CAUSE NO: G 0103 of 2022

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

BETWEEN:

THE KING

(on the application of
1. CAYMAN ISLANDS URGENT CARE LTD (Trading as Doctor's Express)
2. KAISER DAY CANNACEUTICALS LTD
3. KAISER DAY PHARMACEUTICALS LTD)

Applicants

AND

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

Appearances: **Mr Jude Bunting KC instructed by Mr James Austin-Smith of Campbells for the Applicants**
Mr David Perry KC instructed by Ms Toyin Salako of the Office of the Department for Public Prosecutions for the Respondent

Before: **The Honourable Justice Jalil Asif KC**

Heard: **18 October 2024**

Ex Tempore
Judgment Delivered: **18 October 2024**

Finalised
Judgment Approved: **22 October 2024**

Judicial review—disclosure of instructions to and advice from external leading counsel on charges—whether breach of disclosure order in respect of failure to disclose instructions to counsel

EX TEMPORE JUDGMENT

A. Introduction

1. This is my judgment on the restored hearing of the Applicants' application for discovery by the Respondent of documents underlying the decision made regarding potential charges of certain individuals.

2. I heard the original application on 11 July 2024 and gave judgment on 5 August 2024. I refer to that judgment for the detailed factual background both to the substantive judicial review claim and also to the discovery application and my reasons for making the original Order for disclosure in the Applicants' favour.

3. The Applicants now complain that the Respondent has not properly complied with the terms of the Order. The Applicants ask that I order that the Respondent:

   3.1 swear an affidavit explaining who instructed leading counsel, when and how, and

   3.2 provide any communications sent to leading counsel for the purposes of the advice.

4. The Applicants say that the Respondent's evidence in relation to its current complaint *"strains credibility,"* and as a result, the Applicants ask for the affidavits and communications to be provided within 7 days and asks that I endorse the Order with a penal notice.

5. The Respondent, on the other hand, contends that:

   5.1 he has complied with the Order;

   5.2 there is no proper basis for including a penal notice; and,

   5.3 the judicial review application is now *otiose* because the Respondent has indicated that he will consider and make the challenged decision afresh.

B. Preliminary matter

6. Before I deal with the substantive application I raise one preliminary matter. Prior to finalisation of my judgment dated 5 August 2024 I circulated a draft judgment to counsel to obtain input regarding any typographical errors and corrections required, in the usual way.

7. I raised at the outset of the hearing that the Applicants' evidence and submissions impermissibly seek to go behind the embargo attached to that draft judgment. The Applicants' argument on the current application seems to me necessarily to involve having to compare the terms of the draft judgment with the finalised judgment.

8. The Applicants did not appear to me to have a good answer to this. I therefore ordered that paragraph 8 of Mr Austin Smith's affidavit sworn on 14 October 2024 should be struck out as being scandalous, and I forbade the Applicants from advancing that part of their submissions that sought to rely on that evidence, namely, paragraphs 12, 13 and 17(c) of the Applicants' submissions.

9. I take this opportunity to remind counsel that draft judgments are subject to a strict embargo for good reason. The fact that a finalised judgment is subsequently handed down does not affect the existence of the embargo on the draft judgment. Breach of the embargo amounts to a contempt of court. There have been a number of cases in England and Wales addressing the practice of circulating draft judgments, the nature and extent of the embargo, and the consequences of breach, the most recent being *R v Counihan* [2024] EWCA Crim 799.

10. Whilst I have not heard full argument on this today, or indeed perhaps I should say, any substantial argument, it seems to me that the principles applied in England and Wales are readily exportable to the Cayman Islands and should be borne in mind by all counsel appearing before a court. It is a serious matter to breach the embargo, as it necessarily involves a contempt of court.

C. Breach of Discovery Order?

11. I now turn to deal with the substantive question before me, was there a breach of my previous Order?

12. The Order was expressed in terms that it was for disclosure of:

> *(a) the advice of leading counsel dated 10 February 2022, and*
> *(b) the instructions to leading counsel that led to* ***that advice****" (emphasis added)*

13. In summary:

13.1 the reason for sub-paragraph (a) of my order was that leading counsel's advice of 10 February 2022 is the closest document available to a contemporaneous record of how and why the decision on prosecution was made; and

13.2 the reason for subparagraph (b) was that part of the Applicants' argument is that the Respondent's decision making was flawed because leading counsel, whose advice was endorsed in making that decision, had not seen all the relevant material before formulating their advice, for example, a transcript of the evidence of the customs officer who had been instrumental in obtaining the search warrant that was challenged.

14. I therefore concluded that the Applicants should have sight of documents demonstrating what information and material was provided to leading counsel.

15. My judgment, and the Order, presumed, on the basis of the way in which the Respondent's case was presented in Court, that there was a document or documents constituting the instructions, under cover of which the documents on which leading counsel relied were provided. The Respondent now says,

> *"7. Having made inquiries within my office, I established that the instructions for leading counsel were provided verbally but were summarised in the advice itself. As a result, in an email on 16 August 2024, I provided the advice of leading counsel, dated 10 February 2022 to Mr Austin Smith, and confirmed that the instructions giving rise to the advice were contained within the first three paragraphs of the advice itself."*

16. Turning to the advice, it sets out in some detail what material and information was provided to leading counsel and the purposes for which leading counsel was instructed. She says in paragraph 1:

> *"1. I am briefed on behalf of the Crown in this matter, and I have been asked to advise on whether there are any charges arising from a series of events emanating from the discharge of a cease notice issued by Dr John Lee in his capacity as Chief Medical Officer of the Cayman Islands …"*

and then she goes on to describe the application for the search warrant and its subsequent execution.

17. In paragraph 2, leading counsel lists the potential defendants whose conduct she was asked to consider. In paragraph 3, she sets out a number of potential offences which she has been asked to consider as potentially applicable against those individuals. Then, in paragraph 4, she says:

> *"4. In order to write this advice, I have considered the following material …"*

She sets out a large number of sub-paragraphs expressly identifying documents with which she has been provided. In sub-paragraph (m), she says:

> *"(m) A large number of emails sent and received by the potential defendants and others associated with these events, too numerous to list here. …"*

Suffice to say, these emails were either provided by the potential defendants themselves during the course of the judicial review proceedings, or as a result of the ACC investigation. I pause here to say, it is clear from leading counsel's description of those "numerous" emails that they substantially post-date the relevant events leading to the obtaining and execution of the search warrant, etc.

18. In paragraph 5, leading counsel records:

> *"5. I understand that only HS gave evidence at the judicial review proceedings. I have not been provided with a transcript of her evidence."*

19. The Applicants rely on two authorities to support its argument that there has not been full compliance with the Order in terms of provision of copies of the instructions. The first is the case of *Edwards v HMA* (unreported, Court of Appeal, Scotland, 25 September 2009). In paragraph 9, Lord Nimmo Smith, giving the unanimous judgment of the Court of Appeal, said this:

> *"The word instructions has various shades of meaning, as can be seen from such works of reference as the Oxford English Dictionary, and other Dictionaries. A convenient brief definition which is appropriate in the present context may be taken from Collins, English Dictionary: 'Law: facts and details relating to a case given by a client to his solicitor, or by a solicitor to a barrister, with instructions to conduct the case.' The same applies to a Scottish advocate, as it does to an English barrister. A client or his solicitor does not give orders to an advocate whose services have been engaged for the conduct of a case. As it is put in the* Guide to the Professional Conduct of Advocates *issued by the Faculty of Advocates, at paragraph 1.2.3, '[A]lthough it is said that the client or his agent 'instructs an advocate' or 'instructs counsel', this does not mean he can give orders. An Advocate is however obliged to follow instructions as to basic matters such as the line of defence in criminal cases."*

20. I interpolate here that the reason that Lord Nimmo Smith was addressing that particular aspect of the meaning of *"instructions"*, was because this was a criminal appeal where there was a complaint regarding the conduct of defence counsel, and the way in which he had acted on behalf of his client.

21. It therefore seems to me that the assistance to be gained from Lord Nimmo Smith's discussion on the meaning of *"instructions"* needs to be qualified by the context in which he was addressing that particular question.

22. Secondly, the Applicants rely on *Lucas v Barking, Havering and Redbridge Hospitals, NHS Trust* [2003] EWCA Civ 1102. This is a case concerning whether materials provided to an expert for the purpose of preparing a report in connection with clinical negligence proceedings were exempt from disclosure under paragraph 35.10(4) of the English Civil Procedure Rules, which is the particular provision dealing with the circumstances in which expert's instructions may or may not be disclosable to another party.

23. There is no similar provision in the GCR, nevertheless, that is not material for the purpose of the Applicants' argument, which is that having discussed previous authorities dealing with what is and is not disclosable in terms of an expert's instructions, Waller LJ continued at paragraph 34:

> *"34. It follows that I disagree with the decision of Morland J in* Taylor v Bolton Health Authority *14 January 2000 and would hold that that should no longer be considered authoritative in this area. Material supplied by the instructing party to the expert as the basis on which the expert is being asked to advise should in my view be considered as part of the instructions and thus subject to CPR. 35.10(4)."*

In other words, Waller LJ was saying that material that comprises part of the instructions is not subject to disclosure to the other side within the proceedings, unless certain very limited exceptions to that are made out.

24. The question in this case is whether there is any additional document falling within the concept of *"instructions"* that the Respondent should have disclosed in compliance with my Order and has not done.

25. Mr David Perry KC, who appeared on behalf of the Respondent, confirmed in the course of his submissions that there was nothing substantive in any covering letter or email by which the documents which were provided to leading counsel for the purpose of preparing her advice dated 10 February 2022 were sent.

26. I go back to record that paragraph 4 of the advice is a very lengthy list of specifically identified documents which leading counsel had before her. The one question, then, is whether the description

in paragraph (m) of *"a large number of emails sent and received by potential defendants and others associated with these events too numerous to list here,"* is sufficient to give rise to a further obligation on the Respondent to disclose those additional emails.

27. It seems to me that the relevant question here is: "*are those documents material to the instructions*?" In the authorities that I have been referred to, the Courts talk about the documents being *"material"* to the task that counsel has been asked to perform.

28. In my judgment, these emails, are not material to the task, particularly because they were prepared during the course of the judicial review proceedings, or as a result of the ACC investigation, as counsel identified them, and are therefore not contemporaneous with the conduct and events on which leading counsel was being asked to advise on charge.

29. Thus, subject to confirmation by the Respondent in a further affidavit that no covering letter or email providing the documents listed in paragraph 4 of Leading Counsel's advice included any substantive information, my conclusion is that there has not been a breach of the terms of my Order.

30. I do not need to comment on the Respondent's subsequent disclosure of further advices from leading counsel, which do not strike me as being relevant to the charging decision that was made on 10 February 2022, simply because they clearly postdated that decision. The relevance of those documents, if any, is simply to demonstrate, as I accept, that the Respondent does appear now to be taking seriously his duty of candour.

31. Finally, I record that the Respondent has raised *sotto voce* that the judicial review application is now academic because he intends to re-make the relevant decision on charging. There is no formal application before me to dismiss the proceedings on that basis, and so I do not say any more about this other than it may potentially provide an answer to the current proceedings, depending on how the parties move forward from here.

32. On the question of costs, whilst the Applicants suggest that the appropriate order for costs should be "no order" on the basis of their partial success in requiring a further affidavit to be sworn by the Respondent, the affidavit that I have ordered to be provided is a long way short of the relief that the

Applicants were seeking. The fair outcome is to order the Applicants to pay the Respondent's costs of the application today, to be taxed on the standard basis, if not agreed.

D. Post-judgment matters

33. When I delivered my *ex tempore* oral judgment on 18 October 2024, Mr Bunting KC, who appeared on behalf of the Applicants immediately complained that I had made a finding of contempt of court against Mr Austin-Smith in relation to the Applicants' intended argument based on a comparison of the terms of my draft judgment on the substantive application for discovery with the final judgment, without hearing submissions on behalf of the Applicants. At his request, I allowed the Applicants 7 days to provide written submissions on that point.

34. Mr Bunting very promptly provided me with his written submissions on 21 October 2024. Mr Bunting points out the difference between criminal contempt and civil contempt. He says that I made a finding of criminality against Mr Austin-Smith. He submits that a high standard of procedural fairness is required when considering criminal contempt and complains that I did not act in a way that was procedurally fair. He argues that the Respondent had not raised any concern, no allegation of contempt was put to Mr Austin-Smith, and he had not had an opportunity to contest it. Mr Bunting also submits that my finding was not justified on the facts. He does not address the situation of civil contempt and entirely focusses on criminal contempt.

35. I have carefully considered the content of my judgment and have taken the time also to listen back to the audio recording of my *ex tempore* judgment. I did not make any finding of contempt against Mr Austin-Smith, whether of a criminal or civil nature. Mr Bunting's further submissions therefore, in my judgment, proceed on an erroneous basis.

36. In addition, I have also listened back to the audio recording of the argument on this point. As recorded in paragraph 7 of this judgment, I raised during submissions whether the Applicants' argument founded on paragraph 8 of Mr Austin-Smith's affidavit was impermissible because it involved a comparison between the draft judgment and the final judgment, which required going behind the embargo. I gave Mr Bunting the option to take some time to consider the point or to agree to striking out the relevant paragraph of Mr Austin-Smith's affidavit and deleting that aspect from his argument. I said that it needed to be addressed if Mr Bunting wished to continue with that point. Mr Bunting

indicated that he did not need to rely on that argument, and so I ordered that paragraph 8 of Mr Austin-Smith's affidavit should be struck out as being scandalous and vexatious. There was no objection from Mr Bunting or Mr Austin-Smith at the time to proceeding in this way. However, I did not make any finding that Mr Austin-Smith had behaved in a manner which was scandalous and vexatious, as Mr Bunting attributes to me in his written submissions. Mr Bunting then argued the Applicants' case without reliance on that aspect of the evidence or that strand of the Applicants' argument.

37. When it came to delivery of my judgment, having summarised events during argument as set out in paragraph 7 of my judgment above, I then made some general comments regarding the importance of respecting the embargo on draft judgments, as recorded in paragraphs 9 and 10 of this judgment.

38. Mr Bunting says in his written submissions that I *"found in terms that Mr Austin-Smith's affidavit … had breached the embargo on the draft judgment and that this amounted to a contempt of Court."* As is clear from the terms of this judgment, I did not make either of these findings. I simply held that the Applicants' evidence and submissions impermissibly sought to go behind the embargo attached to that draft judgment.

39. Mr Bunting's submissions are that I held that the Applicants had no good answer to the proposition that they had breached the embargo on the draft judgment and that this amounted to a contempt of court. These submissions are also incorrect. As appears from paragraphs 7 and 8 of this judgment, my finding was that the Applicants did not have an answer to the fact that their argument necessarily involved having to compare the terms of the draft judgment with the final judgment. That is very different from what Mr Bunting seeks to attribute to me.

Dated 22 October 2024

THE HONOURABLE JUSTICE JALIL ASIF KC
JUDGE OF THE GRAND COURT