IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. G 103 OF 2022

IN THE MATTER OF AN APPLICATION FOR LEAVE TO SEEK JUDICIAL REVIEW

BETWEEN

1) CAYMAN ISLANDS URGENT CARE LTD
2) KAISER DAY CANNACEUTICALS LTD
3) KAISER DAY PHARMACEUTICALS LTD

APPLICANTS

AND:

DIRECTOR OF PUBLIC PROSECUTIONS

RESPONDENT

Submissions:	**Mr. James Austin-Smith, Campbells LLP on behalf of the Applicants** **Attorney Generals Chambers for the Respondent**
Before:	**The Hon. Justice Cheryll Richards K.C. (in Chambers)**
Heard:	**On the papers**
Ruling delivered:	**16th February 2023**

HEAD NOTE

Leave to seek judicial review - relevant test for granting leave, Grand Court Rules Order 53 rule 3

RULING ON EXPARTE APPLICATION FOR LEAVE TO SEEK JUDICIAL REVIEW

THE APPLICATION

1. This is a ruling on an amended *ex parte* application for leave to apply for judicial review. The application is supported by the Affidavit of Samuel Banks dated 4th May 2022. It is made on notice to the Respondent, the Director of Public Prosecutions, ("the Director").

2. The Applicants, Cayman Islands Urgent Care Ltd., trading as Doctors Express, ("Doctors Express"), Kaiser Day Cannaceuticals Ltd., and Kaiser Day Pharmaceuticals Ltd., seek relief in respect of certain decisions made by the Director. These are: -

   i) The decision not to institute criminal proceedings against the former Chief Medical Officer of the Cayman Islands Dr. John Lee ("Dr. Lee") for perjury, attempting to pervert the course of justice, misfeasance in public office or other offences.

   ii) The decision not to institute criminal proceedings against Customs Officer Holly Schneider ("CO Schneider") for perjury, attempting to pervert the course of justice, misfeasance in public office or other offences.

   iii) The decision not to institute proceedings against certain other individuals.

   iv) The refusal to give reasons for his decisions in the three matters above.

3. Orders of certiorari are sought to quash:-

   i) The decisions of the Director not to bring criminal prosecutions against Dr. Lee and CO Schneider as to what are alleged to be unlawful actions in relation to their evidence given in judicial review proceedings in Grand Court Cause 169 of 2019 ("the 2019 proceedings").

   ii) The decision of the Director not to bring criminal prosecutions against other parties as a result of what are alleged to be unlawful actions in relation to the facts giving rise to the 2019 proceedings.

4. An order of mandamus is sought to direct the Director to reconsider the charging decisions made in respect of the matters above.

5. Two declarations are sought to declare that the failure to give reasons for the decisions not to bring criminal proceedings was unlawful and rendered the decisions void and that the Attorney General's Chambers is conflicted in acting for the Director in this matter.

6. On the 14th April 2022 pursuant to the Pre-action Protocol (Practice Direction No. 4 of 2013), the Applicants provided to the Director a notice of a possible application to bring judicial review proceedings if no response was received by the 28th April 2022 to their request. The request was for full reasons for the decisions which were taken not to bring criminal prosecutions against any person and the evidence underpinning those decisions. No response was received by that date.

7. The judicial review application was filed on the 4th May 2022. Subsequent to that filing there was a letter from the Director dated 6th May 2022. There is a factual issue as to whether an earlier letter under the hand of the Assistant Director dated 4th May 2022 had been received before or after the filing of the application. By letter dated 20th May 2022 the Attorney General's Chambers ("the Attorney General") on behalf of the Director provided a detailed response. This maintains the position of the Director which had been briefly stated in the two earlier letters that applying the evidential test, there was insufficient evidence to justify bringing charges against any of the identified individuals and no reasonable prospect of conviction of

any person. In addition, details are set out as to the materials and evidence which formed the basis of the decisions made and the reasons for the conclusion that the test was not satisfied in each case. The Attorney General also refers to the case law on the jurisdiction to review decisions made by the Director and contends that in the particular circumstances of this case the application for permission to judicially review the decisions made "is misconceived and wholly without merit."

8. On the 31st May 2022, the Applicants filed an amended application with an Addendum of paragraphs 69 to 132 which is said to be responsive to the submissions of the Attorney General.

9. I have reviewed all the material provided and the written submissions of both parties. Given the nature of the subject matter involving as it does a power of review which is to be "sparingly exercised" and the conclusion which I have reached, I consider that it is appropriate to provide these short reasons.

THE GRAND COURT RULES

10. The ***Grand Court Rules*** Order 53 rule 3 provides that on an application for leave to apply for Judicial Review:-

> *"The Judge may determine the application without a hearing, unless a hearing is requested in the notice of application, and need not sit in open Court; in any case, the Clerk of the Court shall serve a copy of the Judge's order on the applicant."*

11. I am conscious that the purpose of the leave stage is to act as a filter for claims at an early stage to prevent the time of the Court being wasted on applications which are groundless or hopeless.

12. The test to be applied on the application for leave is set out in the case of ***R v The Commissioner for the Special Purposes of the Income Tax Acts ex parte Stipplechoice***[1]. In order for leave to be granted the Applicants must demonstrate that there is an arguable case that a ground for judicial review exists. The test is also stated in one of the cases cited by the Attorney General, ***Sharma v. Brown-Antoine and Others***[2]**.** The court "will refuse leave to claim judicial review

[1] [1985] 2 All ER 465
[2] [2007] 1 WLR 780

unless it is satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternate remedy." In outlining this governing principle, the Privy Council stated that arguability is a test which is flexible and which cannot be judged without referring to the nature and gravity of the issue to be argued.

THE SEQUENCE OF EVENTS

13. The broad sequence of events in the instant matter may not be much in dispute. On the 17th September 2019, a search warrant was executed by Customs and Police Officers at the premises of Doctors Express. The search warrant had been obtained from a Justice of the Peace on the application of CO Schneider. The purpose of the search warrant was to search for and seize vaporised cannabinoid products. Doctors Express had previously obtained the necessary licenses and permissions to allow them to import, hold and prescribe these products. About forty-five minutes after the search began, Doctors Express was served with a Cease and Desist Notice issued by Dr. Lee. The Notice required that health practitioners cease the provision of vaporising cannabinoid products. It had been issued on the 14th or 15th September 2019 but had not been immediately sent to the Applicants.

14. Following the search, the Applicants brought the 2019 proceedings. The judgment of McMillan J. in those proceedings concluded *inter alia* that the Cease Notice and the search were unlawful. The Court found that the Cease Notice had not been issued because of the serious health risks of vaporisable cannabinoid products and that the search warrant had been sought and obtained for an improper purpose. The learned Judge made findings of fact as to inconsistencies in the evidence of the witnesses, Dr. Lee and CO Schneider and ultimately as to their veracity and motives.

15. On the 9th April 2021, after the conclusion of the 2019 proceedings, the Applicants complained to the Anti-Corruption Commission about possible criminal conduct by some persons in relation to the search. The Commission carried out an investigation and submitted a file to the Office of the Director. On the 28th February 2022, the Applicants were advised by the Commission that following a review of the evidence, the Office of the Director had recommended that no charges be brought against any person in respect of the complaint made.

THE ALLEGATIONS

16. The circumstances leading up to the search may be briefly summarised. This is by no means intended to be a full exposition of the facts some of which are in clear dispute. The sequence of events appears to be that on the 10th September 2019, Doctors Express caused or permitted to be circulated a text message to users of Digicel telephones advertising the availability of vaporisable medical cannabinoids. This came to the attention of Customs Officers. CO Schneider was given instructions to investigate this. Customs Officers approached and met with the Health Practice Commission raising concerns as to these products. The Commission raised the matter with the Chief Medical Officer who thereafter issued the referenced Cease and Desist Notice to all registered Health Care Practitioners.

17. The Applicants rely on what is said to be powerful evidence of wrongdoing arising from the judgment in the 2019 proceedings and the materials disclosed during that Court process. In particular, they highlight the following: Dr. Lee stated in the Cease Notice that it was issued inter alia because of concerns as to the exponential growth in cannabinoid prescribing in the Cayman Islands. The Notice stated that in the best interest of the Cayman Islands public, the ministry and other entities had opened an investigation into the use of cannabinoids. The Notice also stated:-

> *"There is a lack of sufficient evidence surrounding the safety and efficacy of vaporising cannabinoids."*

18. The Applicants say that Dr. Lee swore two Affidavits as evidence in the 2019 proceedings that it was his view in September 2019 that vaping cannabinoids present a real and present danger to public health.

19. They also say that it emerged in the course of those proceedings that on the day before the Notice was issued, Dr. Lee wrote to the Health Practice Commission and expressed the view that it is highly likely that vaporising cannabinoids is not more injurious to health than smoking marijuana and that the deaths from vaping seem not to be related to the type of medical cannabinoid vapes being used by Doctors Express.

20. With respect to CO Schneider the Applicants point primarily to what are said to be the inconsistencies in her evidence given in the course of the 2019 proceedings. In particular that her evidence was that a search warrant was not necessary as there was reasonable cause to believe that drugs offences had been committed on the premises in contrast to her evidence that a search warrant had been obtained because it was necessary for one to be obtained. The Applicants assert that the CO made statements on oath which are irreconcilable and contradictory to earlier statements made. The Applicants say that there is evidence of perjury and conspiracy to defeat justice.

21. The Applicants also assert that there are several senior officers who it can be reasonably inferred from the evidence, gave instructions to CO Schneider and that consideration ought to be given to whether the actions of those officers, taken prior to and on the search were as a result of a wider conspiracy in which multiple people were involved.

22. The core assertion of the Applicants is that a number of public officers abused the powers of their office to such a level that the criminal threshold is met.

DISCUSSION

23. The case of ***Sharma v. Brown-Antoine and Others*** highlights the distinction in the way decisions to prosecute have been treated in contrast to decisions not to prosecute. While decisions to prosecute are subject to judicial review, it is described as a "highly exceptional remedy" and one which is "rare in the extreme." One of the primary reasons for this is that in the absence of a claim for judicial review, the aggrieved person is not left without a remedy and will have the opportunity to raise complaints or concerns as part of the trial process including any subsequent appeal. It would be open to such a person to make abuse of process arguments before the trial court that a charge should never have been brought.

24. The Attorney General also refers to the case of ***R. v. DPP (Ex parte Chaudhary).***[3] This was an application for leave to review a decision of the English Director of Public Prosecutions not to prosecute a person, FC, in respect of the alleged offence of Buggery. The English Divisional Court identified several guiding principles relative to the power of review as discussed in a

[3] [1995] 1 Cr. App, R, 136

number of cases between 1968 and 1993. The Court noted that the authorities show that a court does have power to review a decision of a director not to prosecute but that this is one to be "sparingly exercised." The Court referred to the case of ***General Council of the Bar ex parte Percival***[4], a decision of Watkins LJ in which the learned Judge stated that each case must be considered with regard to how the particular complaint was or was not dealt with.

> *"It falls to be decided, in our view, on the substantive issues of irrationality and/or procedural irregularity, with due regard to the nature of the discretion involved."*

25. In the matter before it, the Court concluded from the cases reviewed that it could only be persuaded to act if some unlawful policy had been applied, if there was a failure to act or the decision was perverse. Perverse meaning a decision which no reasonable prosecutor could have arrived at. The Court stated:-

> *"From all of those decisions it seems to me that in the context of the present case this court can be persuaded to act if and only if it is demonstrated to us that the Director of Public Prosecutions acting through the Crown Prosecution Service arrived at the decision not to prosecute:*
>
> • *(1) because of some unlawful policy (such as the hypothetical decision in Blackburn not to prosecute where the value of goods stolen was below £100); or*
>
> • *(2) because the Director of Public Prosecutions failed to act in accordance with her own settled policy as set out in the Code; or*
>
> • *(3) because the decision was perverse. It was a decision at which no reasonable prosecutor could have arrived..."*

26. Following a review of the available evidence the Court determined that the Code for Crown Prosecutors had not been properly applied, in that, the decision made failed to have regard to any possible lines of defence open to the accused. The decision maker had instead made the assumption that the defence would be consent and did not consider whether a denial may have

[4] [1991] 1 Q.B. 212

been raised. There was thus a failure to act in accordance with the settled policy as set out in the Code. Judicial review was therefore granted.

27. The case of ***Ex parte Chaudhary*** was referred to in the judgment of the Court in the case of ***R v DPP Ex parte Manning.***[5] The latter case concerned an application for judicial review of a decision not to prosecute in respect of an allegation of Manslaughter. This was as to the death of a prisoner by asphyxia. The evidential issue was the manner in which the prisoner had been held by prison officers. At a Coroner's inquest there had been evidence about this from prison officers which conflicted with the evidence of certain prisoners.

28. The Lord Chief Justice in delivering the judgment of the Court noted that the decision not to prosecute had been made in accordance with the Code for Crown Prosecutors applying the evidential and public interest tests. The evidential tests is whether there is a realistic prospect of conviction, it is an objective test meaning whether it is more likely than not that a jury will convict a defendant of the charge alleged. The learned Judge stated that the power of review is to be sparingly exercised for the very clear reasons that Parliament had entrusted the decision whether to prosecute to the Director as head of an independent body.

29. The Court said:-

> *"In any borderline case the decision may be one of acute difficulty, since while a defendant whom a jury would be likely to convict should properly be brought to justice and tried, a defendant whom a jury would be likely to acquit should not be subjected to the trauma inherent in a criminal trial."*

30. The internal review process which was followed in cases such as that before the Court was noted. If there is a decision not to prosecute, the decision will be subject to review by Senior Treasury Counsel who will exercise independent professional judgment. The Court stated that:-

> *"This exercise of judgment involves an assessment of the strength, by the end of the trial, of the evidence against the defendant and of the likely defences. It will often be impossible to stigmatise a judgment on such matters as wrong even if one disagrees with it. So the*

[5] [2000] WL 571205

courts will not easily find that a decision not to prosecute is bad in law, on which basis alone the court is entitled to interfere."

31. Importantly the Court also said that the standard of review should not be set too high as it is the only means by which a citizen can seek redress against a decision not to prosecute.

32. In that case the Court granted the application for judicial review and required the English Director to reconsider the decision whether or not to prosecute. The Court did so having concluded that five evidential points had not been considered in coming to a decision not to prosecute.

33. Against the background of the guiding principles and approach, this ruling will consider some areas of complaint which appear at this stage to have some resonance.

34. The Applicants assert *inter alia* that there is a failure by the Director to consider all the evidence which failure may properly render the decisions unlawful. It is said that the Director failed to consider:-

a) actions in relation to the 2019 proceedings and focused only on the actions in relation to the warrant;
b) other offences set out s.322 (b) to (g) of the ***Penal Code*** (2019 Revision); and
c) other available evidence including the evidence of Professor Moore, the expert called on behalf of the Applicants, that there was no health risk to justify the issue of the Cease Notice.

It is also said that the Director applied a higher test of knowledge than is required in proof of the offence of Misconduct in Public Office.

ALLEGATION OF FAILURE TO CONSIDER ALL AVAILABLE EVIDENCE

35. At paragraph 4 of the 20th May letter sent on behalf of the Director, there is a list of the evidentiary material which was considered. The Applicants highlight that it does not include five items. Two appear to be of import. They are the two Affidavits of the Justice of the Peace

who granted the search warrant and the video recorded evidence of the testimony given by CO Schneider in the course of the 2019 proceedings. The other three are, affidavits of officers who attended the search, the expert report of Professor Moore and the Affidavits of Samuel Banks dated 4th December 2019 and 29th May 2021.

36. There is reference in the reasons provided on behalf of the Director to the absence of evidence as to what was said on the application for the search warrant. It is also stated therein that there is no record of the evidence given by CO Schneider at the 2019 hearing[6].

37. The Applicants also point to the statement at paragraph 31 of the reasons that there was no evidence that CO Schneider was instructed to obtain the warrant. There is said to be sworn evidence from CO Schneider in the course of the 2019 proceedings that she had been instructed to obtain the warrant by a senior officer.

MISCONDUCT IN PUBLIC OFFICE

38. With respect to their complaint as to the failure to properly consider the elements of the offence of wilful misconduct in public office, the Applicants rely on the case of ***Attorney General's Reference (No. 3 of 2003[7])***. In that case the English Court of Appeal identified the elements as being that "a public officer was acting as such, wilfully neglected to perform his duty and/ or wilfully misconducted himself, such that his conduct amounted to an abuse of the public's trust in the office holder and that he acted without reasonable excuse or justification." It is a breach of a duty by a public officer by way of an act of commission or omission. Recklessness will apply to the question whether a duty arises at all and to the conduct of the defendant if the duty does arise.

39. The Court held that:-

> *"The misconduct complained of had to be serious misconduct, the seriousness of which might depend on the seriousness of the consequences that followed the act or omission. In order to establish the mens rea of the offence it had to be proved that the office holder was*

[6] Paragraphs 27 and 29 of the letter dated 20th May 2022
[7] [2004] EWCA Crim 868

aware of the duty to act or, subjectively, was reckless as to the existence of the duty applying. The recklessness test applied both to the question whether in particular circumstances a duty arose at all as well as to the conduct of the defendant if it did arise and the subjective test applied both to reckless indifference to the legality of the act or omission and in relation to the consequences of the act or omission."

40. The Court referred with approval to a passage in the judgment of Brennan J. in the High Court of Australia in the case of ***Northern Territory of Australia v Mengel***[8]**,** which is descriptive of the offence**.** It is the exercise of some power by a public officer otherwise than in an honest attempt to perform the functions of his office which causes loss to a plaintiff. The threshold is a high one and a mistake even if it is a serious one will not suffice. It was also stated:-

"Malice, knowledge and reckless indifference are states of mind that stamp on a purported but invalid exercise of power the character of abuse of or misfeasance in public office …"

41. The specific complaint of the Applicants is as to the Director's consideration and exposition of the mental element of the offence. In summary, it is that there is no reference in the detailed reasons provided on behalf of the Director to wilful misconduct as including a state of mind which may be one of recklessness. Thus, it is said that the Director restricted himself to considering the element of knowledge as deliberate and intentional *mens rea*, when willfulness also includes a lesser state of knowledge.

42. The Applicants point to paragraphs 7, 17 and 18 of the reasons. Paragraph 7 refers to proof that is required that Dr. Lee's conduct fell so far below the standard of conduct expected of him as to amount to an abuse of the public's trust "and that he did so deliberately with a criminal state of mind". Paragraph 17 refers to applying the same test for CO Schneider as set out above. Paragraph 18 in respect of CO Schneider states that "in order to meet the evidential test the Crown would need to prove that the CO intentionally obtained the warrant using evidence that she knew to be false and/or executed the warrant in the knowledge that she had obtained it falsely".

[8] [1995] 69 ALJR 527 at 547

43. The mental element with respect to the offence of misconduct in public office in succinctly stated in ***Blackstone's Criminal Practice 2022***[9]. It includes a state of mind of deliberately doing something which is known to be wrong or reckless indifference as to whether it is wrong or not. However, in defining the mental element of the offence, ***Archbold 2022,*** cites the later case of ***W (M)*** [10] as supporting the proposition that the mental element will not be identical for each set of circumstances, what is required is a *"criminal state of mind"*[11].

44. It is unclear from the reasons provided, whether the criminal state of mind referred to in paragraph 7 of the reasons is as stated in paragraph 18 thereof, that is, only meaning a deliberate and intentional state of mind.

COURSE OF JUSTICE AND CONSPIRACY

45. The reasons provided state that no course of justice had been embarked upon at the time when the Cease Notice was issued in order to ground the offence of conspiracy to defeat justice[12]. The Applicants point out that there does not appear to have been consideration given to the actions of Dr. Lee in swearing affidavits in the course of the 2019 proceedings and thus to whether an affidavit which was untruthful, or misleading would have had a tendency to pervert the course of justice. Reliance is placed on Archbold paragraph 28-21 which states that in order to prove the offence the prosecution must either prove an intent to pervert the course of justice or an intention to do something which if achieved would pervert the course of justice.

46. The further complaint is made that the reasons refer to considering the offence of conspiracy to defeat justice and there is no indication that other possible conspiracies under s.322 (b) to (g) of the ***Penal Code*** (2019 Revision) were considered. This section provides:-

> *"A person who conspires with another or others to —*
>
> *(a) prevent or defeat the execution or enforcement of any law or regulation;*

[9] Paragraph B15:30
[10] 2010 EWCA Crim 372
[11] Paragraph 25-386
[12] Paragraph 15 of the letter dated 20th May 2022

(b) cause any injury to the person or reputation of any person or to depreciate the value of any property of any person;

(c) prevent or obstruct the free and lawful disposition of any property by the owner thereof for its fair value;

(d) injure any person in that person's trade or profession;

(e) prevent or obstruct, by means of any act or acts which if done by any individual person would constitute an offence on that person's part, the free and lawful exercise by any person of that person's trade, profession or occupation;

(f) effect any unlawful purpose; or

(g) effect any lawful purpose by any unlawful means, commits an offence.

CONCLUSIONS

47. Although it may not need to be stated, I make it plain that for the purpose of this decision, I do not make findings of fact. This is not a decision as to whether the asserted facts are true. They may or may not be. Neither is it a decision as to whether judicial review should or should not be granted, nor whether on the facts asserted any person ought or ought not to be prosecuted. This is a decision as to whether on the face of the papers presented there is an arguable case on any ground such that leave to apply for judicial review ought to be granted.

48. The Applicants have raised the issue of conflict of interest on the part of the Attorney General. While noting the reference in the letter of the Assistant Director of the 4th May 2022, to instructing external leading Counsel for advice and the possible checks and balances which may arise from this, I have not considered the arguability of this issue. I have focused instead on what appears to me to be the core issue. Given the conclusion that I have reached on this core issue no conclusions are reached and no statements are made in respect of any others.

49. In my view the Applicants raise points which do not appear to be resolved by the response of the Director such that it could be said that there is no arguable case. Those which are immediately apparent are:-

i) Whether all the available material was reviewed by the Director before decisions were made. In particular, the reference in the reasons to the absence of evidence as to what was said on the application for the search warrant. Whether this is correct given the assertion of the Applicants that there are two affidavits from the Justice of the Peace which are not listed as having been reviewed. There is also the reference in the reasons to the absence of a record of the evidence of CO Schneider in the 2019 proceedings which record say the Applicants is in fact available.

ii) Whether the elements of the offence of misconduct in public office, in particular the mental element, were appropriately considered. Was a higher test as to intent applied?

iii) Whether there are factual errors stated in the review of the evidence underlining the decision making.

iv) Whether there was a failure to consider all the offences under s.322 of the ***Penal Code***.

50. At this stage on a *prima facie* basis, the complaint of a failure by the Director to consider all the available evidence and the full range of offences with the possible consequential effect as asserted by the Applicants appears to be arguable.

51. Applying the test for granting leave as set out above and it being apparent that the Applicants have sufficient interest, I conclude that this is a matter in which leave should be granted.

Dated this 16th day of February 2023

The Honourable Justice Cheryll Richards K.C.
Judge of the Grand Court