

ANGUILLA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. AXAHCV 0009/2012

BETWEEN:

SIMEON FLEMING

Claimant/Applicant

And

MIRIAM FLEMING

(in a personal capacity and as Administratrix of the Estate of the late Sarah Ann Connor
aka Richardson, deceased)

Appearances:

Ms. Jenny Lindsay of Jenny Lindsay & Associates for the Claimant/Applicant
Ms. Samantha Wright of Hodge's Law Office

.....
2012: May 8

July 2
.....

DECISION

[1] **BLENMAN, J:** This is an application by Mr. Simeon Fleming (Simeon) to have Hodge's Law Office, who are the Solicitors/Attorneys-at-Law on record for Ms. Miriam Fleming (Miriam), Administratrix of the Estate of Sarah Ann Connor aka Richardson, restrained from acting on behalf of Miriam. The application is strenuously resisted by Hodge's Law Office.

Issue

- [2] The sole issue that arises for the court to determine is whether an order should be made preventing Hodge's Law Office from representing Miriam in relation to the Estate of Sarah Ann Connor aka Richardson (Sarah); the Estate of Catherine Fleming (Catherine), and that of Mr. John Richardson (John) deceased.

Background

- [3] Ms. Sarah Ann Connor aka Richardson died leaving valuable land in Anguilla. She was survived by Catherine Elrica Fleming now deceased. Simeon and Miriam are Catherine's children.
- [4] In circumstances which are not material to the application before the court, Catherine Elrica Fleming leased the land to Malliouhana Company Limited and the lease was reassigned to an entity Malliouhana (EC) Limited which controlled a large and very well established hotel. Subsequently Catherine had given a Power of Attorney to Miriam to collect the rents from the land. There appears to have been disputes between the parties and other beneficiaries in relation to Miriam's proper accounting for the rents she had obtained which resulted in her being sued by one of the beneficiaries. It appears that a consent judgment was entered against Miriam in relation to that matter.
- [5] Ms. Catherine died in 2000 and the beneficiaries of the Estate of Sarah Ann Connor aka Richardson including Simeon and Miriam agreed that he should be appointed as the Administrator of his grandmother Sarah's Estate. Towards this end, he says that he had retained the services of Hodge's Law Office but despite paying Hodge's Law Office and giving instructions, Hodge's Law Office failed to obtain the Letters of Administration of Sarah's Estate on his (Simeon's behalf). However, prior to this, Miriam, acting on behalf of the beneficiaries, had retained Hodge's Law Office to represent the beneficiaries in relation to the Estates of Sarah and that of Catherine. Simeon says that Miriam did not obtain the results she wanted so she and beneficiaries permitted Simeon to continue the process. Simeon, acting on behalf of himself and the other beneficiaries,

retained Ms. Jenny Lindsay of Jenny Lindsay and Associates to represent and advise them in relation to their interests under both Sarah and Catherine's Estate.

- [6] The beneficiaries were eager to have the two estates administered. Faced with that situation and allegedly with the assistance of Miriam, they changed Solicitors from Hodge's Law Office to Ms. Jenny Lindsay. While his present solicitor was in the process of applying for Letters of Administration of Sarah's Estate and with the seeming assistance from Miriam, unbeknownst to him and the other beneficiaries, Miriam applied and obtained Letters of Administration of Sarah's Estate utilizing the services of Hodge's Law Office.
- [7] Also, he applied for a caution to be placed against the property in the Land Registry. Miriam filed a statutory declaration and opposed the caution being placed against the register.
- [8] Simeon says that he is acting on behalf of the other beneficiaries of the Estate of Sarah, Catherine and John Richardson. He has filed a claim to have Miriam removed as the Administratrix of Sarah's Estate. He deposes that he and his siblings are of the view that Miriam is not to be trusted and, as a consequence, he has filed an application for her to be removed as the Administratrix of the Estate of Sarah. Hodge's Law Office represents Miriam in that claim.
- [9] The fact that Hodge's Law Office filed the statutory declaration on behalf of Miriam and also represents her in the claim that Simeon has brought to have her removed, led to Simeon applying to have Hodge's Law Office restrained from acting on her behalf. Simeon complains that Hodge's Law Office acted for the Fleming family on several matters. In fact, Hodge's Law Office was first retained by Miriam on behalf of her family in relation to Sarah's Estate matters. He says that with Miriam's agreement Hodge's Law Office continued to represent the family and in so doing took instructions from (him) Simeon.
- [10] Simeon says that the family, including Miriam, agreed that he would take over the matter and become the Administrator of the Estates of Sarah and Catherine. He says that after some 10-11 years of representing the family in relation to the Estates, Miriam assisted him to obtain the services of the alternative solicitors. Armed with the knowledge that he was nominated to become

the Administrator of the two Estates, Miriam surreptitiously applied and obtained Letters of Administration of Sarah's Estate. In so doing, she utilized the services of Hodge's Law Office. He accuses Miriam of being motivated by the need to deal with the property to the exclusion of the other beneficiaries since there was the real possibility of the lands which form the subject matter of the Estate being sold. He accuses Miriam of wanting to access the potential sale money.

[11] It was after Simeon had brought the application to have Miriam removed that Hodge's Law Office entered an appearance on her behalf. Thereafter, Simeon applied to have Hodge's Law Office restrained from acting as solicitors for Miriam in relation to the Estate of Sarah, Catherine and John.

[12] More importantly, Simeon complains that Hodge's Law Office was privy to confidential information which was obtained during its retainer by Simeon and other beneficiaries. Simeon says that it would therefore be inequitable and unjust for Hodge's Law Office to act on behalf of Miriam against himself and the other beneficiaries of the Estates of Sarah, Catherine and John. Simeon also says that Hodge's Law Office divulged to Miriam information which he gave to them and that she used the information against him in the statutory declaration.

[13] Simeon says that even though on behalf of himself and the other beneficiaries he had terminated the retainer that they had with Hodge's Law Office, given the fact that they are dealing with the same estates that there is a real possibility of a conflict of interest coupled with the further improper use of confidential information. Simeon urges the court to restrain Hodge's Law Office from acting for Miriam. He says that Hodge's Law Office has placed itself in a position in which its duty as solicitor conflicts with its interest. Simeon says that the court should intervene in order to prevent the further misuse of confidential information by restraining Hodge's Law Office from acting for Miriam.

[14] The order that Simeon seek is as follows:

"The Respondent's Attorneys, Hodge's Law Office, be restrained whether acting by its partners, employees or agents or otherwise howsoever from acting for or advising or

otherwise assisting Miriam Fleming in the Estate of Sarah Ann Connor aka Richardson and/or the Estate of John Peter Richardson and/or the Estate of Catherine Fleming and/or any other person or beneficiary acting in concert with the Respondent in connection with the administration or potential Administration of the Estates”.

[15] Hodge’s Law Office objects to the court granting Simeon the relief which he seeks. Hodge’s Law Office complains that Simeon has failed to file any application against it but rather in circumstances in which he has sued– Miriam Fleming, Simeon is seeking to prevent them from acting.

[16] Also, Hodge’s Law Office complains that there is no evidential basis upon which the court can properly conclude that it has come into possession of confidential information and therefore should not act on behalf of Miriam; as it is, it would be not acting in conflict of interest. Miriam says that Hodge’s Law Office is her choice of solicitors and she should not be prevented from utilizing the services of the solicitor whom she has chosen.

Submissions on behalf of Hodge’s Law Firm

[17] Ms. Wright argued that the court should not accede to Simeon’s request to prevent Hodge’s Law Office from acting as Miriam’s solicitor. Ms. Wright said that there is no confidential information that he disclosed to the Hodge’s Law Office which can now form the proper basis of an order to prevent Hodge’s Law Office from representing Miriam.

[18] Ms. Wright submitted that the OECS Bar Association Code of Ethics regulate the conduct of solicitors. She says that Clause 35 (11) of the Code is relevant, if at all, to the application at Bar. There has been no breaches of the Code by any member of Hodge’s Law Office stated Ms. Wright. Even if there were any such breaches, the remedies are to have the OECS Bar discipline the offending member. The court has no jurisdiction to intervene. The Code is not law and while it provides ethical guidelines to the legal profession, Ms. Wright posited that until such time as Anguilla enacts legislation, perhaps in the form of the Legal Profession Act, the court has no specific role in “disciplining” solicitors.

- [19] It is noteworthy that Ms. Wright had previously appeared on behalf of Hodge's Law Office. However, in her subsequent appearance and oral arguments she sought to take the point of objection that there was no cause of action against Hodge's Law Office. Also, Ms. Wright complained that Simeon had not served Hodge's Law Office with a copy of his application for the injunction. Ms. Wright therefore argued that Hodge's Law Office is not a party to the proceedings. Further, Ms. Wright urged the court to accept that Simeon did not have a retainer with Hodge's Law Office in relation to the Estate of Sarah. Even though Ms. Wright has placed extensive submission before the court on behalf of Hodge's Law Office, she maintains that Hodge's Law Office is not a proper party to the application at Bar.
- [20] Significantly, Ms. Wright argued that there is no finding of fact upon which Hodge's Law Office could be said to have committed any wrongdoing. Insofar as Hodge's Law Office has not committed any breaches of the solicitor-Client relationship, such as there was with Simeon and the persons upon whose behalf he purports to act, the court could not properly intervene on his behalf.
- [21] Next, Ms. Wright advocated that the application to restrain Hodge's Law Office is an abuse. It seeks to prevent Hodge's Law Office from acting for Miriam and other persons/estates that are not parties to these proceedings.
- [22] Ms. Wright argued that for Simeon to succeed he must place before the court cogent evidence which must indicate fully the relevant confidential information which is in jeopardy of being disclosed. She said that the court should take judicial notice of the fact that the documents that are filed in the probate registry are public documents. It is therefore incumbent on Simeon to state which are the documents that he gave to Hodge's Law Office and this must be done so as to "squarely fall within the protection of confidential information". Ms. Wright also stated that the court should note that Miriam's application for Letters of Administration of the Estate of Sarah was concluded at the time when Simeon was in the process of applying for the Grant of Letters of Administration de Bonis non administrates. Ms. Wright therefore submitted that Simeon's application to prevent his former solicitor from acting is being made "after the event" meaning the alleged disclosure.

- [23] Ms. Wright posited that the court's jurisdiction to intervene on behalf of a client is limited to the grant of injunctive relief. She asserted that even if the court were to conclude that there was any breaches of confidentiality, even though Hodge's Law Office denies that this was so, the appropriate remedy which the court should award Simeon are damages. Ms. Wright asked the court not to grant the injunction sought since to do so would in effect prevent Miriam from selecting the solicitor of her choice. For the court to bar a solicitor from acting for a client is very draconian order.
- [24] Ms. Wright further argued that the court should not grant the injunction sought since Simeon has failed to provide the evidential basis on which to ground an injunction. Ms. Wright referred the court to the well-known principles that were enunciated in *American Cyanamid v Ethicorn* [1975] AC 396, in support of her argument.
- [25] Ms. Wright submitted that based on the evidence that has been placed before the court, Simeon has failed to demonstrate that Hodge's Law Office was in possession of confidential information, which belonged to him. Further, he has failed to indicate the nature of the harm that he would suffer if the confidential information was disclosed. Ms. Wright submitted that even if there were any breaches, the appropriate remedy is not the grant of injunctive relief. In support of her contention Ms. Wright referred the court to *Hilton v Barker Booth and Eastwood* (a firm) [2005] UKHL8.
- [26] Ms. Wright said that there is no dispute that Hodge's Law Office had acted for Simeon in relation to the Estate of Catherine, but not in relation to the Estate of Sarah. It would therefore not be appropriate to restrain Hodge's Law Office from acting for Miriam in relation to the Estate of Sarah.
- [27] Ms. Wright reinforced the fact that the application that was made by Miriam for Letters of Administration of the Estate of Sarah was made after Simeon had withdrawn his instructions from Hodge's Law Office. No confidential information was ever in possession of Hodge's Law Office. Further, Ms. Wright maintained that Hodge's Law Office denies ever being retained or instructed by Simeon to apply for Letters of Administration on his behalf.

[28] Ms. Wright maintained that Simeon is not entitled to the injunctive relief which he seeks. In support of her contention Ms. Wright referred the court to the very helpful decision of Justice Janice George Creque, as she then was, in *Willard v Paragon Holding* et al, AXAHCV2006/0088. In that case, a party to a civil claim sought to have a firm of Solicitors restrained from acting for the other party on the basis that there was a conflict of interest with a former client or there was the potential for the conflict of interest. The learned trial judge said that in effect what was being sought was a restraining of a firm of Solicitor's from acting. Her Ladyship Justice George Creque stated as follows:

“whether a solicitor who at one point acted for one party was at some subsequent time against that party brings two considerations which the court must strive to balance namely:

- (1) on the one hand, the legitimate right and expectation of a client placing his fullest confidence in his Solicitor knowing that such confidential information relating to his affairs acquired by his Solicitor will not be disclosed to anyone else. It is this relationship of confidence which underpins the well settled legal principles of legal professional privilege, and
- (2) on the other hand, the freedom of a person to instruct a Solicitor of their choice and the corresponding freedom of a Solicitor to act on behalf of any person where there is no real constraint must be equally considered”.

[29] In support of her arguments, Ms. Wright also referred the court to the Barbadian case of *Royal Caribbean Hotels Ltd v Barbados Development Ltd*, Civil Appeal 21 of 2000, in which Simmons CJ at paragraph 15 said:

“The fiduciary relationship commences on payment of the retainer and ends with the termination of the retainer. While the retainer subsists, the legal and equitable principles relating to fiduciaries apply but, after termination of the retainer, issues concerning the use or misuse of confidential information obtained during the relationship will arise and call for the application of legal principles relating to confidentiality. After the termination of the retainer, the overriding relationship of trust and confidence may form the basis for injunctive relief to prevent the Attorney-at-Law from acting against the interests of the

former client. Equity will intervene to prevent the disclosure of relevant confidential information. In other words, the obligation of confidentiality survives the termination of the retainer”.

[30] Ms. Wright insisted that Simeon did not provide Hodge’s Law Office with any confidential information and there was therefore nothing at risk of being disclosed. She insisted that the court should not accede to Simeon’s request.

Simeon’s Submissions

[31] Learned Counsel Ms. Lindsay argued that Hodge’s Law Office was in a fiduciary relationship to Simeon, in his capacity as representative of the Estate of Catherine and Sarah, and advised and represented the beneficiaries with regard to each Estate. Simeon’s main objection to Hodge’s Law Office is that the firm acted for Miriam on behalf of the family members and she was later replaced by him (Simeon) and all of this was in relation to the Estates of Sarah and that of Catherine.

[32] The main objection is raised by Simeon against Hodge’s Law Office representing Miriam on account of the fact that they were solicitors for him and instructed as the family solicitor for himself, and beneficiaries of Catherine including Miriam whose estate is expectant of estate lands from Benjamin Fleming, Hezekiah Fleming, James Fleming, Sarah and to advise and represent the beneficiaries with regard to each estate.

[33] Ms. Lindsay asserted that the relationship between a lawyer and its client is a fiduciary one. A fiduciary must not put himself in a position of actual or potential conflict with his client without his client’s full and informed consent asserted Ms. Lindsay. In support of her argument, Ms. Lindsay referred the court to *Bokilah v KPMG*, (1992) 2 AC 222.

[34] Further, Ms. Lindsay postulated that a solicitor must not place himself in a position where his duty to act in the interests of the confiding party, (his client) and his personal interest may conflict. In a word, a solicitor must not put himself in a position in which his duty to his client and his own interests conflict.

[35] Ms. Lindsay said that *Bokilah v KPMG* ibid is authority for the proposition that a solicitor cannot act for a former client and later against that former client without the informed consent of the former client. Ms. Lindsay specifically commended to the court the pronouncement of Lord Millett in *Bokilah v KPMG*; at page 234 H where His Lordship said:

“My Lords, I would affirm this as the basis of the court’s jurisdiction to intervene on behalf of a former client. It is otherwise where the court’s intervention is sought by an existing client, for a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation”.

[36] Ms. Lindsay advocated that the fact that the retainer Simeon had with Hodge’s Law Office has been terminated in no way detracts from the general principle that the solicitor still has a continuing obligation to ensure that his personal interest does not conflict with the interest of the client. In support of this argument, Ms. Lindsay relied on *Longstaff v Birtles* [2002] 1 WLR 470 in which it was stated that:

“The source of the [fiduciary] duty is not the retainer itself, but all the circumstances (including the retainer) creating a relationship of trust and confidence, from which flow obligations of loyalty and transparency. As long as that confidential relationship exists the solicitor must not place himself in a position where his duty to act in the interests of the confiding party and his personal interest may conflict”.

[37] Ms. Lindsay referred to the pronouncement of Lord Millett where he stated at page 237 F *Bokilah v KPMG* as follows-

“This would run counter to the fundamental principle of equity that a fiduciary may not put his own interest or those of another client before those of his principal. In my view no

solicitor should without the consent of his former client, accept instructions unless, viewed objectively, his doing so will not increase the risk that information which is confidential to the former client may come into the possession of a party with an adverse interest”.

[38] Ms. Lindsay said that Part II of Clause 23 of the Code of Ethics of the Eastern Caribbean Supreme Court mandates an Attorney-at-Law to scrupulously guard and never divulge its client’s secrets and confidences. Ms. Lindsay also referred the court to the pronouncement of Lord Millett in *Bokilah v KPMG* where His Lordship stated as follows-

“Whether founded on contract or equity, the duty to preserve confidentiality is unqualified. It is a duty to keep the information confidential, not merely to take all reasonable steps to do so. Moreover, it is not merely a duty not to communicate the information to a third party. It is a duty not to misuse it, that is to say, without the consent of the former client or to make any use of it or to cause any use to be made of it otherwise than for his benefit. The former client cannot be protected completely from accidental or inadvertent disclosure. But he is entitled to prevent his former solicitor from exposing him to any avoidable risk; and this includes the increased risk of the use of the information to his prejudice arising from the acceptance of instructions to act for another client with an adverse interest in a matter to which the information is or may be relevant”.

Lord Justice Millett further pronounced that:

“It is difficult to discern any justification in principle for a rule which exposes a former client without his consent to any avoidable risk, however slight that information which he has imparted in confidence in the course of a fiduciary relationship may come into possession of a third party and be used to his disadvantage. The risk must be a real one, and not merely fanciful or theoretical. But it need not be substantial”.

[39] Ms. Lindsay reminded the court of the evidence that Mr. Simeon has placed before the court. He says that when he applied for a restriction or caution to be placed against the Estate of Sarah, Miriam used against him, information that he had shared with Hodge’s Law Office. It was as a

consequence of this use of that information by Miriam that she was able to oppose his application and to state that "I am advised that no application for Letters of Administration was ever filed by Simeon Fleming". He also referred to the fact that Miriam, in opposing his application, had stated about him: "I am aware he lives in England and then gives an address to make it seem as though he lives in Long Bay, Anguilla". Also, that in seeking to launch a challenge to his application for a restriction to be placed, Miriam through Hodge's Law Office filed a statutory declaration said as follows-

"I am advised that Simeon had availed himself of Hodge's Law Office in an acutely pro bono manner. There was simply no retainer ever entered into and certainly no monies paid to any Lawyer at Hodge's Law Office by Simeon. In fact when the subject of paying a fee for the time Hodge's Law Office had given to Simeon, he left without making a payment".

- [40] In view of the above statements that were made by Miriam, Ms. Lindsay is adamant that Hodge's Law Office has disclosed confidential information which Simeon shared with Hodge's Law Office to Miriam and she has used that information in a manner that is adverse to his interest.
- [41] Also, Ms. Lindsay adverted the court's attention to the fact that Simeon says that none of the beneficiaries expected Miriam to have gone behind their backs and to apply for Letters of Administration since 10-11 years had elapsed and she showed no inclination to do so. Importantly, Simeon says Hodge's Law Office was unable to do so for the family since this is exactly what they were retained to do.
- [42] Ms. Lindsay reiterated that Simeon objects to Hodge's Law Office acting as solicitor for Miriam in relation to the Administration of the Estates when this is the same thing that the firm was retained to obtain on behalf of himself and the other beneficiaries namely, to obtain Letters of Administration in relation to the self-same Estate.
- [43] Ms. Lindsay said that the imminent sale of the property is the real reason why Miriam and, by extension, Hodge's Law Office rushed to ensure that she obtained Letters of Administration of the Estate.

[44] In order to reinforce her arguments, Ms. Lindsay referred to Part II Clause 23(II) of the Code which states that an Attorney-at-Law shall scrupulously guard and never divulge his client's secrets and confidences. Ms. Lindsay also referred the court to the decision of the Court of Appeal of England and Wales in *Philip Hines v Maureen Williams* [1997] EWCA CIVI 1135 in which Lord Justice Waller said:

“As it seems to me, there will be circumstances in which a solicitor should feel embarrassed to act, vis-à-vis someone for whom he has acted even after the account has been rendered and the specific business finished. If that is so, the law in my view ought to recognize a continuing obligation. Where for example, joint instructors have been given on a particular matter on which the solicitor has acted in their joint interests and to protect joint interests. I have serious doubts as to whether the limit on the ability of the solicitor to act for any one party against the interests of the other (albeit the account has been rendered and paid) is limited simply to a situation in which the use of confidential is involved”.

[46] Ms. Lindsay also relied on *Davies v Davies* [2000] 1FLR39 to buttress her argument that the court should restrain Hodge's Law Office from acting on behalf or advising Miriam in the terms of the injunctive relief which Simeon seeks.

Court's Analysis and Findings

[47] I have reviewed the affidavits and documentary evidence that have been filed in the matter. I have also given deliberate consideration to the submissions that were advanced by learned counsel.

[48] I have no doubt that Hodge's Law Office was the Solicitors/Barristers who were jointly instructed by Simeon and Miriam on behalf of the beneficiaries to attend to the Administration of Estates of Sarah and Catherine. In particular, Hodge's Law Office was retained by Simeon and the beneficiaries to advise and probate the Estate of Sarah and Catherine deceased. There is a direct link between the two Estates. They are inextricably interlinked. Equally, I have no doubt that now that Simeon has filed a claim against Miriam, she has utilized Hodge's Law Office, who was

previously retained to represent, even on Hodge's Law Office's own case, the Estate of Catherine. The Estate of Mr. John Richardson maybe of relevance, since there appears on the record to be some connection to that Estate and the other two. I will however, leave that aside since there is no evidential basis has not been provided for me to make a definitive finding.

[49] I accept Ms. Lindsay's submissions that it is wrong for a solicitor who has acted on behalf of the former client/beneficiaries in relation to the Estate to act in a suit brought by one set of beneficiaries against another set, particularly as in the case at bar, in relation to the Estate.

[50] Let me state that it is no part of my function to determine whether Simeon's application to have Miriam removed as the Administratrix of the Estate of Sarah is proper. I am concerned in this application to determine whether in view of all of the circumstances whether it is equitable and just to restrain Hodge's Law Office from acting on behalf of Miriam in relation to the relevant Estates and nothing more.

[51] There is uncontroverted evidence that Ms. Wright who is a Solicitor Advocate and a member of Hodge's Law Office, is the person who appears to be representing and advising Miriam in the matters that concern the Administration of the Estate of Sarah and by extension the Estate of Catherine. It is noteworthy that relevant documents that are filed on behalf of Miriam are filed by Hodge's Law Office. Prudence may have dictated that since Ms. Wright is so intimately involved in the matter that she should have sought independent representation.

[52] Be that as it may, it is interesting that Ms. Wright would seek to justify the position taken by Hodge's Law Office on the basis that it acted for the beneficiaries of Catherine's Estate and not Sarah's Estate in face of evidence to the contrary which is so compelling. I am mindful of the fact, however, that an injunction is not a mini trial. It is no part of my duty to determine which side I believe. However, looking at the clear and cogent evidence in the matter, one thing that is very clear, is as stated earlier, that the Estate of Catherine is interrelated or intertwined with the Estate of Sarah that one cannot properly or sensibly speak about the Estate of Catherine without referring to the Estate of Sarah.

- [53] I emphasise that Sarah, deceased, was the mother of Catherine, deceased. The latter was the mother of both Simeon and Miriam. Catherine was the Administrator of the Estate of Sarah and was entitled to benefit from the Estate of Sarah. It is clear that any claim by either Simeon or Miriam to be entitled to benefit from the Estate of Sarah could only arise through their claim to such benefit through their deceased mother, Catherine.
- [54] In any event, I am not of the view that the court should seek to compartmentalize the matter in the way that is suggested by Ms. Wright. Nothing would be gained from the court seeking to make artificial boundaries as to whether Hodge's Law Office represented Simeon in relation to Catherine's Estate as distinct from Sarah's Estate. I reiterate that Catherine's Estate is so intertwined with Sarah's Estate so that any representation in relation to the former of necessity would have included the latter. Even if Ms. Wright is correct on this point and I am wrong, the mere fact that Hodge's Law Office was instructed in relation to Catherine's Estate means that it would as matter of necessity have had to address matters in relation to Sarah's Estate since Catherine's Estate was to have benefitted from Sarah's Estate.
- [55] In my considered view, it is not open to Ms. Wright to argue that since Miriam's application for Letters of Administration for the Estate of Sarah was made around May 2011 and this was after Simeon had withdrawn his instructions from Hodge's Law Office, as a basis for saying that the court should not accede to Simeon's request.
- [56] It bears stating that Mr. Valencia Hodge, the senior partner in Hodge's Law Office and who initially apparently had most of the dealings with Simeon and his sister Miriam, appears to have done the correct and honourable thing – he does not seem to be personally involved in the matter. This is very commendable. However, that is not the end of the matter in so far as the Hodge's Law Office of which he is the head and which was retained by Simeon in relation to the relevant Estates is concerned. I have no doubt that Mr. Hodge ought to have ensured that his associate, Ms. Wright was not involved. The name of his Law Office should not be associated with the representation of any of the parties to the dispute. It cannot be correct for an associate of a law office which was retained by a former client/beneficiaries on behalf of an Estate in relation to the specific Estate

which is the subject matter of the dispute, to seek to represent one of the beneficiaries in a claim brought by another beneficiary.

[57] I find the decision in *Willard v Paragon Holding Ltd* et al ibid very helpful and I can do no better than to adopt the principles enunciated by Justice Janice George Creque as she then was. However, the factual circumstances of that case are clearly distinguishable from those in the application at Bar. In that case, the applicant who had very minimal contact with a former solicitor in a totally unrelated matter sought to have the solicitors restrained from acting for the opposing side in a matter. In that case the learned trial judge, as she then was and with respect, quite properly refused to restrain the solicitors in those circumstances.

[58] In contradistinction to **Willard's** case, in the application at Bar the former solicitor acted for the client/beneficiaries in the matters which concern the self-same Estate (subject matter) and one of the beneficiaries is suing another beneficiary who is also the administratrix in very contentious circumstances. It is beyond me how Ms. Wright could even attempt to argue that there is nothing improper for Hodge's Law Office to represent one of the parties in these circumstances. There is overwhelming evidence that information about Simeon which would have been in the exclusive knowledge of Hodge's Law Office found itself in Miriam's statutory declaration. This information was used against him.

[59] In passing and for what it is worth, I should state that there is no merit in Ms. Wright's assertion that the application should have been served on Hodge's Law Office. The application was filed and Ms. Wright has appeared in the matter and she has chosen to argue the matter and take those technical points after the fact. Critically, she seeks to take those technical objections after she had entered appearance in person. I do not propose to say anything further on this matter since had she taken that point earlier it would have been the easiest thing for the documents to have been served on Ms. Wright and Hodge's Law Office. In my view, this is not the sort of point that should be taken in the course of participation in the legal arguments.

[60] I return to the important aspect of the application. It is noteworthy that in her second affidavit in answer to Simeon's affidavit, Miriam deposed that she could not comment or defend the

allegations that are made against Hodge's Law Office because she was not a party to any such matters. Yet in the statutory declaration in which she opposes Simeon's application for a restriction she was able to refer to many detail and private matters that concern the professional relationship between Hodge's Law Office and Simeon. It is clear to me that the only way in which Miriam could have made those statements would have been if they were communicated to her by someone from Hodge's Law Office.

[61] Accordingly, I have no doubt and accept learned counsel's Ms. Lindsay's submission that Hodge's Law Office who represented Miriam in relation to Sarah's Estate and in the present application has clearly utilized information obtained from Simeon or of which they have knowledge against Simeon. This is self-evident when one examines the statutory declaration which Miriam has filed in opposition to Simeon's application for a restriction.

[62] I do not accept Ms. Wright's submissions that the law requires Simeon to prove that he had provided Hodge's Law Office with confidential information. Even if there is such a requirement, I am satisfied that Simeon has placed a plethora of cogent evidence before the court to sustain his position that he provided confidential information to Hodge's Law Office which has been misused. See *Bokilah v KPMG*; *Philip Hines v Maureen Williams* *ibid*.

[63] Further, I find very instructive the principles that were enunciated by Lord Justice Waller in *Philip Hines v Maureen Williams* [1977] EWCA Civi 135. His Lordship propounded as follows:

"As it seems to me, there will be circumstances in which a solicitor should feel embarrassed to act, vis a vis someone for whom he has acted even after the account has been rendered and the specific business finished. If that is so, the law ought in my view to recognize a continuing obligation. Where for example, joint instructions have been given on a particular matter on which the solicitor has acted in their joint interests and to protect joint interests. I have serious doubts as to whether the limit on the ability of the solicitor to act for only one party against the interests of the other albeit the account has been rendered and paid, is limited simply to a situation in which the use of confidential information is involved".

[64] Equally, I find the pronouncement of Lord Millet at page 237 F *Bokilah v KPMG* very instructive. His Lordship stated as follows:

“This would encounter to the fundamental principle of equity that a fiduciary may not put his own interest or those of another client before those of his principle. In my view no solicitor should without the consent of his former client accept instructions unless viewed objectively, his doing so will not increase the risk that information which is confidential to the former client may come into position of a party with an adverse interest”.

[65] Further, I agree with Ms. Lindsay’s submission that the solicitor’s fiduciary duty extends beyond the retainer. See *Longstaff v Butles* *ibid* and *Hilton v Barker Booth and Eastwood* *ibid*.

[66] Equally relevant is the very helpful judicial pronouncement of Lord Millet in *Bokilah v KPMG* where His Lordship made very helpful pronouncement which I can do no better than to adopt, namely:

“Whether founded on contract or equity, the duty to preserve confidentiality is unqualified. It is a duty to keep the information confidential, not merely to take all reasonable steps to do so. Moreover, it is not merely a duty not to communicate information to a third party, it is a duty not to misuse it; that is to say, without the consent of the former client to make any use of it or to cause any use to be made of it otherwise than for his benefit. The former client cannot be protected completely from accidental or inadvertent disclosure. But he is entitled to prevent his former solicitor from exposing him to any avoidable risks and this includes the increased risk of the use of the information to his prejudice arising from the acceptance of instructions to act for another client with an adverse interest in a matter to which the information is or may be relevant. It is difficult to discern any justification in principle for a rule which exposes a former client without his consent to any avoidable risk, however slight, that information which he has imparted in confidence in the course of a fiduciary relationship may come into possession of a third party and be used to his disadvantage. The risk must be a real one and not merely fanciful or theoretical. But it need not be substantial”

[67] From the above cases, I can distill the following principle: namely, that even in the absence of any finding of wrongdoing by Hodge's Law Office the court would still be entitled in an appropriate case to prevent solicitors from acting for and on behalf of a client and against a former client. I do not share Ms. Wright's view that the court could only restrain the solicitors from acting if there is evidence of wrongdoing. Once there is cogent evidence that a former client has imparted confidential information to his solicitor, the solicitor should be prevented from misusing it or the risk that the solicitor will do so.

[68] I am not of the respectful view that the fact that Miriam has indicated that Ms. Wright is her solicitor of choice and that she should have the freedom to choose her legal representation would suffice to answer Simeon's very serious complaints of conflict of interest, which have not been successfully challenged. Neither do I accept that it is sufficient for Ms. Wright to assert that Simeon had retained Mr. Valencia Hodge of Hodge's Law Office to represent him and that there is nothing to prevent Ms. Wright (who is a member of Hodge's Law Office) from now representing Miriam. Let me be clear, it would not be proper for Ms. Wright to even assist another solicitor "behind the scenes" to represent Miriam in any claim that is brought by Simeon in relation to the Estate of Sarah or the Estate of Catherine; or in any claim that Miriam may bring against Simeon and the other beneficiaries in relation to the Estate of Sarah and the Estate of Catherine.

[69] I am not convinced that Simeon had consulted Hodge's Law Office in relation to John Richardson's Estate. I therefore will refrain from making any order in relation to that Estate.

[70] In view of the totality of circumstances, I am ineluctably driven to the conclusion that an injunction should be granted restraining the Solicitors, Solicitor Advocate, Barristers or employees of Hodge's Law Office from acting for and on behalf of Miriam in relation to matters that involve the Estates of Sarah Ann Connor aka Richardson and Catherine Fleming.

Conclusion

[71] There will be judgment for Simeon Fleming against Hodge's Law Office.

[72] It is hereby ordered that the Solicitors, Solicitor Advocate, Barristers or employees of Hodge's Law Office are forthwith restrained from acting for and on behalf of Miriam Fleming and from advising/representing Miriam Fleming in relation to the Sarah Ann Connor aka Richardson and Catherine Fleming Estates.

[73] Each party is to bear its own costs.

Louise Esther Blenman
Resident High Court Judge
Anguilla