BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

CV 1186 of 2013

BETWEEN

STEVE STRAUGHN **CLAIMANT**

AND

JENNIFER EDWARDS **FIRST DEFENDANT**
GAIL ATKINS **SECOND DEFENDANT**
ATTORNEY GENERAL **THIRD DEFENDANT**

Before the Honourable Mr. Justice William Chandler, Judge of the High Court

2015: December 3rd

Mr. David Comissiong, Attorney-at-Law for the Claimant
Mr. Patterson K. H. Cheltenham Q.C, Attorney-at-Law for the Defendants

DECISION

THE PARTIES

[1] The Claimant is an Attorney-at-Law presently engaged in private practice in Barbados and previously was at all material times employed as a legal officer in the public service of Barbados.

[2] The First Defendant is the Solicitor General of Barbados and was at all material times an officer of the Crown. She is one of her Majesty's Counsel for Barbados (Q.C.)

[3] The Second Defendant is the Chief Personnel Officer of the Public Service of Barbados.

[4] The Third Defendant is the Honourable Attorney General of Barbados and is sued herein as the representative of the Crown in right of its Government of this island pursuant to Section 33 (2) (b) of the Crown Proceedings Act, Chapter 197 of the Laws of Barbados.

Brief Background

[5] The Claimant was, at all material times, a member of the National Union of Public Workers (NUPW) and was employed as a legal officer in the Solicitor General's chambers. Sometime in September, 2011 the Claimant and the then General Secretary of the NUPW, Mr. Dennis Clarke, met with Mr. Patterson Cheltenham, Q.C., Attorney-at-Law (Mr. Cheltenham Q.C.), with regard to certain industrial relations problems which the Claimant claimed to be experiencing at his workplace.

The Claim

[6] The Claimant brought a claim against the First, Second and Third Defendants by way of a claim form and statement of claim filed on the 3rd

day of July 2013, claiming the following:

i. Damages, including exemplary damages, for defamation
ii. Interest
iii. Legal Costs.

Chronology of Filings and Events

(1) The Claim Form and Statement of Claim were filed on 03 July 2013.

(2) The Claimant served the Claim Form and Statement of Claim on the Second Defendant on the 8th day of July 2013 as evidenced by the Affidavit of Service of Deandra Payne.

(3) An Acknowledgment of Service of Claim was not filed on behalf of the Second Defendant.

(4) On the 16th day of September 2013 the Claimant filed for Judgment in Default of Acknowledgment of Service of Claim against the Second Defendant (the application for default judgment).

(5) By letter dated the 18th of November, 2013, addressed to counsel for the Defendant, counsel for the Claimant, David A. Comissiong, indicated that an application for Default Judgment had been filed against the Second Defendant on the 16th day of September 2013. Counsel for the Defendants stated in their submissions however, that they never received the application.

(6) On the 26th day of November 2013 a Defence was filed by Patterson Cheltenham, Q.C. on behalf of the Defendants. On the 15th day of April 2014, the Claimant filed a reply to the Defendants' defence.

[7] On March 25, 2014 the Claimant filed a Notice of Application (the present application) applying to the Court for an order that:

The Defendants' Attorney-at-Law, Patterson Cheltenham Q.C., be disqualified from acting on behalf of the Defendants in this matter.

[8] The application was supported by an affidavit filed on even date with the application. The salient paragraphs are now set out herein:

"1…
2…

3. That on 1st September, 2011 Dennis Clarke, General Secretary of the National Union of Public Workers (NUPW) agreed to retain legal counsel on my behalf to provide representation with respect to industrial matters which I had been experiencing at my workplace, the Solicitor General's Chambers of the Attorney General's Chambers of Barbados.

4...

5.That on 1 st September, 2011 Dennis Clarke informed me that Patterson Cheltenham Q.C. had been retained by the National Union of Public Workers (NUPW) to provide legal representation on my behalf with respect to the said industrial matters which I had been experiencing at the Solicitor General's Chambers.

6.That on 1st September, 2011, Dennis Clarke further informed me that Patterson Cheltenham Q.C., in his capacity as the NUPW appointed and retained Attorney-at-Law, had scheduled a consultation with myself and Dennis Clarke at his office on 5th September, 2011.

7.That on 5th September, 2011, I, along with Dennis Clarke, General Secretary of the National Union of Public Workers NUPW), met with Patterson Cheltenham Q.C. at his offices located at Charlton House White Park Road, St. Michael, in his capacity as the NUPW-appointed and retained Attorney-at-Law, with respect to industrial matters which I had been experiencing at my workplace, the Solicitor General's Chambers of the Attorney General's Chambers of Barbados.

8.That at the said meeting of 5th September, 2011, after I along with Dennis Clarke presented an outline of the matters for which I required legal representation, Patterson Cheltenham Q.C. in the presence of myself and my union representative Dennis Clarke, agreed to take conduct of the matter.

9.That at the said meeting of 5th September, 2011, in the presence of myself and Dennis Clarke, Patterson Cheltenham

Q.C. requested that I submit a written outline of the said matter to him.

10. …

11.That I submitted a detailed written outline of the matter to Patterson Cheltenham Q.C. on October 22, 2011.

12. …

13. That the said industrial matters at the Solicitor General's Chambers culminated in my filing of suit *712/2013* - Steve Straughn v the Chief Personnel Officer on 3rd May" 2013.

l4. That in September 2012 I discussed the details of a defamation matter which arose out of the circumstances of my work at the Solicitor General's Chambers with Dennis Clarke in his capacity as General Secretary of the National Union of Public Workers (NUPW).

15.That in September, 2012 Dennis Clarke agreed to schedule another meeting with Patterson Cheltenham at his office in Patterson Cheltenham's capacity as the NUPW appointed Attorney-at-Law and counsel retained to provide representation on my behalf with respect to the industrial matters at my workplace, the Solicitor General's Chambers.

16. …

17.That Dennis Clarke and I again met with Patterson Cheltenham Q.C. in his capacity as the NUPW appointed and retained Attorney-at-Law at his said offices located at Charlton House Whitepark Road, St. Michael, on 8th October, 2012 with respect to the said industrial matters which I had been experiencing at the Solicitor General's Chambers, and in addition, specifically with respect to the defamation matter which arose out of my work circumstances at the Solicitor General's Chambers.

18.That during the course of the said meeting of 8th October, 2012, I discussed at length with Patterson Cheltenham Q.C. the details surrounding the defamation suit *1186/2013* - Steve Straughn v Jennifer Edwards and Gail Atkins and the Attorney General in respect of which I afterward initiated suit in the High Court of Barbados in July 2013.

19.That on 30th October, 2013, my Attorney-at-Law in this matter, David Comissiong, provided me with a copy of an Acknowledgement of Service of Claim Form, dated 20th

September, 2013, in the matter S.C. Claim No. *1186/2013* - Steve Straughn v Jennifer Edwards and Gail Atkins and the Attorney General, and filed on behalf of the three Defendants: Jennifer Edwards, Gail Atkins and the Attorney General, by Patterson Cheltenham, Q.C.

20.That on 30th October, 2013, my Attorney-at-Law, David Commisiong, provided me with a copy of a letter from Patterson Cheltenham Q.C. in the matter S.C. Claim No. *1186/2013* - Steve Straughn v Jennifer Edwards and Gail Atkins and the Attorney General informing that Patterson Cheltenham Q.C. had filed an Acknowledgement of Claim Form in the said matter and indicating that Patterson Cheltenham Q.C. will file a defence in the matter shortly. A copy of the said letter is attached and marked **"Exhibit DS 1".**

21.That I was informed by the National Union of Public Workers that at all material times between September 2011 and October 2014 Patterson Cheltenham was retained by the National Union of Public Workers (NUPW) to provide legal representation and advice on my behalf with respect to the situations arising out of my work circumstances at the Solicitor General's Chambers.

22.That by letter dated 30th October, 2013, I informed Patterson Cheltenham Q.C. that I was informed by the NUPW that he was still the NUPW appointed Attorney-at-Law, and that I am still a member of the said NUPW with an outstanding matter being dealt with by the said NUPW, a matter which was discussed at length with him and which is intricately connected to the said defamation suit in which he now acts on behalf of the Defendants.

23.That by means of the said letter, dated 30th October, 2013, attached and marked "Exhibit DS 2" I informed Patterson Cheltenham Q.C. that the situation where he interviewed me with respect to the details of the defamation case which I initiated against Jennifer Edwards, Gail Atkins and the Attorney General in the High Court of Barbados, and in turn filed an Acknowledgement of Claim Form signaling his intention to act on behalf of the Defendants in the said matter with reference to which he had interviewed me, constitutes a conflict of interest on his part, since he possesses intimate and detailed knowledge of my proofs of evidence in support of the action for defamation as a result of my discussion with him of the details of the defamation matter in and of itself and also as a form of explanation and elaboration of the details of the judicial review matter in connection with which I met with him on 5th September, 2011 and 8th October, 2012 in his capacity as the NUPW appointed and retained Attorney-at-

Law.

24.That in October 2012 I instructed my union representative, Dennis Clarke, to forward much of the content of my file with the NUPW to Patterson Cheltenham Q.C. in his capacity as the Attorney-at-Law retained by the NUPW to provide legal representation for me in these matters.

25.That in subsequent conversations Dennis Clarke, informed me that he had so forwarded the requested information from my NUPW file to Patterson Cheltenham Q.C.

26.That my instruction to the NUPW to forward the said documents was given after my discussion of the details of the defamation matter with Dennis Clarke and Patterson Cheltenham Q.C.

27.That on 30th October, 2013 I telephoned Patterson Cheltenham Q.C. with respect to the matter of his acting on behalf of the three Defendants in a matter in which I had provided intimate details of my proofs of evidence and what I intended to rely on in my claim to him.

28.That during the course of my telephone conference with Patterson Cheltenham Q.C. on the 30 October, 2013, Patterson Cheltenham Q.C. acknowledged receipt of the documentation and correspondence which I had asked the NUPW to forward to him in October 2012.

29. …
30. …
31. …
32. ...
33. ...
34. ...

35.That on 23rd January, 2014 I filed a complaint, attached and marked "Exhibit DS 4" with the Disciplinary Committee of the Barbados Bar Association detailing the actions of Patterson Cheltenham Q.C. in this matter and outlining the fact that the actions of Patterson Cheltenham Q.C. contravene Articles 24; 26(1) and (2); 29(1) and (2); 67(2); and 71 of the Legal Profession Code of Ethics, 1988 to the detriment of my position in the case *1186/2013* - Steve Straughn v Jennifer Edwards and Gail Atkins and the Attorney General.

36.That by letter dated 30th October, 2013, attached and marked "Exhibit DS 2" I requested that Patterson Cheltenham

Q.C. recuse himself from the position of legal counsel acting on behalf of the three Defendants: Jennifer Edwards, Gail Atkins and the Attorney General, in the matter: *1186/2013* - Steve Straughn v Jennifer Edwards and Gail Atkins and Attorney General, as his so acting constitutes a conflict of interest and a violation of Attorney-at-Law - client confidentiality and a breach of the Legal Profession Code of Ethics".

[9] Mr. Cheltenham Q.C. filed an affidavit in reply on the 12th day of September 2014 in which he deposed, inter alia, that:

"1…

2. For the last twenty (20) years I have represented the National Union of Public Workers (NUPW) and its members in various court proceedings. I have also provided advice in relation to numerous matters handled out of court. However, I used to be retained by the NUPW. However, that retainer relationship came to an end at least ten (10) years ago due to financial reasons. I am also not the sole attorney-at-law who manages matters on its behalf. At the time of the matter in issue, I was not retained by the NUPW or the Claimant. The arrangement which I have with the NUPW permits me to act on its behalf in certain matters and also permits me to refuse to act on its behalf in matters which I do not consider viable. On the occasions when I act on behalf of the NUPW I am compensated upon completion of a matter. I have never entered into a contract with the NUPW which mandates me to act on behalf of it or its members.

3. I do not recall meeting with the Claimant in this matter on the 5th September, 2013. However, I acknowledge that at some time during the month of September, I met with the Claimant and Dennis Clarke of the NUPW at my law office located on Whitepark Road, St. Michael.

4. I do not precisely recall the discussions held at that meeting. However, I am aware that the Claimant's complaint at that time concerned the fact that despite being under the employ of the Solicitor General's Chambers for approximately six (6) years, he remained as acting Crown Counsel and was not appointed to a permanent post. I received a letter dated 22nd October, 2011 from

the Claimant confirming his complaints. A copy of that letter is hereto annexed and marked "PKHC 1".

5. Within the said letter dated 22nd October, 2011, the Claimant stated on the ultimate page "*We therefore seek your representation in these matters"*. However, I never consented to act on behalf of the Claimant. Rather, I formed the opinion that the Claimant's concerns were insufficient to warrant the commencement of judicial review proceedings. I indicated my position verbally to Dennis Clarke. This was also confirmed in a letter dated 21st November, 2012 addressed to me from Dennis Clarke, which states at page 3 "*We (Cheltenham/Clarke) have discussed the matter and you have expressed the view that the case as outlined by me did not merit a Judicial Review. I have accordingly informed Mr. Straughn of your opinion and he has requested a review in light of the decision handed down in the case of Mr. Watts*." A copy of this letter is hereto annexed and marked "PKHC 2".

6. I am unable to confirm the nature or content of the conversations which occurred between the Claimant and Dennis Clarke. However, I was never informed by the Claimant of his intention to commence defamation proceedings against the defendants nor did I have any discussions with him in relation to any defamation proceedings concerning the instant matter or otherwise".

7. A letter dated 1st July, 2013 and entitled ***"Defamation Claim against Solicitor General Jennifer Edwards and Chief Personnel Officer Gail Atkins by Steve Straughn of* 36 *Durant's Park; Christ Church"*** was sent to me from Jennifer Edwards Q.C. Within that letter she advised that she was directed by the Attorney General to refer the captioned matter to me and also requested that I act on behalf of the Solicitor General and the Chief Personnel Officer. A copy of this letter is hereto annexed and marked "PKHC 3":

8...
9...
10...

11. Thereafter, the defence was prepared and filed on 26th November, 2013. The information contained within that defence

was provided by Donna Brathwaite, Q.C.. In actuality, all information, instructions and documents which I have received in relation to this instant defamation matter were received from Donna Brathwaite, Q.C..

12. I did not receive any documents from the NUPW in relation to the Claimant and this defamation matter as the Claimant has alleged at paragraph 25 of his affidavit. Moreover, I do not recall having a conversation with the Claimant on the 30th October, 2013, or at all, in relation to this matter nor did I ever acknowledge receipt of any documentation or correspondence from the NUPW as he has alleged at paragraph 27 of his affidavit.

13. I do recall receiving a letter from the Claimant marked *"private and confidential"*. I advised my staff to send that said letter to the Claimant's home address as he has alleged at paragraphs 29 and 30 of his affidavit. I also acknowledge that I received a letter dated 18th November, 2013 from the Claimant's attorney-at-law David Comissiong, which enclosed a letter dated 30th September, 2013 which was drafted by the Claimant.

14. I perused the letter dated 30th September, 2013. However, I did not respond to that letter. The contents of that letter were untruthful and in my view, it did not necessitate a response.

15. On March 25th 2014, I was served with a Notice of Application in relation to these current proceedings which was drafted by the Claimant. That is the application now before the court. Thereafter, I was also served with the reply to the Defendant's Defence filed by David Comissiong on 15th April, 2014.

16. I am of the opinion that I did not act in contravention of the Legal Profession Code of Ethics by opting to represent the Defendants in this current matter. The brief discussions which I had with the Claimant were in relation to separate and distinct issues and concerned a matter of an entirely different nature. Moreover, I am not, nor have I ever been, in possession of any information of a confidential nature arising out of or pertaining to the instant defamation action brought by the Claimant. Consequently, I can find no reason why I should be prohibited

from representing the Defendants in this matter and it is my intention to continue to act on their behalf".

THE ISSUES

[10] The issues that arise for determination are:

1) Whether or not Mr. Cheltenham Q.C., should be disqualified from acting on behalf of the Defendants in this action, and

2) Whether the Court ought to accede to the Claimant's request for the entry of a default judgment in favour of the Claimant against the Second Defendant.

THE FIRST ISSUE

[11] Whether or not Mr. Cheltenham Q.C., should be disqualified from acting on behalf of the Defendants in this action.

SUBMISSIONS OF THE CLAIMANT

[12] The Claimant filed written submissions in support of his application on December 23, 2014. He submitted that Mr. Cheltenham Q.C. contravened **Articles 29 (1)** and **(2)** and **67 (2)** of the **Legal Profession Code of Ethics, 1988, Cap. 370A of the Laws of Barbados** when he, in his position as the Attorney-at-Law retained by the National Union of Public Workers to provide legal representation to the Claimant with respect to the instant matter, used the information provided to him by the Claimant to file a defence on behalf of the defendants in the same matter.

[13] The Claimant contended that Mr. Cheltenham Q.C. relied on the proofs of evidence which he (the Claimant) discussed with Mr. Cheltenham Q.C. during the course of their Attorney-at-Law Client consultations. The Claimant further contended that Mr. Cheltenham Q.C. contravened **Articles 71** and **26 (2)** of the Legal Profession Code of Ethics.

[14] The Claimant averred that Mr. Cheltenham Q.C. failed to inform him of the nature of his relationship with the defendants in the instant matter in contravention of **Article 26 (1)** of the **Legal Profession Code of Ethics (the Code)**.

[15] The Claimant submitted that Mr. Cheltenham Q.C.'s continued participation in the matter would prejudice his position in the instant matter. He further submitted that Mr. Cheltenham Q.C.'s actions in first acting on behalf of the Claimant and advising the Claimant with respect to the circumstances surrounding the matter: **S.C. Claim 712/2013** and **S.C. Claim 1186/2013**, and in turn acting on behalf of the defendants in the same matter constitute a conflict of interest which contravenes **Articles 24; 26 (1)** and **(2); 29 (1)** and **(2); 67(2);** and **71** of **the Code**. The Claimant relied, *inter alia*, on the following cases:

(a) Martin v Gray (1991) 121 N.R. 1 at p. 9;

(b) R v Neil [2002] 3 S.C.R. 631;

(c) R v Sussex Justices, Ex parte McCarthy [1924] 1 KB 256.

SUBMISSIONS OF MR. CHELTENHAM

[16] Mr. Cheltenham Q.C. filed written submissions in this matter on September 12, 2014. He submitted that he was not retained by the NUPW and that he was not mandated to act on behalf of the NUPW nor its members and that he remained entitled to reject certain matters which he does not consider viable.

[17] The Claimant further submitted that the previous matter to which he referred is not connected or related to the instant defamation proceedings. Mr. Cheltenham Q.C. averred that the discussions which he held with the claimant were solely in relation to the commencement of judicial review proceedings, which, in any event, were never initiated by him.

[18] Mr. Cheltenham Q.C. contended that the burden rests on the Claimant to prove that he did indeed provide him with confidential information which relate to the instant proceedings. He further contended that the Claimant had made a general allegation and had not satisfied the burden of proof required to establish that he (Mr. Cheltenham Q.C.) was previously in possession of confidential information. He relied on the following cases:

(a) Saffron Walden Second Benefit Building Society v Rayner (1880) 14 Ch D 406 CA (Saffron v Rayner);

(b) Re A Firm of Solicitors Ch 1995 C No. 2433 (Re A Firm of Solicitors); and

(c) Prince Jefri Bolkiah v KPMG (a firm) [1999] 1 All ER 517 HL (Prince Jefri Bolkiah).

THE LAW

Conflict of Interest

[19] It is important to note that **S.C. Claim 712/2013** is shortly intituled **Steve Ian Straughn v The Chief Personnel Officer** and was filed on **3rd May 2013** (emphasis mine) by Mr. David A. Comissiong, Attorney-at-Law acting for and on behalf of the Claimant and not Mr. Cheltenham Q.C. The instant application was filed on 03 July 2013 some two months after suit No. 712 of 2013. Mr. Cheltenham could not at that time be considered counsel for the Claimant since his services had been dispensed with. In **Prince Jefri Bolkiah** Lord Millett opined:

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

[20] The submissions of the Claimant raise the issue as to whether Mr. Cheltenham Q.C.'s involvement in **S.C. Claim 1186/2013** has resulted in a conflict of interest. A conflict of interest in based on the fiduciary relationship that an Attorney-at-Law has with his client. (**Prince Jefri Bolkiah**). The evidence of a fiduciary relationship is the presence of a retainer agreement between the Attorney-at-law and client. The fiduciary

relationship between Attorney-at-law and client comes to an end with the termination of the retainer and "thereafter the solicitor has no obligation to defend and advance the interests of his former client" (per Lord Millet in **Prince Jefri Bolkiah** at pg. 527). If there is no retainer, the Attorney-at-law cannot be held liable for a conflict of interest for representing another client. Therefore, the Court must determine whether there was a retainer between the Claimant and Mr. Cheltenham Q.C.

[21] The Claimant contended that Mr. Cheltenham Q.C. had been retained by the NUPW to provide the necessary legal representation for the Claimant. Mr. Cheltenham Q.C. denies such a retainer. The principle that there is no general relationship of attorney and client of a standing and permanent character was confirmed in **Saffron v Rayner**, where James LJ observed at page 409:

> "A man has no more a solicitor in that sense than he has an accountant, or a baker, or butcher. A person is a man's accountant, or baker, or butcher, when the man chooses to employ him or deal with him, and the solicitor is his solicitor when he chooses to employ him and in the matter in which he is so employed. Beyond that, the relationship of solicitorship does not extend..."

[22] Mr. Cheltenham Q.C. submitted that he advises the NUPW on various matters and may receive remuneration following the completion of each individual matter. He admitted that he had had discussions with the Claimant concerning the commencement of judicial review proceedings. Does that mean that he was retained to act for the Claimant?

[23] This is a civil case and the burden of proof is on the Claimant. The standard of proof is on a balance of probabilities. In determining whether or not the Claimant has proven his case to the standard required by law, we must look to the affidavit evidence of the Claimant which is the only evidence filed in support of the application. In summary, the Claimant, in this affidavit, deposes that Mr. Cheltenham was retained by the NUPW to represent him in the proposed suit and not by the Claimant himself. He further deposed that he provided an outline to Mr. Cheltenham of the matters in respect of which he required legal representation. He further deposed that he discussed with Mr. Cheltenham the details surrounding the instant suit at a meeting in October 2012 and later initiated the suit in July of 2013. Paragraph 21 of the affidavit in support bears repetition, it says:

> " That I was informed by the National Union of Public Workers that at all material times between September 2011 and October 2014 Patterson Cheltenham was retained by the National Union of Public Workers (NUPW) to provide legal representation and advice on my behalf with respect to the situations arising out of my work circumstances at the Solicitor General's Chambers."

[24] The Claimant has not vouchsafed the details to which he alluded in his affidavit neither did he file a copy of the written outline he deposed that he forwarded to Mr. Cheltenham Q.C. on 22 October 2011. He could have filed them under confidential cover but did not do so. The Court must not be left to guess on these matters especially where these allegations reflect upon the integrity of counsel at the bar.

Discussion

[25] Neither of these deponents was cross-examined on their affidavits. The Court did not, therefore, have the benefit of assessing their demeanour and credibility in examination in chief and under cross-examination. Mr. Cheltenham exhibited a letter from the Claimant to himself dated 22 October 2011 in which the Claimant and other employees of the Solicitor General's Chambers sought his services. He deposed that he did not respond to that letter. This was unchallenged. It cannot be said, on the state of the evidence, that the Claimant retained Mr. Cheltenham Q.C to act as counsel. Silence is not consent. The most that can be inferred is that Mr. Cheltenham was retained by the NUPW to advise the NUPW with respect to the issues facing the Claimant.

[26] That is not the end of the matter. If any confidential information was communicated to Mr. Cheltenham Q.C. during the discussions, I am of the opinion that he would still be duty bound not to disclose it or use it to the prejudice of the Claimant.

[27] The Claimant contended that Mr. Cheltenham Q.C. used confidential information received in discussions with the Claimant to file a Defence against the Claimant's claim in **S.C. Claim 1186/2013**. **Articles 26** and **71** of the **Code of Ethics** place a duty on Attorneys-at-Law not to disclose their client's confidential information. The issue is whether or not Mr. Cheltenham Q.C. breached that duty.

Burden of proof

[28] The burden of proof is on the Claimant: **Prince Jefri Bolkiah**. The test to be used by the Court was stated by Lord Millet in that case. He said at pg. 527:

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

[29] The first limb of the test is whether Mr. Cheltenham Q.C. was in possession of information which is confidential and whether he used it to the prejudice of the Claimant when he prepared the Defendants' defence in this matter. In **Prince Jefri Bolkiah**, Lord Millet further opined at pg. 527:

> "Whether a particular individual is in possession of confidential information is a question of fact which must be proved or inferred from the circumstances of the case…"

[30] The second limb of the test raises the issue of the relevance of the confidential information. In **Prince Jefri Bolkiah**, Lord Millet said at **pg. 527**:

> "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."

[31] The issue of relevance with regard to confidential information was discussed by **Lightman J** in **Re a Firm of Solicitors**. He said at pg.10:

> "On the issue whether the solicitor is possessed of relevant confidential information (a) it is in general not sufficient for the client to make a general allegation that the solicitor is in possession of relevant confidential information if this is in issue: some particularity as to the confidential information is required…But the degree of particularity required must depend upon the facts of 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."

[32] The Claimant has not stated the specific information that was allegedly given to Mr. Cheltenham Q.C. in their discussions.

[33] Moreover, the Claimant did not give particulars of the information that he alleges that Mr. Cheltenham Q.C. used to prepare the Defence in **S.C. Claim 1186/2013**. In addition, the Claimant described the matters he discussed with Mr. Cheltenham Q.C. as industrial matters. The Claimant also stated in his submissions that those industrial matters culminated in the Claimant filing **S.C. Claim 712/2013** for Judicial Review. This is confirmed by Mr. Cheltenham Q.C. who submitted that the discussions he held with the Claimant were in relation to the commencement of judicial review proceedings.

[34] With regard to **S.C. 1186/2013**, the Claimant, in his submissions referred to it as a defamation suit. Mr. Cheltenham Q.C. also describes it as a defamation matter. It should also be noted that Mr. Cheltenham Q.C. never commenced either **S.C. Claim 712/2013** or **S.C. Claim 1186/2013**

on behalf of the Claimant. In the circumstances, I am of the opinion, and hold that the Claimant has failed to establish, on a balance of probabilities, that (1) Mr. Cheltenham Q.C. was in possession of confidential information from the Claimant relative to this claim which was communicated to him in relation to CV No. 712 of 2013 and (2) that Mr. Cheltenham Q.C. used any such information in the preparation of the defences in the instant suit.

The Law under the Code

[35] The relevant Articles of the **Legal Profession Code of Ethics, 1988** are as follows:

"**Article 26**

26. (1) An attorney-at-law shall at the time of retainer disclose to his client all the circumstances of his relations to the parties and his interest in or connection with the controversy (if any) which might influence the client in his selection of an attorney-at-law.

(2) An attorney-at-law shall scrupulously guard and never divulge his client's secrets and confidences.

Article 29

29. (1) An attorney-at-law may represent multiple clients only if he can adequately represent the interests of each and if each consents to such representation after full disclosure of the possible effects of multiple representation.

(2) In all situations where a possible conflict of interest arises, an attorney-at-law shall resolve all conflicts by leaning against multiple representation.

Article 67 (2)

67. (2) An attorney-at-law shall not accept or continue his retainer or employment on behalf of two or more clients if their interests are likely to conflict or if his independent professional judgment is likely to be impaired

Article 71

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… 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."

DISPOSAL

[36] In the circumstances and having regard to my findings above, I hold that A**rticles 29 and 67 of the Code** are irrelevant to this matter. I hold further that Mr. Cheltenham Q.C. is not in breach of **Articles 26 of the Code** since he was not retained by the Claimant to file the instant matter. He was not the Claimant's Attorney-at-Law at the date of filing the instant matter and was therefore not retained and under no duty to disclose to the Claimant all the circumstances of his relations to the parties and his interest in or connection with the controversy (if any) which might influence the Claimant in his selection of an attorney-at-law.

[37] And it is further ordered that Mr. Cheltenham Q.C. should not be disqualified from acting on behalf of the Defendants in **S.C. Claim 1186/2013**.

THE SECOND ISSUE

[38] The second issue which arises is whether the Court ought to accede to the Claimant's request for the entry of a default judgment in favour of the Claimant against the Second Defendant.

The Claimant's Submissions

[39] The Claimant submits that in accordance with **Part 9.3** of the **CPR**, the period for filing an Acknowledgment of Service is fourteen (14) days after the date of service of the claim form. Additionally the stipulated period for filing a defence in accordance with **Part 10.3** of the **CPR** is 28 days after the date of service of the claim form and statement of claim.

[40] The Claimant further submits that the **CPR** gives the court the authority to grant default judgments for failure of a party to file documents within the stipulated time periods. **Part 12.1 and 12.5** of the **CPR** state:

> "**Part 12.1:**
>
> *"In these Rules, default judgment means judgment without trial where a defendant (a) has failed to file an acknowledgment of service giving notice of intention to defend in accordance with Part 9; or (b) has failed to file a defence in accordance with Part 10."*
>
> **Part 12.5:**
> *"The Registrar may at the request of the claimant enter judgment for failure to defend where*

(a) the claimant proves service of the claim form and statement of claim;

(b) an acknowledgment of service has been filed by the defendant against whom judgment is sought;

(c) the period for filing a defence and any extension agreed by the parties or ordered by the court has expired;

(d) the defendant –

(i) has not filed a defence within time to the claim or any part of it or any defence filed has been struck out;

(ii) where the only claim, apart from costs and interest, is for a specified sum of money, has not filed or served on the claimant an admission of liability to pay all of the money claimed, together with a request for time to pay it; and

(iii) has not satisfied the claim on which the claimant seeks judgment; and

(e) the claimant has the permission of the court to enter judgment; and

(f) there is no pending application for an extension of time to file a defence."

[41] The Claimant therefore submits that in circumstances where the Claimant served a Claim Form and Statement of Claim on the 8th day of July 2013, and where the Second Defendant subsequently filed a Defence four (4) months later on the 26th day of November 2013, the Second Defendant's

Defence must be deemed to have been filed outside the period stipulated by the CPR and as such the application for default judgment ought to be granted.

The Defendant's Submissions

[42] The Second Defendant in this matter submits that the Claimant did not serve the Defendant with the requisite notice pursuant to the **CPR 12.7 (2)** which would have allowed the Defendants to remedy their default. The said rule prescribes that a request for a default judgment is not to be filed unless the notice has been served on the Defendants. In consequence, counsel submitted the Claimant failed to comply with **Part 12.7(2)** of the **CPR** and consequently, the request for default judgment ought to be rejected.

The Law

[43] **Part 12.7** of the **CPR** states:

> "*(1) A claimant applies for default judgment by filing a request in Form 6.*
>
> *(2) No request for final judgment in default of defence shall be filed unless notice in writing has been served upon the defendant calling upon the defendant to remedy his default within 14 days after service of the notice.*
>
> *(3) A copy of this notice shall be filed in the Registry immediately after service of the notice with an endorsement on the copy of the time, place and particulars of the service of the notice."*

Discussion

The Overriding Objective

[44] The overriding objective of the **CPR** is to enable the court to deal with cases justly. **Part 1.1 (2) (d)** states "*dealing justly with a case includes, so far as is practicable ensuring that it is dealt with expeditiously and fairly.*" The timelines as set down in the CPR are to ensure that the overriding objective is upheld. A court ought not therefore to allow with impunity the breach of the rules.

Procedural Requirements for Default Judgment

[45] The timelines given in the **CPR** ensure that matters are dealt with expeditiously. There are also procedural stipulations that ensure fairness. **Part 12.7(2)** therefore stipulates that "*No request for final judgment in default of defence shall be filed unless notice in writing has been served upon the defendant calling upon the defendant to remedy his default within 14 days after service of the notice."* Implicit in the overriding objective is the role of the court to balance the rights of parties to have their matters heard and disposed of in a timely manner whilst giving due credence to fairness, within the bounds stipulated.

[46] **Part 12** of the **CPR**, which gives parties the right to apply for a default judgment, was written with the intention that such measures would sift out weak defenses of parties, who were not forthcoming with filing their

proceedings. The procedures set out in **Part 12** make it clear that the use of the default judgment is not intended to be a draconian measure, applied merely with regard to expedition but also addresses the issue of fairness.

[47] The right of a defendant to put forward a defence is a natural justice right that must be guarded. This is evident, as in practice, a defence can be entered outside of the timeline stipulated, provided that an application for a default judgment has not been filed. In ***Thorne v Co-operators General Insurance Company Ltd (Thorne) BB 1213 HC 30,*** **Worrell J** discussed the intention of Part 12 of the CPR. In the instant matter a request for default judgment had already been entered when the Defendants filed a defence. The Defence was filed on behalf of the First, Second and Third Defendants. It must also be noted and emphasized that, in the instant matter, the Claimant filed a reply to the Defendants' defence on 15 April 2014. **Thorne** is however of some relevance to us. **Worrell J.** (in **Thorne**) made reference to **the Supreme Court Practice 2011 (UK). (The White Book)** which notes at paragraph **15.4.2 p. 454 1 Civil Procedure, the White Book Service** that:

> "*In practice, if the time for filing a defence has expired but the claimant has taken no step to obtain default judgment and the defendant files a late defence, the court office will accept the defence, file it and proceed as usual so that the claimant will not now be able to obtain default judgment... the reality is that the court office will accept a late defence unless the claim is stayed."*

[48] The court therefore will not act to prohibit a party from entering a defence, unless a default judgment has been correctly filed or the action has been stayed. **Part 12.7** of the **CPR** outlines the procedure required to file a default judgment. In keeping with the overriding objective, the **CPR** has built in a notification to the party who has found him/herself out of time, to remedy the default, so as to ensure that parties who intend to defend an action have an opportunity to do so, before a clandestine attempt to prohibit them is made.

[49] The **CPR** thereby ensures that a party, who after receiving such a notice, still fails to enter a defence, cannot thereafter complain if judgment is entered against him due to their disregard of the timelines stipulated in the **CPR**. This was highlighted in ***Olympiad Incorporated and Chandler v RBTT Bank Barbados Ltd, BB 2014 HC 17***, where **Kentish J**, in an application to set aside a default judgment which had been regularly obtained, noted that included in the determination of regularity was the fact that a notice to remedy the default had been sent to the Defendant and filed in accordance with **Part 12.7**.

The Reply

[50] The Claimant applied for judgment in default of Defence on 02 October 2013. As previously mentioned, the Defence was filed on behalf of all three Defendants on 26 November 2013. The Claimant filed his Reply on

15 April 2014 and an amended Reply on 20 May 2014 in which he responded to the matters alleged in defence of the claim by the Second Defendant. In these circumstances, it may reasonably be concluded that the Claimant had waived his right to apply for judgment in default. Such a determination is not required for my decision in this matter.

Findings

[51] The Claimant has not pleaded that he served any notice in writing to the Second Defendant, calling upon the Second Defendant to remedy her default within fourteen (14) days after service of the notice as stipulated in **Part 12.7 (2)** of the **CPR**. This requirement is mandatory since it ensures compliance with the overriding objective of the **CPR**. Consequently, the request for final judgment against the Second Defendant is defective. There was no impediment to the Second Defendant filing her defence out of time. This does not mean that the Court condones the Second Defendant's breach of the CPR. She ought to have applied for permission to file her Defence out of time in accordance with the CPR.

[52] With regard to Mr. Cheltehman Q.C.'s averment that he did not receive the application for default judgment, the burden of proof that the application was served is on the Claimant. The Claimant has not produced an affidavit of service or a certified copy of the application signed by Mr. Cheltenham Q.C. or someone from his office entitled to

accept service on his behalf. There is, accordingly, no evidence to refute Mr. Cheltenham's Q.C.'s assertion.

Disposal

[53] The Court therefore orders that:

1. Mr. Cheltenham Q.C. should not be disqualified from acting on behalf of the Defendants in S.C. Claim 1186/2013.
2. The application for Default Judgment is dismissed.
3. The Defence filed by the Second Defendant in this matter, though filed out of time, do stand.

It is further ordered by consent:

4. That the issue of costs is reserved.

William J. Chandler
Judge of the High Court