counsel for the appellant identified the factual issues which arise in the substantive claim³⁴ in the following terms:

- “(1) With effect from when was Pascall appointed to act in the office of Technical Officer?
- (2) When did PSC decide to revert Pascall to his lower substantive office of Statistical Officer, with effect from what date, and on what grounds?

³³ [2020] EWCA Civ 609.

³⁴ The factual issues were addressed on behalf of the PSC by the affidavit of Naomi Jeremiah, the witness statement of Francis Robertson and the witness statement of Naomi Jeremiah.

- (3) Was there at all times while Pascall acted in the office of Technical Officer a substantive holder of that office?
(4) Was there at all times while Pascall acted in the office of Technical Officer a substantive holder of his lower office of Statistical Officer?"

Counsel concluded that none of these questions are, or raise, confidential matters. Indeed, counsel submitted that no confidential information is in danger of being breached here because no secret confidential information of the PSC has been referred to or used, either by the PSC or by Mr. Pascall. He further concluded that the information sought in the appellant's request for information did not involve confidential information. While Mr. Sylvester was certainly a party to decisions accommodating the substantive holder of the office of Technical Officer, Mr. Robertson, acting in a higher office, counsel argued that the information concerning Mr. Robertson is wholly irrelevant, immaterial and extraneous to the main claim. He reiterated that the main claim touches and concerns Mr. Pascall and does not concern Mr. Robertson in any way at all.

[68] Counsel further argued that while the business of PSC may be confidential, the outcomes of its deliberations are published in the relevant departments involving the affected public officer. He took issue with the PSC's statement that the "intimate details of proceedings lay sacrosanct with the Commissioners" contending that this is not in issue. Rather, counsel submitted that what is relevant is the outcome of those deliberations.

[69] Citing the decision of **Singh v Public Service Commission**,³⁵ counsel asserted that Mr. Pascall was entitled to know the reasons which informed the decision to revert him to his substantive office. He argued that the rationale for the decision was a matter properly to be disclosed in the circumstances.

[70] The appellant also contended that the learned judge erred in failing to hold that the PSC did not show what information was being urged by the PSC as being

³⁵ [2014] UKPC 26.

confidential. The appellant submitted that the PSC was obliged to identify the specific information which is alleged to be confidential but yet has failed to identify any secret confidential information of the PSC or otherwise, which has been referred to or used.

- [71] Finally, counsel for the appellant further submitted that the judge erred in law in failing to sufficiently consider the fact that PSC was obliged in law to voluntarily disclose the information requested because of the duty of candour which applies in judicial review proceedings. This submission forms the basis of grounds of appeal 1 and 2 and will be considered separately below.

The Court's jurisdiction

- [72] The starting point is the landmark 1912 English case of **Rakusen v Ellis, Munday & Clarke**. This case is considered to be authority for the following two propositions: (i) that there is no absolute rule of law in England that a [legal practitioner] may not act in litigation against a former client; and (ii) that the [legal practitioner] may be restrained from acting if such a restriction is necessary to avoid a significant risk of the disclosure or misuse of confidential information belonging to the former client. Subsequent judicial authorities have approached the issue more restrictively than the approach adopted in **Rakusen** culminating in the landmark decision handed down by the House of Lords in **Prince Jefri Bolkiah v KPMG (a firm)**. The decision puts the issue of acting against a former client in terms, not of a conflict of interest, but rather a misuse of confidential information. In discussing the basis of the jurisdiction, Lord Millett in **Prince Jefri Bolkiah** stated:

“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 with 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 ... I would affirm this is the basis of the court’s jurisdiction to intervene on behalf of a former client.”

[73] The leading judgment was given by Lord Millett (with whom the remainder of the House concurred). Lord Millett observed that, like a lawyer, an accountant providing litigation support services owed a continuing professional duty to his or her former clients following the termination of the lawyer–client relationship. The content of this duty is to preserve the confidentiality of information imparted during the relationship. The duty was unqualified and required the accountant to keep the information confidential, not merely to take all reasonable steps to do so.

[74] At pages 235-237 of **Prince Jefri Bolkiah** the court explained the duty in the following terms:

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

...

...This is a matter of perception as well as substance. It is of the highest importance to the administration of justice that a solicitor or other person in possession of confidential and privileged information should not act in any way that might appear to put that information at risk of coming into the hands of someone with an adverse interest.

...I prefer simply to say that the court should intervene unless it is satisfied that there is no risk of disclosure. It goes without saying that the risk must be a real one, and not merely fanciful or theoretical. But it need not be substantial.”

[75] Moreover, it is not only a prohibition against communication to third parties. It is a duty not to misuse confidential information without the consent of the client. The client cannot be protected completely from accidental or inadvertent disclosure. At pages 235–236 of the judgment Lord Millett stated:

“The former client cannot be protected completely from accidental or inadvertent disclosure. But he is entitled to prevent his former [lawyer] from exposing him to any avoidable risk; and this includes the increased risk of the use of the information to his prejudice arising from the acceptance of instructions to act for another client with an adverse interest in a matter to which the information is or may be relevant.”

[76] In this regard, **Rakusen** was overruled.

[77] In summary therefore a court will restrain a lawyer from continuing to act for a party to litigation or a transaction if:

- (1) a ‘reasonable observer’, informed of the facts, might reasonably anticipate a danger of misuse of confidential information of a client; and
- (2) there is a ‘real and sensible possibility’ that the interest of the lawyer in advancing the case in the litigation or transaction might conflict with the lawyer’s duty to keep that information confidential and to refrain from using it to the detriment of the client.

[78] It is however clear that while the risk need not be substantial, it must be a real one, and not merely fanciful or theoretical.

[79] Turning to the onus of proof, Lord Millett also observed that the former client bore the onus of proving that the lawyer possessed and continues to possess his or her confidential information and that the lawyer is proposing to act for another client with an adverse interest in a matter to which the information might be relevant. If this was proven, the onus then shifted to the lawyer to prove that effective measures had been taken to ensure that there was no risk of disclosure of the client’s

confidential information.³⁶ Ultimately, his Lordship held that KPMG had failed to discharge the heavy burden of establishing that there was no risk of disclosure of Prince Jefri's confidential information.

[80] Having reviewed the learned judge's judgment, I am satisfied that she was fully seised of these basic legal principles which are uncontroversial.

[81] I am further satisfied that it was entirely appropriate that these principles be applied in the factual context which obtained in this appeal although it did not concern a former client but rather a formerly held constitutional office.

What is confidential information?

[82] It is an essential precursor to invoking the **Prince Jefri Bolkiah** jurisdiction to establish that the legal practitioner had been in possession of information which was confidential to the applicant and to the disclosure of which the applicant had not consented. This is an important antecedent because it is clear that not everything communicated to a legal practitioner will be confidential. In **Re A Firm of Solicitors**³⁷ Lightman J defined in the following terms:

"Confidential information includes not merely information communicated in confidence by the client to the solicitor but also confidential information acquired by the solicitor on behalf of his client, e.g. on consulting experts, as well as advice communicated in confidence by the solicitor to the client."

[83] At pages 9 -10 of the judgment, the learned judge further observed that:

"Confidential information passing between solicitor and client and otherwise acquired by a solicitor on behalf of his client may, like any other confidential information communicated to anyone else, subsequently cease to be confidential. Confidential documents and information may become common knowledge or at least known to an opponent in the course of a trial. Some information may be memorable and some eminently forgettable. Common sense requires recognition that not all confidential information acquired by a solicitor will remain in the mind of the solicitor or be susceptible of being triggered as a recollection after the lapse of a period of time. **For the**

³⁶ See *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222 at 237.

³⁷ [1997] Ch 1 at pages 9–10.

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

- [84] When an application is made to restrain a legal practitioner from acting in a cause where it is alleged that a defendant has received confidential information and should be restrained from using it, the burden must be on the applicant to identify the confidential information and prove on the balance of probabilities the communication of the same to the respondent. It is therefore critical that the applicant identify the confidential information which is at risk of being disclosed or misused. However, as was made clear in **Re A Firm of Solicitors**³⁸ “...the degree of particularity required must depend upon the facts of the particular case, and in many cases identification of the nature of the matter on which the solicitor was instructed, the length of the period of 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.”
- [85] Courts have therefore recognised that depending on the relevant context, it may not be possible for an applicant to point to a specific item of confidential information. It may be that this information comprises no more than the knowledge of the thinking, strategies, approaches, attitudes and of the personalities involved.
- [86] In the court below, the PSC contended that during his tenure as chairman of the PSC, Mr. Sylvester would have had unrestricted access to the PSC’s files and as chairman, would have made decisions affecting the crux of the defence in the substantive claim. Counsel for the PSC submitted that while final decisions may be

³⁸ [1997] Ch 1.

communicated; the intimate details of proceedings lay sacrosanct with the commissioners of the PSC. Counsel pointed out that the fact that the PSC has made disclosures in this matter at the appellant's request does not forecast the breadth of the cross examination which may be engaged in during trial. In the proceedings below, counsel for the PSC would have submitted that in circumstances of admitted confidentiality it would not be appropriate for Mr. Sylvester to:

- (i) Use information obtained while he held that position to advance his client's case;
- (ii) Have used his knowledge of the file of Francis Robertson to determine the manner in which he would conduct the claimant's case, to wit, the questions directed to the PSC in the Request for Information filed on 12th April 2021; and
- (iii) Be placed in a position to cross-examine an officer of the PSC at trial with the knowledge of the secrets of the decision-making room which may not be possessed by the witness for the PSC, the PSC's minutes only producing decisions, not a transcript of the proceedings leading thereto.

[87] The critical matter upon which the parties have joined issue in the substantive claim is whether the substantive post of Technical Officer was, in fact, vacant such that the appellant (who would have acted in that post for approximately 9 years) could have been confirmed. The gravamen of the respondent's defence is set out at paragraph 14 of the defence where they state:

"...As to paragraphs 19, 20 and 21, the Defendant denies that the Claimant is entitled to the Orders sought upon the simplistic reasoning that he acted in a post, which was not vacant, for the period which he did."³⁹

³⁹ At paragraph 13 of the appellant's reply to defence he pleads: "...As it relates to the allegation that the post was not vacant, the Claimant puts the Defendant to strict proof of this assertion."

[88] The PSC's concerns stem from the fact that Mr. Sylvester would, during his tenure as chairman of the PSC, have acquired knowledge relative to the status of the substantive post of the Technical Officer in the Ministry of Tourism. This is confirmed because Mr. Sylvester would have presided over meetings in which this post (relative to Mr. Robertson) would have been the subject of discussion and so the PSC contends that as chairman of the PSC at the material times, he would have been party to the deliberations/discussions relative to this substantive post.

[89] It is clear that the PSC's arguments found some favour with the judge who at paragraph 36 concluded:

"The court accepts that the decisions of the PSC are public as the outcome of the decisions are published in the ministry or department to which the officer is assigned. What is not public are the deliberations and rationale leading to the final decision. Those are integral matters within the knowledge of the Chairman and other members of the PSC involved in the decision-making process."

[90] Later, at paragraph 38 the learned judge would have summarised the position in the following terms: "...this Court is of the view there is compelling evidence before this court to restrain Mr. Derick Sylvester from continuing to represent the claimant in the substantive claim. As chairman of the Public Service Commission, he was privy to confidential information in the decision making process and had acquired personal knowledge of the status of the substantive post of the Technical Officer now in dispute."

[91] It is not disputed that Mr. Sylvester would have presided over meetings in which matters concerning this post and its substantive holder would have been discussed. The learned judge was clearly satisfied that it was the internal (undisclosed) deliberations of the PSC relative to the post of Technical Officer in the Ministry which would constitute the confidential information that is at risk of being misused. These internal deliberations would have the necessary quality of confidence about it and

would have been communicated in circumstances importing an obligation of confidence.⁴⁰

[92] The judge also concluded that this confidential information would have been relevant to matters in dispute in the litigation, and would have been communicated to Mr. Sylvester during his tenure as chairman. In my judgment she was right to do so. The pleadings and evidence in the court below make it plain that a critical issue of joinder between the parties is whether the substantive post of technical officer at the material time was vacant and therefore available such that the appellant could be confirmed in post. The learned judge could not have ignored the glaring connecting factors which she summarised at paragraph 24 in the following terms:

“It is evident from the minutes of the meetings of the PSC that Mr. Derick Sylvester as Chairman deliberated and made decisions in relation to the transfer of Mr Robertson, terms and conditions of his transfer and emolument of the substantive post in dispute. Mr Sylvester in request for information from the PSC requested precise information in relation to all the issues discussed during his tenure. This would all have been information which he would have deliberated and decided upon which is now relevant to his client’s case.”

The filing and the contents of the witness statement by Mr. Robertson would put the question of relevance beyond doubt.

[93] I am not satisfied that there is any real basis on which this Court should interfere with the learned judge’s findings in this regard. The common law has for some time recognised and adopted a shift in the evidential burden of proof. A former client bore the onus of proving that the lawyer possessed and continues to possess his or her confidential information and that the lawyer is proposing to act for another client with an adverse interest in a matter to which the information might be relevant. Once this is proved, the onus then shifts to the lawyer to prove that effective measures had been taken to ensure that there was no risk of disclosure of the client’s confidential information. The lawyer must satisfy the court on the basis of clear and convincing

⁴⁰ See paragraph 34 of the judgment in the court below.

evidence that all effective measures have been taken to ensure that no disclosures will occur.

[94] In this appeal, there is no reason to doubt the correctness of the judge's view that the appellant had failed to show that there was no real risk of the misuse of confidential information. The test to be applied in exercising this inherent jurisdiction is whether a fair minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice. It is clear that the learned judge applied the appropriate test and concluded that a reasonable observer, aware of the relevant facts, would think that there was a real risk or possibility that the confidential information garnered by Mr. Sylvester might be used to advance the interests of Mr. Pascall to the detriment of the PSC and that there is a real risk or possibility that Mr. Sylvester's interest [or duty] in advancing Mr. Pascall's case might conflict with his duty to keep information made known to him in his former role as chairman of the PSC confidential.

[95] Having carefully considered the submissions of the parties and given the way in which the litigation in the court below has progressed, I am not satisfied that these grounds of appeal disclose any basis to interfere with the learned judge's findings.

Grounds 1 - 2 - Duty of Candour

[96] Even if a judge were to accept that the relevant information has the necessary quality of confidence about it and was imparted in circumstances importing an obligation of confidence, it is clear that for the purpose of the law imposing constraints upon solicitors acting against the interests of former clients, the law is concerned with the protection of information: (a) which was originally communicated in confidence and (b) which, at the date of the later proposed retainer, is still confidential.⁴¹

⁴¹ Per Lightman J in *Re A Firm of Solicitors* [1997] Ch 1 at page 9.

- [97] In this appeal, the appellant contends that in any event, the judge failed to give any, or any sufficient, consideration to the fact that the PSC was obliged in law to voluntarily disclose to the appellant the information requested by the appellant because of the duty of candour falling upon the PSC in judicial review proceedings. Moreover, counsel further argued that the judge failed to properly acknowledge that the rationale for the PSC's "decision is to be disclosed pursuant to its duty of candour and is a matter over which the Court trying the substantive matters has jurisdiction."
- [98] According to counsel for the appellant, that duty to disclose would include all of the relevant facts relating to the office of Technical Officer while the appellant acted; the reason as to why he would have reverted to his substantive post after the period of 9 years; as well as all materials bearing on the issue of whether the post in which the appellant acted was vacant during the period while he was acting.
- [99] Contrary to what is represented, the judge's reasons demonstrate a wholehearted acceptance that the PSC, in these proceedings, has a duty of candour which obliges it to provide full and accurate explanations of all facts relevant to the issue that the court must decide.⁴² The judge nevertheless had to consider whether the PSC's duty of candour negated or neutralised the legal practitioner's obligations such that a court should not grant an injunction restraining the legal practitioner from acting. Ultimately, she concluded that it did not. I cannot disagree. In my judgment, the argument advanced in these grounds of appeal misses the point. The fact that the PSC has a duty of candour which arises in the context of the litigation does not mean that the information gleaned by Mr. Sylvester in his role as chairman of the PSC is not confidential in the necessary sense.⁴³ It certainly would not erode the duty and obligations of Mr. Sylvester to ensure that his interest in advancing the case of his client does not conflict with his duty to keep information given to him in

⁴² See *R v Lancashire County Council ex p Huddleston* [1986] 2 All E.R. 941 at 945 and See paras. 25 – 27 of the judgment in the court below.

⁴³ See *Spincode Pty Ltd v Look Software Pty Ltd & Ors* [2001] VSCA 248.

a prior association confidential or to refrain from using that information to the detriment of the PSC.

[100] In such circumstances, it can be no answer to a restraint application to suggest that an applicant is mandated or required to disclose information to the court in any event.⁴⁴ Ultimately, the integrity of the legal profession and the perception of that integrity by the public, is in large measure, a consequence of the fidelity which a legal practitioner owes to his client. In this appeal, Mr. Sylvester is placed in the invidious position where he must safeguard the adverse interests of both sides of this litigation. The paradox arises out of his obvious duty to disclose to Mr. Pascall or put at his disposal all information within his [Mr. Sylvester's] knowledge that is relevant in order to act in Mr. Pascall's best interests. The difficulty presented was demonstrated in the English case of **Spector v Ageda**⁴⁵ which put the problem of conflict of interest in terms, not only of the inability to discharge properly the duty owed to two clients whose interests are different, or in terms of the duty of confidentiality owed to each client, but also in terms of the duty of disclosure. In that case Megarry J concluded:

"A solicitor must put at his client's disposal not only his skill but also his knowledge, so far as is relevant; and if he is unwilling to reveal his knowledge to his client, he should not act for him. What he cannot do is act for the client and at the same time withhold from him any relevant knowledge that he has...The relevance of the alterations in this case is obvious and inescapable. In my judgment, Mrs. Spector was here guilty of a plain breach of duty towards her clients..."

[101] At paragraph 30 of her judgment, the learned judge cited and applied the following excerpt from this Court's decision in **Honourable Guy Joseph v The Constituency Boundaries Commission et al**⁴⁶ which brings the point home:

"The court always has an inherent jurisdiction (i.e., the authority) to restrain solicitors from acting in a particular case and to control its processes to ensure the proper administration of justice. **If there are circumstances which are likely to compromise the discharge of these duties to a**

⁴⁴ Boyce t/as Hunt and Hunt lawyers v Goodyear Australia Ltd. [1996] NSWCA 63.

⁴⁵ [1973] Ch 30.

⁴⁶ SLUHCVP2015/0013 (delivered 6th April 2016, unreported).

court by a legal practitioner acting in a case, whether because of some prior association with one or more of the parties against whom the legal practitioner is then to act, or because of some conduct by the practitioner (whether arising from associations with the client or a close interest which gives rise to the fair and reasonable perception that the legal practitioner may not exercise the necessary independent judgment), a court may conclude that the legal practitioner should be restrained from acting, even for a client who desires that the legal practitioner continue to represent him.” (Emphasis Added)

[102] I am therefore satisfied that these grounds must also fail.

Ground 10 – Attribution - Law Firm v Individual Lawyer

[103] In the last ground of appeal, learned King’s Counsel submitted that the judge erred by failing to give sufficient consideration to whether any other lawyer in the law firm Derick F. Sylvester & Associates might properly have carriage of the matter. This ground of appeal was pursued with a decided lack of enthusiasm and was not addressed in the appellant’s written submissions. Nevertheless, it was trenchantly rejected by the PSC which relied on judgment in **Prince Jefri Bolkiah** in which the House of Lords stated that it was a heavy burden for KPMG to demonstrate that there was no risk of unwitting or inadvertent disclosure of confidential information. The respondent argued that it was for the appellant’s counsel in the court below to put before the court whether there was another such attorney existing. It was their responsibility to persuade the court below that a “Chinese wall” existed to protect the information held by the former chairman.

[104] The PSC further submitted that this was not done as this was not a matter properly before the trial judge and thus, the issue is not properly raised before this Court. Furthermore, the appellant failed to put forward any evidence before this Court upon which it could make such a determination. For these reasons, the PSC concluded that this ground must also fail.

[105] In my judgment, the respondent’s arguments carry great force. It is clear from the record that the appellant’s evidence and submissions in the court below were

premised wholly on the appellant's categorical contention that issues of confidence do not properly arise in this case. The evidence proffered by Mr. Sylvester and the submissions in the court below did not address the possibility that effective measures could have been taken to ensure that there was no risk of disclosure of PSC's confidential information.

- [106] It is critical that such cogent evidence be advanced because of the application of the doctrine of imputed knowledge, which provides that the knowledge of one partner, including possession of a client's confidential information, is imputed to the other partners within the firm. This doctrine can be traced back to **Davies v Clough**,⁴⁷ where it was held that 'if two solicitors are in partnership, and are carrying on a suit as partners, if it is right to restrain one of them, the other, of necessity, cannot carry it on; because the act of one partner is in law the act of both.'
- [107] The imputation of knowledge is said to be justified by the danger of inadvertent disclosure of confidences inherent in the everyday interchange of ideas and discussion of problems amongst law partners. In **Supasave Retail Ltd v Coward Chance (a firm); David Lee & Co (Lincoln) Ltd v Coward Chance (a firm)**,⁴⁸ Browne-Wilkinson V-C observed that *prima facie*, in a firm, information does move. In other words, unless special measures are taken, information moves within a firm. These special measures usually involve the establishment of internal rules and procedures (giving of undertakings, the imposition of restraints upon persons, and/or limitations upon communications between various persons within a firm) designed to prevent the passage of confidential information from one part of a firm of lawyers to another, often referred to as the erection of a 'Chinese wall'.⁴⁹
- [108] A court will restrain a lawyer from acting 'unless satisfied on the basis of clear and convincing evidence, that [all reasonable] measures have been taken to ensure that

⁴⁷ (1837) 8 Sim 262 at 268; 59 ER 105 at 107 (per Shadwell V-C).

⁴⁸ [1991] Ch 259 and see: Prince Jefri Bolkiah v KPMG (a firm) [1999] 2 AC 222 at 237 (per Lord Millett).

⁴⁹ Staughton LJ in *Re A Firm of Solicitors* [1992] QB 959 preferred to call it an 'information barrier'.

no disclosure will occur⁵⁰ and it is clear that it is the legal practitioner who bears the evidential onus of proving (with clear and cogent evidence) that effective measures had been taken to ensure that there was no risk of disclosure of the client's confidential information. Having not advanced any evidence or submissions relative to this issue in the court below, it is not surprising that the learned judge would not have addressed this issue in her reasoning. I am satisfied that this ground of appeal should fail for that reason.

Order

[109] For the reasons given above, I would make the following orders:

- (i) The appeal is dismissed.
- (ii) The judgment of the judge in the court below is affirmed.
- (iii) The stay of execution granted on 6th April 2022 and continued on 20th February 2023 by this Court is discharged.
- (iv) The respondent will have its costs of this appeal to be assessed, if not agreed by the parties within 21 days of this judgment.

I concur.
Paul Webster
Justice of Appeal [Ag.]

I concur.
Gerard St. C. Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar

⁵⁰ See *MacDonald Estate v Martin* [1990] 3 SCR 1235 at 1262 (per Sopinka J), as adopted in *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222 at 237–8 (per Lord Millett).