

**THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA**

**IN THE HIGH COURT OF JUSTICE
(CRIMINAL DIVISION)**

CASE NO. ANUHCR2023/0075

THE KING

Complainant

-and-

**1. SALIEM HARRIGAN
2. WAYNE THOMAS
3. LASEAN BULLY**

Accused

Appearances:

Mr. Warren Cassell & Wendel G. Alexander for the 1st Defendant
Mr Sherfield Bowen for the 2nd Defendant
Mr Michael Archibald for the 3rd Defendant
Mr Clement Joseph Director of Public Prosecutions for the Crown

2026: March 18; 19

RULING ON APPLICATION TO RECUSE DEFENCE COUNSEL

[1] **PERSAD, J (Ag).**: Before the Court is an application by the Director of Public Prosecutions for Mr. Alexander Counsel for Mr. Harrigan to recuse himself from participating further in this trial.

[2] The background to this application being filed, is that the Director of Public Prosecutions did raise in chambers with the Court and Counsel in this matter certain concerns that he had. As a result of the conversation in chambers the Court took the view that Counsel should

try to resolve it and if it is that it could not be resolved, then the Court would deal with the matter once an application was made.

[3] Sometime thereafter an application was made by the Director of Public Prosecutions, the application was supported by an affidavit by Mr. Carlos Joseph with an annexure of a statement / interview done between Mr. Carlos Joseph and the Police in which Mr. Alexander was present at that interview.

[4] It turns out that; Mr. Carlos Joseph was now the prosecution's star witness and at the time of the interview he was a suspect in this murder and Mr. Alexander was asked by a third party to attend the police station to represent Mr. Carlos Joseph at the interview. This was in 2021 these accused were charged for the murder of Nigel Christian and in 2026 Mr. Alexander was briefed to represent Mr. Harrigan.

[5] The application was also supported by written submissions by the Director of Public Prosecutions. Opportunity was given for this to be served on Mr. Alexander. Mr. Alexander took the opportunity to respond with his own affidavit in opposition to what Mr. Carlos Joseph had said. There were also written submissions where Mr. Alexander took the position that because he was the subject matter of the application, he invited Mr. Cassel to represent him and to make submissions in his behalf.

[6] The court was appreciative of that decision, accordingly what really is for the court to determine is whether the application should be allowed.

[7] This application stems out of the fact that Mr. Carlos Joseph was a person of interest in the investigation in relation to the death of Nigel Christian, a senior customs officer in Antigua and Barbuda. The police were doing their investigations and in 2021, according to Mr. Carlos Joseph, he says, at paragraph 4 as follows:-

4. At the beginning of the investigation of this matter, I was arrested by the police and was told I was going to be subjected to a caution interview and obtain a caution statement from me.
5. I was read my rights and those rights were explained to me indicating to me that I had a right to an attorney. During the process, I indicated to the police of my preference to have Mr. Alexander present. The interview took place and Mr.

Alexander represented me at the interview with the Police on 13th April 2021. True copy of the interviews attached

6. As a result, I had a detailed conversation with him concerning my knowledge of the case. I held nothing back. I did that in the common belief that our conversation was protected under the well-known principles of attorney client privilege. I have been advised and verily believe that privilege can only be breached if it's allowed if I allowed it to be. To date, I have not and do not intend to do so.

[8] Mr. Alexander, in his affidavit in response, speaks about a phone call he received from a man who he remembers as Jahiko Bird, who asked him to do something as a matter of urgency. He went to the Longford Police Station to assist a person who the police had in custody in relation to the murder investigation of Nigel Christian.

[9] Prior to this, he says he was not otherwise engaged in the case as an Attorney-at-law for the defense or otherwise. He went to the Longford Police Station and spoke to Mr. Carlos Joseph for about 15 to 20 minutes.

[10] According to Mr. Alexander the contents of that conversation he cannot now recall except to say that Mr. Carlos Joseph seemed willing to tell the police his version or story. The Attorney-at-Law did not take any note during that conversation. Thereafter, Mr. Alexander specifically remembered Senior Sergeant Anthony of Serious Crime interviewing Mr. Carlos Joseph. He recounts that Mr. Carlos Joseph answering the various questions put to him by Senior Sergeant Anthony.

[11] According to Mr. Alexander it is during that interview that he learns that Mr. Carlos Joseph had, before the date, given the police two statements or interviews under caution. Mr. Alexander says he was not present when Mr. Carlos Joseph gave any witness statements to the police. Nor was he present when any previous statements or interviews under the caution were taken.

[12] According to Mr. Alexander, this is the extent of his involvement with Mr. Carlos Joseph in relation to the investigations of this case. He says he was never paid for attending the police station by Mr. Carlos Joseph, nor anyone to this date. No lawyer, client, relationship

developed or retainer was created between us in relation to the matter or any related investigation.

[13] The Court will make some initial observations. I think, as a matter of principle that a Court can intervene to prohibit someone from appearing if there is a breach of legal advice privilege. In the case of **Charles Murphy and The Honourable Wayne R. Munroe and Mrs. Cheryl Darville** Common Law and Equity Division CLE/gen/001548 the Court noted as follows:-

a. A Court has jurisdiction to restrain an attorney from acting for a party only in circumscribed conditions. A party has a constitutional right to due process. An important part of accessing the justice system is the right to be represented by an attorney-at-law. In that context, a party is entitled to choose his counsel. Therefore, it is with care that a court should make any determination to intervene in that choice of an attorney-client relationship.

b. Again, *Benchmark Publishing Company Limited v The Attorney General*, Justice Isaacs considered the case of *Martin v. McDonald Estate* (Gray) 1990 Carswell Mna 233 which provides. Per Sopinka, J.: "Two questions must be answered: (1) Did the lawyer receive confidential information attributable to a solicitor-client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?"

[14] In **Civil Aviation Authority v R (on the application of Jet2.com Limited)**, [2020] EWCA Civ 35 the Court of Appeal, upholding the High Court decision, has affirmed that Legal Advice Privilege ("LAP") is subject to a dominant purpose test.

[15] The Court was tasked with considering two main issues: 1. Whether, for a communication to fall within the scope of LAP, it must have the dominant purpose of seeking or giving legal advice; and 2. In light of the answer to the above, what is the proper approach to determining whether LAP applies to email communications between multiple parties where the senders and recipients are a mixture of lawyers and non-lawyers.

[16] The Court in delivering its decision asked what constitutes legal advice? The communication must be made in a legal context, but otherwise "legal advice" is widely defined. The legal context refers to whether a lawyer is acting qua lawyer – where a lawyer is being asked "to

put on legal spectacles". There must be a relevant legal context to the instruction, but – although a good starting point – that alone is not determinative of whether LAP applies to a specific document. The document must also have come into existence for the purpose of giving or receiving legal advice. Leaving aside for the moment the applicable purpose test, it is well established that "legal advice" covers more than just communication between lawyers and clients as to what the law is. It includes the "continuum of communications" between a lawyer and client and will include communications regarding the application of legal advice, and communications aimed at keeping both parties informed so that advice may be sought and given as required

[17] The judgment is a useful reminder that merely copying a lawyer into a communication, or having a lawyer present at a meeting, is not sufficient to attract LAP. Nor will a document created before lawyers are involved become privileged simply because it is subsequently sent to a lawyer for legal advice.

[18] In **Butterworths Costs Service** under the rubric "Solicitors' remuneration" and the solicitor and client relationship at paragraphs 73-74

- a. The contract between a solicitor and client is determined by the retainer. The starting point in every case is to ascertain what the client has engaged a solicitor to do or to advise on. The solicitor's contractual duty is to carry out the task as instructed by the client and which the solicitor has agreed to undertake. It is implicit in the retainer that the solicitor should proffer advice which is reasonably incidental to the work being carried out¹. In determining what advice is reasonably incidental, it is necessary to have regard to all the circumstances of the case including the client's character and experience.
- b. The giving of instructions by a client to a solicitor constitutes the retainer. In determining whether a retainer has come into existence the general principles of contract law apply. In a case where the client did not sign and return the letter of engagement, a written retainer never came into existence, but the court held that a personal retainer was agreed orally and implied by the client's conduct in employing the solicitor to carry out the work as requested. The terms of the retainer were also varied by oral agreement and evidenced by the conduct of the parties, that variation did not need to be in writing.

[19] In BVIHC (COM) 126 of 2014 between **Barclays Bank PLC -and- Red Oak Operations Limited** the Court noted as follows:-

- a. "(1) The burden of proof is on the party claiming privilege to establish it: see Matthews & Malek on Disclosure (2007) 11-46 and paragraph [50] above. A claim for privilege is an unusual claim in that the party claiming privilege and that party's legal advisers are, subject to the power of the court to inspect the documents, the judges in their or their own client's cause.
- b. Because of this, the court must be particularly careful to consider how the claim for privilege is made out and affidavits should be as specific as possible without making disclosure of the very matters that the claim for privilege is designed to protect: Bank Austria AKT v Price Waterhouse; Sumitomo Corp v Credit Lyonnais Rouse Ltd (per Andrew Smith J)"

[20] In **Kjell Tore Skjevesland - and - Gevevan Trading Co Ltd [2002] EWCA Civ 1567** the Court noted as follows:-

- a. "[37] It is well established that as an officer of the court an advocate has a duty to the court, which overrides his duty to his client (see Rondel v Worsley [1969] 1 AC 191, [1967] 3 All ER 993 p (227-8) of the former report, per Lord Reid). Accordingly, an advocate may not deceive or knowingly mislead the court. The advocate must bring to the attention of the court all relevant decisions and legislative provisions of which he is aware (see for example, Copeland v Smith [2000] 1 All ER 457, [2000] 1 WLR 1371). The advocate must bring to the attention of the court any procedural irregularity during the course of the trial (see R v Langford, The Times, 12 January 2001). The advocate must conduct the proceedings economically (see Practice Direction (Civil Litigation: Case Management [1995] 1 WLR 508). Under the Civil Procedure Rules, it is the express duty of the parties, and hence their legal advisers (including advocates), to help the court to further the overriding objective in the Civil Procedure Rules (CPR 1.3). These are merely some examples of the practical application of the advocate's duty to the court
- b. [38] It is also well established that an advocate or other legal adviser who has acted for one party and has relevant confidential information may commit a breach of confidence and be liable to an order restraining him from so acting,

if he acts for another party against his former client unless he can show that there is no risk of disclosure (see *Bolkiah v KPMG*, above).

- c. [42] Where a party objects to an advocate representing his opponent, that party has no right to prevent the advocate from acting based on the Code of Conduct as the content and enforcement of that Code are not a matter for the court. However, the court is concerned with the duty of the advocate to the court and the integrity of the proceedings before it. The court has an inherent power to prevent abuse of its procedure and accordingly has the power to restrain an advocate from representing a party if it is satisfied that there is a real risk of his continued participation leading to a situation where the order made at trial would have to be set aside on appeal.
- d. The judge has to consider the facts of the particular case with care (see the words of Lord Steyn in the *Man o' War* case cited above). However, it is not necessary for a party objecting to an advocate to show that unfairness will actually result.
- e. We accept Mr. Jones' submission that it may be difficult for the party objecting so to do. In many cases it will be sufficient that there is a reasonable lay apprehension that this is the case because as Lord Hewart CJ memorably said in *R v Sussex Justices ex parte McCarthy* [1923] 1 KB 256, it is important that justice should not only be done, but seen to be done.
- f. Accordingly, if the judge considers that the basis of objection is such as to lead to any order of the trial being set aside on an appeal, as in the *Winston Smith* case, he should accede to an order restraining an advocate from acting.
- g. But we stress that the judge must consider all the circumstances carefully. A connection, for instance, between counsel for one party and a witness on the other side may be an important factor where the evidence is of fact but, depending on the nature of the connection, it may be less important where the evidence is of an expert nature and the cross-examination is likely to be on questions of technical expertise. The judge should also take into account the type of case and the length of the hearing, and any special factor affecting the role of the advocate, for instance, if he is prosecuting counsel, counsel for a local authority in care proceedings or as a friend of the court.
- h. [43] A judge should not too readily accede to an application by a party to remove the advocate for the other party. It is obvious that such an objection

can be used for purely tactical reasons and will inevitably cause inconvenience and delay in the proceedings. The court must take into account that the other party has chosen to be represented by the counsel in question.

- i. Moreover, an advocate is subject to the cab-rank rule. If the court too willingly accedes to applications to remove advocates, it would encourage advocates to withdraw from cases voluntarily where it was not necessary for them so to do and the cab-rank rule would be undermined. We accept that the cab-rank rule is a salutary rule. It is an integral and long-established element in our adversarial system. Down the centuries the cab-rank rule has been the way in which unpopular causes have been represented in court. When Erskine defended Tom Paine in 1792 he was widely criticized for so doing. His reply was: "If an advocate refuses to defend from what he may think of the charge or of the defense, he assumes the character of Judge; nay, he assumes before the hour of judgment, and in proportion to his rank or reputation puts the heavy influence of perhaps a mistaken opinion into the scale against the accused in whose favour the benevolent principle of English law makes all presumptions ..."

- [21] The learning appears to me to suggest that the Court should be very slow to order a recusal, and of course the court must balance the fundamental constitutional rights engaged in this case. Mr. Harrigan is entitled to representation by counsel of his choice. Of course, the Director will say there is a requirement of fairness that applies in the conduct of all trials.
- [22] The critical questions for the Court's determination is (i) whether there was instructions given by the Client, (ii) was advice given by Mr. Alexander and (iii) was there a retainer relationship created. (iv) does legal advice privilege apply in the circumstances of this case? The Court must be mindful that the burden of proof is on the party claiming privilege to establish it.
- [23] There is clearly a dispute between the parties. If one considers what Mr. Carlos Joseph has said and what Mr. Alexander has deposed to. Both sides were invited if they wish to cross-examine the other and both sides agreed that they did not see the need to cross examine.
- [24] This decision not to cross-examine leaves the evidence in a state where the Court has to resolve disputes on the affidavits.

- [25] With the greatest respect, I appreciate that Mr. Carlos Joseph cannot go into all detail, but I think it is important for him to assert that he did give confidential information, and whether he received advice from Mr. Alexander during that twenty-minute conversation -? Neither Mr. Carlos Joseph nor Mr. Alexander in either of their affidavits speak of confidential material being provided or any advice being given.
- [26] The onus is on the party seeking to raise legal advice privilege to basically establish that the advice was indeed given. While I accept that it is not necessary to go into detail about what the confidential information is, I do not know and I am saying with the greatest respect that I had a detailed conversation concerning my knowledge of the case. I held nothing back. I did it in the belief that the conversation was protected. I do not know that that is sufficient in this Court's view to reach a balance of probability, much less beyond a reasonable doubt standard.
- [27] It is clear from the interview that there is no advice given during the course of the interview. It is unclear from the affidavit material whether any advice was given or sought prior to the interview beginning, either from Mr. Robinson and or from Mr. Carlos Joseph.
- [28] Accordingly, the Court is reluctant and unable to make a finding that there was sufficient for legal advice privilege to attach in the circumstances of this case. In these circumstances, this Court is of the view that the requisite standard of evidence needed to show that legal advice privilege attached falls short of what is required.
- [29] If this Court is wrong about legal advice privilege attaching, I do not think the Court's hands are tied because this Court as a criminal trial Court has tools available to it to ensure fairness in this case.
- [30] It is a balance between the fairness of the witness who is saying I don't want to be cross examined by Mr. Alexander Robinson because I gave him instructions back on the 13th of April 2021, five years ago and Mr. Harrigan's entitlement to representation by the lawyer of his choice.

- [31] One of the principles is that the court must be mindful of is that just because somebody is present at a meeting or something of that sort does not necessarily attach legal advice privilege. You need to look at the circumstances, you need to look at the conversations, and you have to look at whether advice was given. Because one of the points about legal advice privilege, as I said already, the onus is on the party who is seeking to raise it to bring evidence. The cases appear to suggest that it is the dominant purpose test which applies with legal advice privilege.
- [32] The question is what was the purpose of the communications, the sharing of information? In my view, the context indicates that the information was given for the purpose of the holding of the interview. When one examines the interview, I have a difficulty in accepting what Mr. Carlos Joseph is saying because Mr. Joseph is giving the impression that it is at the beginning of the investigation. When in truth the fact is the investigation started a year before. He had already given the police statements without the advantage of Mr. Alexander representation. Mr. Alexander is saying, I found this out in the middle of the interview. So even then he didn't know until that interview started. But the scope of any retainer would have been confined only to the interview.
- [33] I think that the Court, in its best attempt to ensure fairness both to the accused, Mr. Harrigan, and to the witness Mr. Joseph is able to strike an appropriate balance during the trial.
- [34] If it is that Mr. Alexander, in the course of the trial purports to ask any questions which the witness believes was based on confidential privileged discussions back in April 2021, I am absolutely certain the Director of Public Prosecutions will get off his feet and will raise an objection. The point is we cannot do better than that in these circumstances. To me it will come down to the way the question posed is phrased, is it suggestive that Mr. Alexander is using confidential information from his relationship with Mr. Joseph?
- [35] If this happens both parties will have to address me, at the same time Mr. Alexander will I imagine, be saying. The question as phrased is based on instructions he has from his client. Which is exactly how he is expected to ask questions based on his clients' instructions. It will be for the Director if he wants assert legal advice privilege and argue that the question

should not be allowed as a result of confidential communications between Mr. Joseph and Mr. Alexander.

[36] If this Court for a moment believes, or suspects that the question is as a result of the use of privileged information, this court will not allow it.

[37] This Court is not to jump into open ended speculation. It has to wait till the question is asked. The Court has to deal with the issue at the point in time it arises, the Court will hear both sides and then determine it on the merits of fairness and the principles of law that are applicable.

[38] The case law appears very clearly to suggest that the court should be very slow to deprive an attorney of his brief. That is not to say it cannot. In appropriate circumstances do so and make an Order for recusal where it is appropriate to do so.

[39] This court does not take the view that in the circumstances of the case currently before the Court that it is appropriate or necessary to direct Mr. Alexander to recuse himself. Accordingly, the application is dismissed, and the Court is going to say that this matter is now set for trial next week.

Rajiv Persad SC

High Court Judge (Ag.)

By the Court

Registrar