

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

**CV No. 392 of 2014**

**IN THE MATTER of the custody, care,  
control and maintenance of TTDJ a  
minor.**

**AND IN THE MATTER of the Minors  
Act Chapter 215 of the Laws of Barbados.**

**BETWEEN:**

**SW**

**CLAIMANT**

**AND**

**JJ**

**DEFENDANT**

**Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the High  
Court.**

**2015: July 09, 13, 16**

**September 16, 22**

**2016: November 29**

**Mr. Philip McWatt, Attorney-at-Law for the Claimant.**

**Mr. Tariq Khan, Attorney-at-Law for the Defendant.**

**Mrs. Beverley Walrond Q.C., Attorney-at-Law for the Child Care Board.**

## **DECISION**

### **Introduction**

- [1] The parties are the parents of a minor child. By a fixed date claim form filed on 14 March 2014, the Claimant father applied, pursuant to the Minors Act, Cap.215, for care and control of the child. Other orders were also sought from the Court. This case has raised the interesting question as to whether information on the file of an Officer of the Child Care Board, (“the Board”), is privileged from disclosure.

### **Background**

- [2] The Court gave a number of directions in order to progress this matter, including access arrangements, and the preparation of reports by the Board. Two reports were prepared by the Board dated 23 May and 01 October 2014 respectively. The first report recommended that the Defendant mother should continue to have care and control of the child. Four months later, the second report recommended that care and control be granted to the father.
- [3] Several affidavits were filed by the parties. And on 09 July 2015, trial of the matter began with the evidence of the Board’s Officer who prepared the two reports. The Officer responded to questioning by counsel for the father. Thereafter, the matter was adjourned to 13 July 2015, for the continuation of her evidence and her cross-examination by counsel for the mother.

- [4] The next day, counsel for the mother wrote the following letter to the Board, for the attention of the Officer:

“Dear Madam,

.....

At the trial of the matter yesterday you gave evidence and were entered as an expert for the purposes of your evidence.

Before Mr. McWatt, Attorney-at-law lead your evidence, I asked that you establish the provenance of the notes you were reading from. It was therefore recorded that you were referring to a file created exclusively for this matter representing all your interventions.

I now formally write you to seek forthwith copies of the notes, statements and other material relevant and germane to this matter. I anticipate your cooperation and I look forward to receipt of the said copies within good time in order for me to conduct my cross-examination of your evidence on Monday 13 July 2015.

I have copied in Mr. Philip McWatt, Attorney-at-Law who is entitled to the same disclosure.”

- [5] Both counsel for the father and the Board vigorously opposed the request for disclosure of the notes. The Board asserted that the file and working materials of the Officer were privileged from disclosure. The Director of the Board filed an affidavit on 27 August 2015, in which she stated the following:

“1. I make this affidavit on behalf of the [Board] to claim privilege from disclosure of the files of the [Board] in the matter presently before

this Court or at any time in any Court proceedings of the nature of this Suit.....

2. The [Board] is a statutory corporation established by the Child Care Board Act, Cap.381.....with its role set out in that said Act which includes providing services and counselling for children in need of care and protection and parents of such children.
3. In the matter before this Court, the [Board] was required to and did carry out investigations ordered by the Court. Two written Reports were submitted....I am advised.... and verily do believe that the Court made the Reports available to Counsel for the parties in the Suit. I am further informed.. that [the Officer] has been sworn to give evidence and is available for cross-exam-ination on the contents of her Reports and on any information which she has gleaned in the matter.
4. [Mr. Khan] has by letter requested to be provided with a copy of the documents on the file of the [Board]. [The Board] claims that as a matter of law its files and work-ings are privileged from such production and has been so privileged over the years. I am legally advised that the said request is unusual and contrary to law.
5. One of the reasons for such privilege is that in carrying out its duties to protect children at risk, it is of critical importance that persons feel confident that they can assist the Board by furnishing information which will allow the Board to investigate cases without themselves becoming embroiled in the

matter. It is in the public interest for that confidentiality to be preserved. The letter of demand does not give any serious basis for the said request.

6. Further, I have been associated with the [Board] since 1986 and I say that such a request has not hitherto been made or considered necessary by any Counsel wishing to prosecute his or her case. The relevant information on the file has been placed before the Court and the [Officer] has been made available to give her evidence before the court including to be tested by cross-examination.
7. I humbly say that to allow such a breach would militate against the public interest and would impact severely on the ability of the [Board] to receive confidential information as it often does and would be a serious impediment to the carrying out of its work for the greater good of protecting the children of Barbados. I ask the Court to refuse the said application.”

[6] The Board also applied for costs, having been put to the legal expense of defending its privilege in a matter in which it was not a party. In an attempt to save costs, the Board had provided opposing counsel, and the Court, with the legal basis for the claim to privilege, prior to filing the Director’s affidavit. (See para.8 of affidavit).

#### **Submissions for the Board and the Claimant**

[7] Counsel for the Board contended that counsel for the Defendant did not

indicate why the Officer's confidential file needed to be disclosed to him.

She questioned whether counsel was on a fishing expedition.

[8] Privilege was claimed on the basis of confidentiality and public interest immunity. Counsel submitted that many of the communications made to the Board are confidential, and would only be made in circumstances that they remain confidential. The information received by the Board is a critical resource for the Board to be able to protect children.

[9] Counsel for the Board relied on the cases of **Conway v. Rimmer [1968] A.C. 910; Gaskin v. Liverpool City Council [1980] 1 W.L.R. 1549; D v. National Society For the Prevention Of Cruelty To Children [1978] A.C. 171; Re D (Infants) [1970] 1 All ER 1088; and R v. Constable Of West Midlands, ex p. Wiley [1995] 1 A.C. 274.**

[10] Counsel for the Claimant made similar oral submissions. Both counsel emphasized that the Officer was available for cross-examination on all aspects of her evidence and her reports. Therefore, the Court was urged not to entertain this unprecedented application for the production of the Officer's file.

#### **Submissions for the Defendant**

[11] In his letter to the Board, counsel for the Defendant offered no specific

reasons for his request for the production of the file. He sought “copies of the notes, statements and other material relevant and germane to this matter”. The Court interpreted the request as predicated upon the relevance of the information on the file, and a claim to the entitlement of both parties to that information.

[12] Counsel was more expansive in his written submissions. He contended that:

“16.....counsel takes issue with the evidence of [the Officer] in relation to what the Defendant had actually stated during the [Officer’s] interventions as opposed to the evidence of these interactions put on record before this Honourable Court. In other words,....counsel challenges the content of the [Officer’s] evidence, the extent of the investigations carried out, the range of interviews conducted that could lead to the recommendation that care and control be vested in the Claimant in contradiction to the [Officer’s] original recommendation that the status quo prevail. ....

17. While the 1 October 2014 report recommended that exclusive care and control was vested with the Claimant; it appears that this was based on the finding:

*Since a number of concerns were raised regarding [the Defendant’s] parenting style by staff from both schools, it is imperative that she seeks assistance in this area.*

19. Defendant’s counsel is entitled to challenge this finding and the assumption on which it is based. In mounting this challenge Defendant’s counsel is entitled to examine the material that forms the interviews/investigations conducted by the

[Officer] that give rise to such a finding. Defendant's counsel is entitled to challenge the quality of the investigation and the basis of the value judgment that the [Officer] has allocated to the evidence of for example the concerns raised by the schools".

[13] Counsel referred to **Sargeant v. R (C.A. B'dos., Crim. Ap. No.2 of 2006, decision delivered 29 November 2006)**. In that case, the Court of Appeal gave guidance on the duties owed to a court by an expert witness in a criminal trial. Counsel also contended that the **Gaskin** case, cited by counsel for the Board, did not assist the Board because it was overruled on appeal in **Gaskin v. The United Kingdom [1990] 1 F.L.R 167**.

[14] The Court was urged further to consider judicial pronouncements which posit that there is no general principle of law granting immunity to social work records. The Defendant was not on a fishing expedition, but was entitled to production of the Officer's file for the just disposal of the matter.

### **The Common Law Principles**

[15] The Board is requesting that its Officer's file be excluded from disclosure on the basis of a privilege arising out of the confidential communications made to the Officer during the course of her investigations. The Board also prays in aid privilege based on public interest concerns. (See paras. 5 and 6 of the

Director's affidavit). However, at common law, confidentiality is not considered to be a separate head of privilege.

[16] In **D. v. National Society For The Prevention of Cruelty To Children**, (supra at para [9]), Lord Diplock opined that:

“The fact that information has been communicated by one person to another in confidence, however, is not of itself a sufficient ground for protecting from disclosure in a court of law the nature of the information or the identity of the informant if either of these matters would assist the court to ascertain the facts which are relevant to an issue upon which it is adjudicating: **Alfred Compton Amusement Machines Ltd. v. Customs And Excise Commissioners (No.2)** [1974] A.C. 405, 433-434. The private promise of confidentiality must yield to the general public interest that in the administration of justice truth will out, unless by reason of the character of the information or the relationship of the recipient of the information to the informant a more important public interest is served by protecting the information or the identity of the informant from disclosure in a court of law”. (Pg.218).

[17] The facts of the **National Society** case bear reciting. The appellant (“the Society”), was an independent body incorporated by royal charter. It received and investigated complaints from members of the public about cases of ill-treatment or neglect of children under an express pledge of confidentiality. The Society was also authorised by legislation to bring care proceedings in respect of children.

[18] A complaint was received from an informant about the treatment of a 14 month old child. An inspector from the Society visited the home of the parents. The mother brought an action against the Society, claiming damages for personal injuries alleged to have resulted from the negligence of the Society. She argued that the failure of the Society to properly investigate the complaint, and the manner and circumstances of the inspector's visit, caused her severe and continuing shock.

[19] The Society denied negligence and sought an order under the rules of court to prevent discovery or inspection of any document which would or might reveal the identity of the informant. The society argued that the proper performance of its duties under its charter, and the legislation, required that the absolute confidentiality of information given in confidence should be preserved. It was contended that, if the court permitted disclosure, the Society's sources of information would dry up, and this would be contrary to the public interest. The Society also argued that, in any event, disclosure was not necessary for the fair disposal of the claim.

[20] The House of Lords ruled in favour of the Society, holding that the balance of public interest fell on the side of non-disclosure. The Law Lords also held that objections to the production of evidence on the grounds of public policy were not confined to the Crown. Therefore, statutory bodies, such as the

Board in this case, may claim immunity from production of documents on the basis of public interest. Again, in the words of Lord Diplock:

“This narrow view as to the scope of public interest as a ground for protecting documents and information from disclosure was supported in argument before this House by copious citations of passages taken from judgments in previous cases in the course of which documents for which a claim to non-disclosure had been described as relating to essential functions of government, to the performance of statutory duties, to the public service or to the interests of the state. From this your Lordships were invited to infer that the document in question would not have been entitled to protection from disclosure unless it fell within the description used in the particular case.....

I see no reason and I know of no authority for confining public interest as a ground for non-disclosure of documents or information to the effective functioning of departments or organs of central government. In **Conway v. Rimmer** [1968] A.C. 910 the public interest to be protected was the effective functioning of a county police force; In **re D.(Infants)** [1970] 1 W.L.R. 599 the interest to be protected was the effective functioning of a local authority in relation to the welfare of boarded-out children. In the instant case the public interest to be protected is the effective functioning of an organisation authorised under an Act of Parliament to bring legal proceedings for the welfare of children.....This is a public interest which the court is entitled to take into consideration in deciding whether the identity of the [Society’s] informants ought to be disclosed”. (Pgs. 220-221).

[21] Courts are required to balance two competing facets of the public interest. The first is the public interest that harm will not be caused to either the state, the public service, departments or organs of central government, statutory bodies or other independent bodies charged with public functions. The second is the public interest that the administration of justice will not be frustrated by the withholding of documents that should be produced if justice is to be done. (See **Conway v. Rimmer**, supra para. [20] at pg. 940).

[22] J.D. Heydon also states that:

“It is the duty of the court, in arriving at a decision on the question whether evidence should be withheld, to balance the public interest in the administration of justice against whatever public interest is likely to be injured by the disclosure of the evidence. This is not a discretionary judgment, and appeals from it are not governed by the limiting principles applicable to discretionary judgments. The balancing of divergent interests means that it is difficult, if not unprofitable, to attempt to extract a series of principles from the decided cases. The importance to be given to any one public policy consideration will depend not only on its own merit but also upon that against which it must be measured”. (**Cross on Evidence**, 9<sup>th</sup> Australian ed., 2013, at para. [27175] and cases there cited).

### **Public Interest and Human Rights**

[23] In balancing competing public interests, courts in the United Kingdom have also grappled with the requirements of the European Convention for the

Protection of Human Rights and Fundamental Freedoms, 1950, and the Human Rights Act 1998. Both the Convention and the Act make provision for the right to a fair trial and the right to respect for private and family life. (Articles 6 and 8 of the Convention which are incorporated with other Convention articles into the 1998 Act).

[24] The European Court of Human Rights considered Article 8 of the Convention in **Gaskin v. The United Kingdom** (supra para.[13]). Mr. Gaskin spent his early years up to the age of majority in the care of the Liverpool City Council. He claimed to have been ill-treated while in care and, intending to bring an action for damages, he applied for discovery of the case records made while he was in care.

[25] The local authority objected to the discovery of the records on the basis that disclosure and production would be contrary to the public interest. It was argued that an order for discovery would jeopardise the public interest in the proper operation of the child care service. Contributors to the records would be reluctant to be frank in their future reports.

[26] The High Court had balanced the public interest in maintaining an efficient child care system, against Mr. Gaskin's private interest in receiving access to his records. That court found that the case records were private and confidential, and that it was necessary for the proper functioning of the child

care system for the confidentiality of the relevant documents to be preserved.

The first instance Judge was in no doubt that the public interest would be better served by refusing discovery.

[27] The Court of Appeal unanimously dismissed Mr. Gaskin's appeal, and refused him leave to appeal to the House of Lords. (**Gaskin v. Liverpool City Council**, supra para. [9]). Thereafter, Mr. Gaskin applied to the European Court. He claimed that the refusal of access to all his case records breached his right to respect for his private and family life under Article 8, and his right to receive information under Article 10.

[28] In a majority judgment, the European Court held that there was a breach of Article 8. The Court found that the procedure followed by the local council failed to secure respect for Mr. Gaskin's private and family life. The Court opined that:-

“.....persons in the situation of the applicant have a vital interest, protected by way of Convention, in receiving the information necessary to know and to understand their childhood and early development. On the other hand, it must be borne in mind that confidentiality of public records is of importance for receiving objective and reliable information, and that such confidentiality can also be necessary for the protection of third persons. Under the latter aspect, a system like the British one, which makes access to records dependent on the consent of the contributor, can in principle be considered to be compatible with the obligations under Article 8,

taking into account the State's margin of appreciation. The Court considers, however, that under such a system the interests of the individual seeking access to records relating to his private and family life must be secured when a contributor to the records either is not available or improperly refuses consent. Such a system is only in conformity with the principle of proportionality if it provides that an independent authority finally decides whether access had to be granted in cases where a contributor fails to answer or withholds consent. No such procedure was available to the applicant in the present case". (Para.49 of the judgment).

[29] In another case, Hale J. (as she then was) noted that:

“...under Art.8 of the Convention both the children and the parents have the right to respect for their family and private life. If the state is to interfere with that there are three requirements: first, that it be in accordance with the law; secondly, that it be for a legitimate aim...; and thirdly, that it be “necessary in a democratic society” ”. (See **Re C and B (Care Order: Future Harm) [2001] 1 FLR 611** at para. [33]).

[30] The European Convention has influenced the decision making in family law cases from the United Kingdom. The Convention is also echoed in the Barbados Constitution as it is the acknowledged source document for the fundamental rights provisions in most Commonwealth Caribbean Constitutions. (See **Alexander v. The Queen, B'dos. C.A. No.14 of 2015, decision dated 13 June 2014** at para. [84]; **Francis et al v. The State of**

**Trinidad & Tobago (2014) 86 WIR 418** at paras. [73] – [74] and [138]; and F. Alexis, **Changing Caribbean Constitutions**, 2<sup>nd</sup> ed., 2015 at para. 4.08).

[31] Whereas our Constitution has no provision dedicated to respect for private and family life, the Constitution recognises the right to a fair trial. It is Section 18 (8) of that document which provides that:

“Any court or other tribunal prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such court or other tribunal, the case shall be given a fair hearing within a reasonable time”.

[32] The Constitutional mandate, for cases to be given a fair hearing, is contained in a suite of provisions intended to secure the protection of the law. These provisions are “subject to respect for the rights and freedoms of others and for the public interest”. (S.11 Barbados Constitution). Section 18(8) does not allow the parties to consent to anything less than a fair hearing. Therefore, any balancing of the competing public interests in this case should take into consideration the necessity to give a fair hearing to all the parties.

[33] In **Re A (a child) [2012] UKSC 60**, the Supreme Court ordered the production of documents that identified an individual who alleged sexual misconduct by a father involved in access proceedings. In a unanimous

judgment, Lady Hale described the Court's task as reconciling the irreconcilable. (Para.[1]). Several Convention rights, including the right to a fair trial, were at play in the case. (Para.[25]).

[34] Lady Hale commented that:

“.....Public interest immunity is not absolute. The public interest in maintaining confidentiality must be balanced against the public interest in a fair trial. ...The essential requirement of any fair procedure is that the person who stands to lose his rights has an opportunity effectively to challenge the essence of the case against him...The privacy rights [of a third party] ...are not a sufficient justification for the grave compromise of the fair trial and family life rights of the parties which nondisclosure would entail”. (Paras.[16], [34] and [35] of judgment).

[35] Although the Barbados Constitution does not speak definitively to respect for private and family life, Barbados ratified the American Convention on Human Rights in 1981. And in 2000, Barbados accepted the compulsory jurisdiction of the Inter-American Court of Human Rights. Article 11 of the American Convention provides for a right to privacy, in these terms:

- “1. Everyone has the right to have his honour respected and his dignity recognised.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honour or reputation.
3. Everyone has the right to the protection of

the law against such interference or attacks”.

[36] Cases such as **Gaskin** (supra at paras.[24] to [28]), and **Re A (a child)** (supra at paras.[33] to [34]), exemplify the possible circumstances under which privacy rights may be infringed.

### **Social Work Records**

[37] Social work records are confidential records. In **Herrick v. Knowles [2014] NSWSC 1223**, Harrison AsJ referred to the Australian Law Reform Commission Report 26 “Evidence (Interim)” Report, 30 June 1984, in order to explain the nature of social work records. This report stated that:

“Inherent in the relationship between social worker and client is the concept of trust... In many situations, however, a social worker cannot continue his or her assistance unless the client can rely implicitly upon the social worker preserving confidences and the disclosure of confidential information communications may also discourage persons from seeking help in the future.

...the relationship between social worker and client is one that demands, in the public interest, that every possible protection be given to the privacy of communications between them”. (See para. [57] of judgment).

[38] The courts have long recognised that public interest immunity attaches to social work records. In **Re M (A Minor) (Disclosure of Material) [1990] 2FLR36**, Butler-Sloss LJ warned that the practice of giving automatic

immunity from production of such records should be reconsidered. The learned Judge observed insightfully that:

“...the strict approach developed in 1970 and followed in subsequent decisions must be relaxed in the light of current legislation and modern opinion about greater openness in society.... The law of evidence must move with the times. None of this invalidates the general principle of public interest immunity, but it will undoubtedly have an effect on the balancing operation to be conducted by a judge”. (Page 43).

### **The Burden of Proof**

[39] The party seeking to withhold documents, on the ground of privilege, has the burden of convincing the court that the discretion should be exercised in favour of non-disclosure. Munby LJ confirmed that:

“It is for those who seek to restrain the disclosure of papers to a litigant to make good their claim and to demonstrate with precision exactly which documents or classes of documents require to be withheld. The burden on them is a heavy one. Only if the case for non-disclosure is convincingly and compellingly demonstrated will an order be made. No such order should be made unless the situation imperatively demands it. No such order should extend any further than is necessary. The test, at the end of the day, is one of strict necessity. In most cases the need for a fair trial will demand that there be no restrictions on disclosure. Even if a case for restrictions is made out, the restrictions must go no further than is strictly necessary”. (**Re: B (Disclosure to Other parties) [2001] 2 FLR**

**1017** at para.89, approved by the C.A. in **Re B, R and C (Child-ren) [2002] EWCA Civ.1825**, para.29, and **Re J (A Child: Disclosure) [2012] EWCA Civ.1204**, paras.49-50).

### **The Legislative Framework**

[40] This claim was filed under the auspices of the Minors Act, Cap.215. Nothing in that Act gives any guidance for the procedural issues now before this Court. Although Section 31 of the Act provides for rules to be made, no such rules appear to exist. The present application is also outside of the scope of the Family Law Act, Cap.214, and the rules made thereunder. The Child Care Board Act, Cap. 381, is likewise of no assistance with the resolution of the issues raised. Neither Cap. 381, nor its attendant rules, make provision in relation to issues of privilege, confidentiality, public interest, disclosure or production.

[41] Part 28 of the Supreme Court (Civil Procedure) Rules, 2008, (“the CPR”), provides for the disclosure and inspection of documents in civil matters. The Court is of the view that the CPR does not apply to these proceedings. Rule 2.2 (3) (b) of the CPR states clearly that the CPR does not apply to family proceedings.

[42] Neither the Supreme Court of Judicature Act, Cap.117A, nor the CPR, contain a definition of “family” or “family proceedings”. However, Section

15(1)(c) of Cap.117A establishes the Family Division of the High Court.

And Section 16(1) further provides that:

“All causes and matters involving the exercise of the High Court’s jurisdiction in proceedings specified in the First Schedule are assigned to the Family Division”.

[43] Paragraph 4 of the First Schedule includes:

“Proceedings under the Minors Act, and otherwise in relation to the guardianship of a minor, except proceedings for appointment of a guardian of a minor’s estate alone”.

[44] It is the combined effect of Cap.117A, the First Schedule and the CPR, that leads the Court to conclude that the CPR is not applicable to these proceedings.

[45] Division 8 to Part IV of the Evidence Act, Cap.121, addresses a number of instances where a court may entertain and uphold objections to the adducing of evidence, on the basis that it is privileged evidence. These privileges pertain to client legal privilege (s.103 to s.105); privilege in respect of confidential communications and documents (s.106); privilege in respect of self-incrimination (s.107); and evidence excluded in the public interest (s.108 to s.110).

[46] With respect to confidential communications and confidential documents, Section 106 of the Evidence Act provides, inter alia, that:

“(1) Where, on the application of a person who is an interested person in relation to a confidential communication or a confidential document, the court finds that, if evidence of the communication or document were to be adduced in the proceedings, the likelihood of

- (a) harm to an interested person;
- (b) harm to the relationship in the course of which the confidential communication was made or the confidential document prepared; or
- (c) harm to the relationships of the kind concerned, together with the extent of that harm, outweigh the desirability of admitting the evidence, the court may direct that the evidence not be adduced.

(2) For the purposes of subsection (1) the court shall take into account, *inter alia*, the following matters

- (a) the importance of the evidence in the proceeding;
- (b) if the proceeding is a criminal proceeding, whether the evidence is adduced by the defendant or by the prosecutor;
- (c) the extent, if any, to which the contents of the communication or document have been disclosed;
- (d) whether an interested person has consented to the evidence being adduced;

(e) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceedings;

(f) any means available to limit publication of the evidence.

.....

(5) In this section, “interested person”, in relation to a confidential communication or a confidential document, means a person by whom, to whom, about whom or on whose behalf the communication was made or the document prepared”.

[47] Section 2 of the Evidence Act defines a “confidential communication” or a “confidential record” as meaning:

“a communication made or record prepared in such circumstances that, at the time when it was made or prepared,

(a) the person who made or prepared it; or

(b) the person to whom it was made or for whom it was prepared was

under an expressed or implied obligation not to disclose its contents, whether or not the obligation arises under law”.

[48] What is immediately apparent is that the legislation circumvents the pronouncements of Lord Cross that confidentiality is not a separate head of privilege, but that it may be a material consideration when privilege is

claimed on the ground of public interest. (See the **Alfred Compton** case, supra at para.[16], and Heydon, supra para. [22] at para. [27120]. The legislation presents confidential communications and confidential documents as a head of privilege separate from the public interest.

[49] The Court adopts the observation of Heydon, in relation to professional confidential relationship privilege, as drafted in New South Wales and Tasmania legislation, that:

“Strictly speaking it does not create a privilege, but rather confers on the court a discretion by which it may direct that evidence of a confidential communication be not adduced. Confidentiality gives rise to the discretion, but the mere fact of confidentiality does not create an entitlement to a favourable exercise of it”. (Heydon supra, para.[22] at para. [2540]; see also **A-G v. Mulholland [1963] 2 Q.B.477** at 492 (CA)).

[50] Section 106 of the Evidence Act is directed to the adducing of evidence in the proceedings. The Court recognises that orders for disclosure and production do not necessarily lead to the adducing of evidence about the content of the documents or the information provided to the requesting party. Even if the Court permits the receipt of documents or information by one party from another party to the proceedings, an application to exclude the adducing of evidence from the documents or the information may be made at a later stage in the proceedings.

[51] In **Urquhart v. Lanham [2003] NSWSC 109**, two grandchildren of a 92 year old gentleman challenged his revocation of a power of attorney and guardianship appointment. These documents had been executed in favour of the grandchildren. A notice was served for the production of the grandfather's most recent will. Counsel for the grandfather argued that any exercise of the court's discretion to permit the inspection of subpoenaed documents, prior to trial, would be influenced by Section 126B of the 1995 New South Wales Evidence Act.

[52] Section 125A of the New South Wales legislation, provided in part that:

“(1) The Court may direct that evidence not be adduced in a proceeding if the court finds that adducing it would disclose:

(a) a protected confidence, or

(b) the contents of a document recording a protected confidence; or

(c) protected identity information”.

[53] The New South Wales act also contained provisions that are similar to Sections 106 (1) and (2) of the Barbados statute. (See para.[46]) supra). The Australian legislation further defined a “protected confidence” as meaning:

“...a communication made by a person in confidence to another person [...the ‘confidant’]:

(a) in the course of a relationship in which the confidant was acting in a professional capacity, and

(b) when the confidant was under an express or implied obligation not to disclose its contents,

whether or not the obligation arises under law or can be inferred from the nature of the relationship between the person and the confidant”. (S.126A).

[54] It was submitted to the **Urquhart** court that the will was a protected confidence between the grandfather and his solicitors, and could not be adduced into evidence in the case. Therefore, the existence of this limitation would affect the exercise of the Court’s discretion whether to permit inspection prior to the commencement of the trial.

[55] Referring to the case of **National Employer’s Mutual General Association Limited v. Waind and Hill [1978] 1 NSWLR 372**, Campbell J. held that:

“...inspection of a document produced pursuant to a notice to produce can be permitted, even if the document is not admissible as it stands”. (Para.14).

The learned Judge continued:

“That being so, it is not in a direct way that the existence of s126B affects the way in which the Court should approach inspection of documents prior to trial. However, in an indirect and more general way, it seems to me that it is a relevant matter. There is a policy concerning the protection of confidences which underlies s126B, which

requires matters favouring the protection of professional confidences, of the type defined in s 126A, to be taken into account in the exercise of discretions about what evidence should be admitted in a hearing. It seems to me that it is appropriate that that policy should be taken into account in deciding the way in which inspection of confidential documents should occur before a hearing. If that did not happen, Parliament's evident intent in enacting s.126B could be undermined". (Para.15).

[56] The similarities between the Australian and the local legislation should be noted. And, following the reasoning in **Urquhart**, it behoves this Court to consider Section 106 of our statute before making any final decision about the request for the production of documents or information from the Board's file. (See too **NRMA v. Whitlam [2007] NSWSC 563** at para.[122], and **Herrick** supra. para.[37] at para.[14]).

[57] The Evidence Act also recognises three types of evidence that may be excluded in the public interest. These are the evidence of the reasons for decisions made by judicial officers and arbitrators (s.108); evidence of matters of state (s.109); and evidence of settlement negotiations (s.110). A perusal of these sections indicate that Sections 108 and 110 are of no relevance to the determination of the issue before this Court.

[58] In relation to the exclusion of evidence of matters of state, Section 109 provides as follows:

“(1) Where the public interest in admitting evidence that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the evidence, the court may, either of its own motion or on the application of any person, whether or not a party direct that evidence not be adduced.

(2) For the purposes of subsection (1), evidence that relates to matters of state include evidence

(a) that relates to

(i) the security of defence of Barbados,

(ii) international relations, or

(iii) the prevention or detection of offences or contraventions of the law,

(b) which, if adduced

(i) would disclose, or enable a person to ascertain, the existence or identity of a confidential source of information in relation to the enforcement or administration of a law, or

(ii) would tend to prejudice the proper functioning of government.

(3) For the purposes of subsection (1), the court shall take into account, *inter alia*, the following matters

(a) the importance of the evidence in the proceedings;

- (b) if the proceedings are criminal proceedings, whether the evidence is adduced by the defendant or by the prosecution;
- (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceedings;
- (d) the likely effect of the evidence being adduced and the means available to limit its publication; and
- (e) whether the substance of the evidence has already been published.

(4) For the purposes of subsection (1), the court may inform itself in any manner the court thinks fit”.

[59] While Section 109 (2) refers to confidential sources of information, and of prejudice to the proper functioning of government, these references are in the context of a recognised matter of state. The Board has not alleged that its Officer’s file contains information that relates to security or defence; to international relations; to the prevention or detection of offences or contraventions of law; or to anything else that might be considered to be a matter of state. Therefore, this Court will confine its analysis to Section 106 of the Evidence Act.

### **Discussion**

[60] Having considered the relevant common law principles and the legislative framework pertaining to this case, the Court now moves to the factual data to which that law is to be applied. The Court accepts that the Board is a creature of statute, vested with the responsibility for the care and protection of children in Barbados.

[61] Section 4 of Cap.381 describes the functions of the Board as:

- “(a) to provide and maintain child care centres for children in need of care and protection;
- (b) to provide counselling and other services
  - (i) for children in need of care and protection; and
  - (ii) for the parents and guardians of those children;
- (c) to place children in foster homes;
- (d) to supervise foster children and foster parents; and
- (e) such other functions as the Minister directs”.

[62] The role of the Board is similar to the work of the local authority referred to in a revealing comment by Charles J. in **Re R (Care) [2002] 1 FLR 755**. The learned Judge noted that:

“Local authorities regularly have to take decisions against a background of disputes, which can be stark and heated. They regularly have to assess risk and act on the basis of that assessment. They are often faced with parents and families who are uncooperative and all too willing to seek to blame others and, perhaps, in particular the local authority for problems that have arisen. They are often under-staffed and have well-known funding problems.

To my mind, the difficulties facing local authorities in the performance of their statutory duties in respect of children and families should not be underestimated”. (Page 766).

- [63] The Officer’s involvement in this matter began on 10 March 2014. The case was assigned to her after the minor’s father made a complaint to the Board. The complaint was classified as physical abuse, and the assignment occurred four days before legal proceedings were initiated, and approximately two weeks before the order was made for the first report.
- [64] The Court assumes that the Board’s initial contact with the father, prior to the commencement of the court proceedings, was either to provide counselling under Section 4 (b) of Cap. 381, or to exercise functions as directed by the Minister under Section 4 (e). There is no evidence before the Court to suggest or confirm that the preparation of reports, at the behest of a court, is a function directed by the Minister. In fact, the Court was given no insight into any existing functions directed by the Minister, which might impact on this case.

[65] The Officer's oral evidence to date reveals that her file in this matter was opened in accordance with the usual practice; that is, a file is created for each matter referred to the Board. She informed the Court that:

“In this instance, the file represents all the interventions I would have noted related to my interactions with the child [T.J.] and his family”.

[66] The Court accepts that information communicated to the Officer was communicated in confidence. The communications were received by the Officer in her capacity as a social worker employed by the Board. In conducting interviews she relied on her training and expertise gained from 12 years of employment with the Board. She informed the Court that her duties with the Board included preparing reports at the request of various local courts in matters relating to the care, custody and control of children.

[67] The Officer also holds a degree in social work, and she has applied the knowledge gained during the degree programme in the performance of her duties with the Board. In fact, she was accepted as an expert witness, by consent, based on her qualifications and experience. And it is those qualifications and experience that were brought to bear on the production of both reports.

[68] Charles J. offered guidelines in relation to the instruction and role of experts in similar cases. He opined that:

“First...all parties owe duties in respect of the identification and instruction of experts. Secondly ...once a report from an expert is received it should be considered by all the parties and their legal advisers to check:

(a) that the expert has reported in accordance with his or her instructions;

(b) whether that party wishes to put any further points to that expert, which would include points on his or her reasoning and also points as to what facts or matters the expert has considered and whether he or she agrees that other facts or matters are relevant and would make a difference; and

(c) the role that the expert should play at the hearing and thus whether and if so when, and as to what the expert should give oral evidence”.  
**(Re R (Care)** supra para.[62] at pages 779-780).

[69] By and large, the above guidelines have been observed thus far in these proceedings. What is apposite to this discussion is the part to be played by the file notes compiled by the Officer who prepared the reports.

[70] The Court’s orders for the preparations of reports were made on 27 March and 12 September 2014. The first report was to address the circumstances of the parties. Members of the immediate and extended family were interviewed. The second report was for the purpose of obtaining information from the minor’s former primary school, and from his present secondary school.

- [71] At the time the reports were prepared, it appears to the Court that the Officer was not immediately engaged in the execution of the core functions of the Board under Cap.381. Rather, she was responding to a request from this Court in proceedings between the parents of the minor. These proceedings are not between the Board and the parents. The Officer's role was grounded in a term of her contract of employment with the Board. That role was more ancillary to the Court's functions, than to the functions of the Board.
- [72] Unlike the social worker in **Herrick**, (supra para.[37]), the Officer in this case did not engage the parties as her clients, *stricto sensu*. Yet still, the mantle of confidentiality covered her interaction with the parties, and with all persons interviewed. It is significant that both of her reports were made available to the Court and to the parties. These reports identified the persons interviewed, and they contained the Officer's analysis and recommendations.
- [73] During her oral evidence, the Officer provided specifics about events reported to her and her conversations with the parents and the minor child. There was no withholding of information during her oral testimony. In this regard, the sources of the information gathered, and the information itself were revealed to the Court and to the parties. Therefore, there has already been disclosure, albeit limited disclosure.

[74] Counsel for the mother is not satisfied with the extent of the disclosure thus far. During the course of the oral submissions, the Court enquired of Mr. Khan whether anything in the evidence of the Officer led him to believe that there was more that he needed to see so as to protect the interests of the mother. Counsel responded that:

“...the [Board’s officer] made references to conversations that she had with a number of people including the Defendant. I challenged the content from the start. Of course I challenge the reports but I need the evidence...

My entitlement to the notes assists in the justice of this matter. Of course I recognise that the Court has the opposing submission that the public interest or the claim to privilege has to be balanced against the interest of the individual”.

[75] How then is the Court to balance the competing interests in this case? On the one hand, there is the public interest in the Board maintaining the confidentiality of its sources of information, so that the performance of its statutory responsibilities is not stymied. In this regard the Court notes that although the information provided to the Officer is confidential, the substance of that information is already available to the parties and to the Court. Except in the case of one source who provided information, but did not wish to be involved, there is no hard evidence that any of the sources have

objected to disclosure, or would resist a summons to appear and give evidence before this Court.

[76] The Court is also mindful of the fact that with an area of 166 square miles, Barbados is a speck in the global village. And given our population density, individuals may quickly become aware that the information provided to the Board could involve them in a bitter dispute fought out in the arena of the court. This is likely to impact negatively on the work of the Board.

[77] The comments of Lady Hale in **Re A (a child)**, (supra at para.[34]), are pertinent here. She observed that:

“[29]...There is an important public interest in preserving the confidence of people who come forward with allegations of child abuse. The system depends upon the public to be its eyes and ears. The social workers cannot be everywhere. The public should be encouraged to take an interest in the welfare of the children in their neighbourhoods. It is part of responsible citizenship to do so....

[30] But many of these informants will not be required to give evidence in order to prove a case, whether in criminal or care proceedings, against the perpetrators of any abuse. Their information will simply trigger an investigation from which other evidence will emerge. Their confidence can be preserved without harming others...”.

[78] In **Re A (a child)**, the Supreme Court permitted the disclosure of an

informant, because the minor's father had no particulars about the allegations of sexual abuse made against him by the informant.

[79] The other consideration is the public interest that justice be done, and that the administration of justice is not frustrated. The rights of the Defendant mother are at stake in that she is faced with a report that recommends that should she lose care and control of the minor child. She must also contend with serious allegations of child neglect and/or child abuse. There are allegations that she beats, threatens and intimidates the child, and that he is not provided with breakfast before going to school.

[80] The mother undoubtedly has a right to a fair trial. In **McMichael v. United Kingdom (1995) 20 EHRR 205** it was stated that:

“...as a matter of general principle the right to a fair - adversarial - trial ‘means the opportunity to have knowledge of and comment on the observations filed or evidence adduced by the other party’ ”. (Para.80; see also **Dunn v. Durham County Council [2012] EWCA Civ.1654** at para.39; and **Re A (a child)** supra at para. [34]).

[81] The Court is of the view that all the particulars of the allegations against the mother are already available to her. The particulars of the allegations are contained in the various affidavits filed by the father, the maternal aunt, and the maternal grandmother. The two reports compiled by the Officer also contain particulars, and the sources of information are identified. Counsel

for the mother has not alluded to any new allegations raised in the Officer's evidence, that would necessitate sight of the notes on which such allegations are based.

[82] The oral evidence in the Claimant's case against the mother began with the Officer's evidence. The Court assumes that there are other witnesses to be called, including those persons who filed affidavits on his behalf. It is also open to the Claimant to summon persons mentioned in the Officer's reports, or in her oral evidence, in order to bolster his case.

[83] It is the Claimant who must satisfy this Court, on a balance of probabilities, that care and control of the minor child should be taken from the mother. The mother does not have to summon the Officer's informants if the Claimant chooses not to do so. Therefore, sight of the notes of information given by the informants, would become critical if the Claimant intends to call these persons. This does not appear to be the Claimant's intention, as no affidavits were filed by these persons, and no requests were made for the Court to summon them as witnesses for the Claimant.

[84] Insofar as the reports are based to some extent on allegations made by the informants, and are the basis of the recommendation in the second report to remove the minor child from the care and control of his mother, the mother is entitled to discovery of the notes taken from the two principals and the

teacher who were interviewed by the Officer. It is information from these persons, and from the minor child that led the Officer to change her original recommendation, to the detriment of the mother.

[85] Also of interest to the Court is Mr. Khan's suggestion that the Officer's evidence, about what the mother told her, does not accord with his instructions. This represents a potential challenge to the credibility of the Officer's evidence. And, in that regard, the contemporaneous notes taken by the Officer about her interactions with the mother, may be of assistance in the mother's case.

[86] Taking the common law principles into consideration, and after balancing the competing public interests, the Court believes that in the interest of justice the Officer's file notes, with respect to her conversations and interactions with the mother, the two principals and the teacher, should be disclosed. However, the Court also has to assess whether evidence from the disclosed notes may be adduced before the Court.

[87] The mother is an interested person within Section 106 (5) of the Evidence Act. The Officer's file notes also constitute confidential communications and/or confidential records. (S.2 Cap.121). In the context of Section 106 (2) of Cap.121, the Court finds that certain evidence from the Officer's file notes are important for ensuring that the mother receives a fair trial.

[88] The content of the notes to be disclosed were partially disclosed to the Court via the Officers reports and her oral evidence. The mother, through her counsel, has impliedly consented to evidence from the notes being adduced. And there is no evidence before the Court that the persons, who provided information for the notes, have objected to the notes being made available to the mother.

[89] These proceedings are to determine whether care and control of the minor child should be removed from the mother and given to the father. The overriding concern of the court in such cases is the welfare of the minor child.

[90] The Court is in a position to limit the publication of any and all evidence adduced in this case, by ensuring that the proceedings are conducted in camera. All parties, including persons called to give evidence, may be instructed not to provide information or interviews about the case to the media. The notes provided by the Officer should be filed in a sealed envelope, with only three copies delivered directly to the Court, and to counsel for the Claimant and the Defendant.

[91] Section 106 (1) requires the Court to consider the likelihood of harm if the evidence is adduced, and the likelihood that the harm may “outweigh the desirability of admitting the evidence”. (See para.[46] supra). The likely harm canvassed before this Court is the possible compromise of the Board’s

ability to gather information from members of the public in the future. However, the Court is of the view that the proposed restrictions, on the dissemination of information, would negate the possibility of the compromise of the Board's ability to assist the Court, or to carry out its statutory functions.

[92] Before disposing of this matter, the Court wishes to refer to the suggestion made that the Court should take a look at the Officer's file. As I understood this proposal, it was to determine whether a miscarriage of justice has occurred, or whether exculpatory evidence exists that was not presented fairly to the Court.

[93] The Court has taken a cautious approach to this suggestion, and has declined thus far to call for or to review the Officer's file. In **Re A (a child)**, (supra at para.[34]), Lady Hale state that:

“[17] if the public interest against disclosure prevails, the decision-maker, whether judge or jury, is not entitled to take the information into account in deciding the result of the litigation. There is no hard and fast rule as to whether the same judge is to continue to hear the case. It is well-established that a judge may do so in a criminal case, but then the jury and not the judge are the finders of fact. It may also be possible to do so in a civil case...The well-established test of apparent bias will apply: see **Porter v. Magill [2002] UKHL 67**”.

[94] This is not a criminal case. And the Court is inclined to disclosure of specific notes from the Officer's file, both on the basis of the common law principles and the guidelines in Section 106 of the Evidence Act. In **Porter v. Magill**, the House of Lords stated that the appropriate test in determining an issue of apparent bias is whether the fair minded and informed observer, having considered the relevant facts, would conclude that there was a real possibility that a tribunal was biased.

[95] The Court has taken the decision not to call for or examine the Officer's file prior to the delivery of this judgment. The Court wishes to avoid raising the spectre of apparent bias in relation to this judgment, or in relation to the proceedings to date.

**Disposal**

[96] It is the order of this Court that the Officer shall produce to the Defendant's counsel, on or before the 30<sup>th</sup> of December 2016, true copies of all her file notes arising from her interviews with the mother, the two principals, and the female teacher.

**Sonia L. Richards**  
**Judge of the High Court**