JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MR JUSTICE LAING JA (AG)

APPLICATION NO COA2023APP00088

BETWEEN	**THE ATTORNEY GENERAL OF JAMAICA**	**1ST APPLICANT**
AND	**NORTH EAST REGIONAL HEALTH AUTHORITY**	**2ND APPLICANT**
AND	**SHELTON SORTIE (BY HIS MOTHER AND NEXT FRIEND SHANETT SORTIE)**	**RESPONDENT**

Miss Kristina Whyte instructed by the Director of State Proceedings for the 1st and 2nd applicants

Ms Jacqueline Cummings instructed by Archer Cummings & Co for the respondent

24, 25 May and 16 June 2023

Negligence -Medical negligence – Expert evidence – Principles to be applied in determining who qualifies as an expert.

Evidence - Legal professional privilege – Inadvertent disclosure of privileged documents – Test to be applied in determining whether such documents should be used.

Evidence - Hearsay – Whether hearsay information originating in an admissible document may be contained in a witness statement.

MCDONALD-BISHOP JA

[1] I have read, in draft, the reasons for judgment of Laing JA (Ag) and I agree with his reasoning and conclusion, which accord with my reasons for concurring in the decision of the court. There is nothing I could usefully add.

SIMMONS JA

[2] I, too, have read, in draft, the judgment of Laing JA (Ag), and agree with his reasoning and conclusion and have nothing else to add.

LAING JA (AG)

[3] The applicants, The Attorney General of Jamaica and the North East Regional Health Authority, filed an application seeking, *inter alia*, leave to appeal the following orders made on the request of the respondent Master Sheldon Sortie (claiming by his mother and next friend Shanett Sortie), by Master Miss S Reid ('the master') on 17 April 2023 ('the 17 April Orders'):

> "1. Professor Hubert Daisley CMT, BSC., MBBS, DM, FRCPE, MFFLM, Pathologist is appointed as an Expert Witness for the purpose of this claim.
>
> 2. The Medical Report of Professor Hubert Daisley dated the 14th of February 2023 is certified as an Expert's Report.
> …
>
> 6. Professor Hubert Daisley is permitted to participate and give evidence in the Trial [sic] of this claim or any other hearing via Zoom or any other suitable videolink platform if necessary.
>
> 7. The Claimant is permitted to file and serve an Amended Particulars of Claim within **14 days** of the disposal of this application.
>
> 8. The Claimant is permitted to rely on Witness Statements of Shanett Sortie and Shelton Sortie, Snr. filed on the 18th of October 2022 and the Witness Statement of Shelton Sortie, Jnr. filed on the 6th January 2023 at the Trial or any other hearing of this claim." (Emphasis as in the original).

[4] The applicants also sought permission to appeal the following orders made on 18 April 2023 ('the 18 April Orders'):

> "1. The oral application of the [Applicants] is refused.

2. Permission is granted for the [Respondent] to use the letter dated December 11, 2013, from Dr. Anna Marie Woodham-Auden to Ms Stacy Ann Joseph, Legal Officer in the Ministry of Health.

…

4. Leave to appeal is denied …"

[5] Applications for leave to appeal were made on different dates in the court below in respect of the 17 April Order and the 18 April Order. These applications were refused, and the applicants have now made a fresh consolidated application before this court pursuant to rule 1.8(2) of the Jamaica Court of Appeal Rules (2002) ('CAR').

[6] On 24 May 2023, we heard this application, and the parties consented to the hearing of the application being treated as the hearing of the appeal. On 25 May 2023, we made the following orders:

"1. The application for permission to appeal the orders of Master S Reid made on 17 April 2023 is refused.

2. The application for permission to appeal the orders of Master S Reid made on 18 April 2023 is granted.

3. With the consent of the parties, the hearing of the application for permission to appeal the orders of Master S Reid made on 18 April 2023 is treated as the hearing of the appeal against the said orders.

4. The appeal is allowed, in part.

5. Order number 1 of the orders of Master S Reid is set aside and substituted therefor is an order that 'the oral application of the Defendant is granted, in part'.

6. Order number 2 of the said order is affirmed and is varied to add the following after the words "Ministry of Health":
'*subject to the requirements of the Evidence (Amendment) Act, the Supreme Court of Jamaica Civil Procedure Rules, 2002 and any other applicable law concerning the admissibility of the said letter.'*

7. Save for the first sentence of paragraph 16 of the witness statement of Shanett Sortie filed on 18 October 2022, which

states '*Shelton and I are still trying to get complete copies of my Medical Records and our son's Medical Records.*', the said paragraph is struck out.

8. Save for the first sentence of paragraph 17 of the witness statement of Shelton Sortie Snr filed on 18 October 2022, which states*, 'Shanett and I are still trying to get complete copies of her Medical Records and our son's Medical records.'*, the said paragraph is struck out.

9. Paragraph 18 of the said witness statement of Shelton Sortie Snr is struck out.

10. The respondent is to file and serve redacted copies of the witness statements of Shanett Sortie and Shelton Sortie Snr with the appropriate endorsement that they are filed pursuant to the order of the court made herein.

11. 50% costs of the appeal to the respondent to be taxed if not agreed."

[7] We promised then to put our reasons in writing. This is a fulfilment of that promise. In order to give context to our decision, I will first provide a background to the application.

Background/history

[8] This application and appeal arose from a negligence claim filed on 9 August 2013, in which the respondent, by his mother and next friend, is claiming damages for the partial loss of his left index finger as a result of gangrene arising from the alleged negligence of staff while he was being treated at the Saint Ann's Bay Hospital. The respondent sustained the injury after he was delivered prematurely by emergency Caesarean section at that facility.

[9] During the disclosure and inspection exercise in the proceedings in the Supreme Court, pursuant to Part 28 of the Supreme Court of Jamaica Civil Procedure Rules (2002) ('CPR') and an order of Master R Harris dated 17 December 2018, the applicants disclosed a letter from Dr Anna Marie Woodham-Auden (paediatric consultant) to Ms Stacy-Ann Joseph (legal officer of the Ministry of Health) ('the Letter'). In this letter, Dr Woodham-

Auden stated that the respondent's hand was wrapped in tape in order to secure the intravenous line used to give fluid, glucose electrolytes and antibiotics to keep the respondent alive.

[10] Dr Woodham-Auden, in the Letter, further stated that "[u]nfortunately it appears that there was so much tape that the medical staff were unable to see the fingers and did not detect that the left index finger was ischemic". The witness statements of Sheldon Sortie Snr and Shanett Sortie, the respondent's parents, at paras. 17 and 18, and para. 16, respectively ('the disputed paragraphs'), each refers to the Letter and to this statement of Dr Woodham-Auden.

[11] By notice of application for court orders filed 14 March 2023, the respondent sought an order for Professor Hubert Daisley [CMT, BSC., MB BS, DM, FRCPE, MFFLM], a pathologist, to be appointed as an expert witness for the purpose of the claim and for his medical report dated 14 February 2023 to be certified as an expert's report. At the pre-trial review held on 17 April 2023, the master granted the orders.

[12] At the pre-trial review on 17 April 2023, the applicants made an oral application to strike out the disputed paragraphs on the bases that they referred to the contents of the Letter, which was subject to legal professional privilege ('LPP') and contained hearsay statements. Furthermore, the applicants said, the Letter was disclosed in error. On the continuation of the pre-trial review the following day, 18 April 2023, the master refused the application to strike out the disputed paragraphs and granted the respondent permission to utilize the Letter in the claim**.**

The issues

[13] The applicants listed their 12 grounds for the application, from (a) through to (l), which can conveniently be reduced to the following issues. The first, is whether Professor Hubert Daisley qualifies as an expert for purposes of the claim ('the expert issue'). The second is whether the respondent should be restrained from using the Letter which is subject to LPP but which was voluntarily, but mistakenly, disclosed to him ('the privilege

issue'). Counsel for the parties are agreed that the master found that the Letter is subject to LPP. Therefore, for the purposes of this appeal, I have taken the issue of whether LPP attaches to the Letter as having already been settled. The third issue is whether the disputed paragraphs contain hearsay evidence and should be struck out ('the hearsay issue').

The appeal

[14] Rule 1.8(8)(c) of the Court of Appeal Rules ('CAR') permits this court to treat the hearing of the application for leave to appeal as the hearing of the appeal itself. That is by stipulating that, "[a]n order giving permission to appeal may-…(c) direct that the hearing of the application for permission to appeal be treated as the hearing of the appeal".

[15] The test to be applied for this court to interfere with the exercise of any discretion by a lower court is well settled (see **Hadmor Productions Ltd and Others v Hamilton and another** [1982] 1 All ER 1042 at page 1046). In **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, Morrison JA as he then was, said:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'." (Para. [20])

The submissions

[16] The applicants relied on the cases of **Sally Fulton v John Ramson and Another** [2022] JMCC Comm 26, and **Joan Allen**, **Louise Johnson v Rowan Mullings** [2013] JMCA App 22 in support of their position on the expert issue. It was argued that the court must be satisfied that the expert is qualified to render an opinion within his field of expertise, which is reasonably required to resolve the issue before the court. It was

submitted that in this case, the triable issue before the trial court is whether the injury sustained by the respondent is attributable to the negligence of the servants and/or agents of the Saint Ann's Bay Hospital in administering the respondent's care. It was further submitted that the court will require the assistance of a medical expert skilled in paediatric and/or orthopaedic care in the determination of liability. Accordingly, it was argued that Professor Daisley, being a pathologist, is unable to give an "objective unbiased opinion in relation to matters within his expertise as required by Rule 32.4 (2) [of the CPR]".

[17] In relation to the privilege issue, the applicants' starting position was that the Letter was protected by LPP. Reliance was placed on rule 28.16 of the CPR, which provides that:

> "Where a party inadvertently allows a privileged document to be inspected, the party who has inspected it may use it or its contents only with-
>
> (a) the permission of the court; or
>
> (b) the agreement of the party disclosing the document."

It was submitted that in the list of documents which was filed by the applicants, letters, medical reports and records from the hospital were listed as not being withheld and available for inspection, but in stark contrast, the Letter was specifically not so listed. It was posited that the Letter was subsumed under the retained class of documents in respect of which a general statement was made that correspondence between the applicant and its attorneys-at-law, advisors, agents and witnesses were being withheld under LPP.

[18] It was submitted further that, in these circumstances, the master ought not to have permitted the respondent to rely on the Letter itself. However, as it relates to the hearsay issue, the master should not have permitted the contents of the Letter as contained in the disputed paragraphs to be utilised in breach of the hearsay rule, especially having regard to the fact that the Letter was disclosed in error. Miss Whyte

argued that even if the Letter is admissible (and she maintained that it is not), the disputed paragraphs clearly offend the hearsay rule as it is usually applied, and there is no applicable statutory or common law basis for their admission.

[19] In response to the applicants' arguments on the expert issue, Ms Cummings (counsel for the respondent) posited that Professor Daisley's qualifications as a medical practitioner are impeccable, and he has attained the highest ranks of the medical profession. Counsel postulated that since general training in a broad range of areas of medical science is given to medical doctors, any medical doctor can read the reconstructed docket, which has been provided to the respondent, and give an opinion as to what transpired and what resulted in the injury to the respondent. Accordingly, Professor Daisley is qualified to give evidence as an expert on the matters he addresses in his report.

[20] As it concerned the privilege issue, Ms Cummings submitted that the case of **Winston Finzi & Mahoe Bay Company Limited v JMMB Merchant Bank Limited** [2016] JMCA Civ 34 ('**Winston Finzi**') provides authority regarding the power of the master to permit the use of the Letter and the disputed paragraphs even after she concluded that the Letter is privileged. Counsel argued that, although **Winston Finzi** was ultimately decided on the basis that the communication, in those proceedings, was irrelevant to the facts in issue between the parties, that is not the situation in the case at bar because the Letter is extremely relevant in assisting any trial judge to determine the real issue between the parties. Furthermore, counsel argued that the Letter is the best and earliest account of what happened to the respondent after his birth and its importance is amplified by the unavailability of the original medical records of the respondent, which are still not available, even after the respondent was supplied with a reconstructed docket.

[21] The gravamen of the position advanced by Ms Cummings in relation to the hearsay issue was that the disputed paragraphs were included not as evidence of the truth of what was said in the Letter by Dr Woodham-Auden but only to establish that it was said

by her. Accordingly, their inclusion would not offend the hearsay rule, and this is supported by the case of **Subramaniam v Public Prosecutor** [1956] 1 WLR 965.

Discussion and analysis

The expert issue

[22] Part 32 of the CPR provides for the use of expert evidence, and rule 32.1 (2) states that the term "… '**expert witness**' is a reference to an expert who has been instructed to prepare or give evidence for the purpose of court proceedings" (bold as in the original). Rule 32.2 provides that "[e]xpert evidence must be restricted to that which is reasonably required to resolve the proceedings justly". The rules do not expressly define who is to be considered an expert witness, but the definition given by Stroud's Judicial Dictionary is adequate and accurate, that is, "an expert witness is one who has made the subject upon which he speaks a matter of particular study, practice or observation; and he must have a particular and special knowledge of the subject".

[23] Case law has established that whether material is admissible as expert evidence is based on a two-stage process. Stage one is determining whether "the evidence in question qualified as admissible expert evidence. The second stage was concerned with an inquiry whether, if it is admissible, it should actually be admitted as being of assistance to the court" (see page 8 of **National Commercial Bank Jamaica Ltd (Successors to Mutual Security Bank Ltd) v K & B Enterprises Ltd** (Vlex) [2005] 9 JJC 0501; Court of Appeal, Jamaica, Supreme Court Civil Appeal No 70/2015, judgment delivered 5 September 2005). In the case of **Mann v Messrs Chetty & Patel** [2000] EWCA Civ 267, a decision of the England and Wales Court of Appeal (Civil Division), Lady Justice Hale at para. 17 observed that there are three matters which ought to be considered by a judge in determining whether to admit expert evidence: "(a) how cogent the proposed expert evidence will be; (b) how helpful it will be in resolving any of the issues in the case; and (c) how much it will cost and the relationship of that cost to the sums at stake". In the case at bar, no issue has been raised as to cost and proportionality, however, the hurdles of a cogency test and a usefulness test are certainly relevant.

[24] The question of whether Professor Daisley may be considered to be an expert must be resolved in the context of the nature of the claim. The claim is one for personal injury resulting from the alleged negligence of the servants and/or agents of the 2nd applicant/the Crown. This being a case of alleged medical negligence, the respondent bears the burden of proving that the acts of negligence of the applicants, which he has pleaded, including "failing to ensure that the infant's left hand and/or left index finger were not wrapped too tightly and/or for too prolonged a period of time". The respondent is required to prove not only the alleged acts of negligence, but he is also required to prove that the applicants' negligence was the cause of his injury. The respondent has indicated that he will be relying on the doctrine of *res ipsa loquitur* (the thing speaks for itself), but he is still required to prove the 'res' or the injury and to call evidence to establish that in the normal course, the injury would not have occurred in the absence of negligence.

[25] In his medical report, Professor Daisley lists his qualifications, which include a Bachelor of Medicine and Surgery from UWI in 1979 and a Doctorate in pathology (which he did not state, but which I understand to be the study of the cause, origin, nature and effect of disease or injury), and his extensive experience as a consultant pathologist. He explains that oxygenated blood is delivered to the organs or tissues by blood vessels called arteries. He states that dry gangrene (ischemic necrosis) is due to prolonged ischemia or inadequate oxygenation or lack of blood flow to an area of the body, which causes that area to become dead and take on a black discolouration. He also opines that the blood supply to the respondent's left index finger needed to have been compromised or blocked for gangrene of his finger to occur and that this could have been caused by a ligature being placed on his left hand.

[26] Although the professor's area of specialization is pathology, he also holds a bachelor of medicine and bachelor of surgery degree (MBBS). Whereas I am not armed with sufficient evidence to form a considered opinion as to whether his specialised expertise in pathology may be of any assistance to the court in determining the issues in dispute, I am firmly of the view that being a medical doctor, he ought to be able to give

the evidence he proposes in his report as to what causes gangrene and what factors may have led to the respondent's injury in this case. I have found the applicant's submission that in order to determine the issue of liability in this case, the court will require the assistance of a medical expert skilled in paediatric and/or orthopaedic care, to be unmeritorious.

[27] I appreciate that a doctor has a duty of care to his or her patients to treat them with reasonable care and that a doctor does not breach the standard of care and is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art (see **Bolam v Friern Hospital Management Committee** [1957] 2 All ER 118). Accordingly, the question as to whether there were any peculiar features of paediatric or orthopaedic care which would impact the reasonableness of the treatment and care of the respondent, may fall for the determination by the judge at trial. However, the fact that Professor Daisley is not a specialist in the field of paediatrics (or to the extent that it may be relevant-orthopaedics) does not prevent him from giving cogent expert evidence on gangrene and its causes, including in the case of an infant. Such evidence is potentially of value to the court. I am, therefore, satisfied that the proposed evidence of Professor Daisley easily clears the hurdle of a cogency test and a usefulness test. However, ultimately, the court will have to determine what weight it will place on his evidence, having regard to any other evidence led at the trial of the matter, including of course, any medical evidence to the contrary.

[28] I, therefore, found that the challenge to the master's exercise of her discretion to permit Professor Daisley to give expert evidence has no real chance of success and, accordingly, permission to appeal this order should be refused.

<u>The privilege issue</u>

[29] The case law on LPP makes a distinction between two categories- legal advice privilege and litigation privilege. This distinction is not important to my analysis. The parties did not see the need to make that distinction, and it was not suggested that the

master did either. This is not a case where there was a keen contest as to whether the Letter was subject to LPP, and I have already alluded to the fact that the parties have accepted the master's opinion that it was.

[30] In **Price Waterhouse (a firm) v BCCI Holdings (Luxembourg) SA and others** [1992] BCCL 583 at page 588 (d), Millet LJ, in discussing legal advice privilege, noted that:

> "[l]egal professional privilege attaches to all communications made in confidence between a client and his legal adviser for the purpose of giving or obtaining legal advice. Litigation does not have to be in contemplation. It does not matter whether the communication is directly between the client and his legal adviser or is made through an intermediate agent of either."

[31] In assessing the approach the court should take to the disclosure and use of documents subject to LPP, it is helpful to acknowledge the basis for the importance of the protection afforded by LPP. Lord Rodgers in **Three Rivers District Council and others v Governor and Company of the Bank of England (No 5)** [2005] 4 All ER 948 accurately identifies the rationale for the protection at page 967 para. 54(d) as follows:

> "… the public interest justification for the privilege is the same today as it was 350 years ago: it does not change, or need to change, because it is rooted in an aspect of human nature which does not change either. If the advice given by lawyers is to be sound, their clients must make them aware of all the relevant circumstances of the problem. Clients will be reluctant to do so, however, unless they can be sure that what they say about any potentially damaging or embarrassing circumstances will not be revealed later. So it is settled that, in the absence of a waiver by the client, communications between clients and their lawyers for the purpose of obtaining legal advice must be kept confidential and cannot be made the subject of evidence. Of course, this means that, from time to time, a tribunal will be deprived of potentially useful evidence but the public interest in people being properly advised on matters of law is held to outweigh the competing public interest in making that evidence available. As Lord Reid

> succinctly remarked in *Duke of Argyll v Duchess of Argyll* 1962 SC (HL) 88, 93: 'the effect, and indeed the purpose, of the law of confidentiality is to prevent the court from ascertaining the truth so far as regards those matters which the law holds to be confidential'."

[32] Notwithstanding the general rule that the courts jealously protect documents that are subject to protection from disclosure by LPP, different considerations may apply where the party entitled to such protection, or his legal representative, discloses the document by accident. For this reason, I do not find the case of **Winston Finzi**, on which the respondent relied, to be of much assistance in resolving the issues before this court, since it was not a case in which the operation of part 28 of the CPR was considered. The law regarding the inadvertent disclosure of privileged documents can be found in both that part of the CPR and in case law. Rule 28.16 of the CPR provides as follows:

> "Where a party inadvertently allows a privileged document to be inspected, the party who has inspected it may use it or its contents only with –
>
> (a) the permission of the court; or
>
> (b) the agreement of the party disclosing the document."

[33] Therefore, a judge/master can allow the utilisation of privileged documents which was inadvertently disclosed under one of those two circumstances. In the case at bar, the master granted permission for the inspecting party to utilise the Letter. It is for this court to determine, in the absence of the written reasons of the master, whether she erred in exercising her discretion in permitting the inspecting party to do so.

[34] The CPR is silent on what factors should guide the master in exercising her discretion, but guidance may be found in the case of **Mohammed Al Fayed and Another v The Commissioner of Police of the Metropolis** [2002] EWCA Civ 780 ('**Al-Fayed**'). This case was considered in the context of the UK CPR, which only provides one basis upon which the reliance on the privileged document may be allowed, and that

is with the court's permission. Nevertheless, because the issue of the admission of documents by agreement of the parties is not applicable to the facts under consideration, this difference is of no moment.

[35] In **Al-Fayed**, the court, having considered several cases concerned with LPP, identified, at para. 16, the principles to be applied. They are worth reproducing:

> "i) A party giving inspection of documents must decide before doing so what privileged documents he wishes to allow the other party to see and what he does not.
>
> ii) Although the privilege is that of the client and not the solicitor, a party clothes his solicitor with ostensible authority (if not implied or express authority) to waive privilege in respect of relevant documents.
>
> iii) A solicitor considering documents made available by the other party to litigation owes no duty of care to that party and is in general entitled to assume that any privilege which might otherwise have been claimed for such documents has been waived.
>
> iv) In these circumstances, where a party has given inspection of documents, including privileged documents which he has allowed the other party to inspect by mistake, it will in general be too late for him to claim privilege in order to attempt to correct the mistake by obtaining injunctive relief.
>
> v) However, the court has jurisdiction to intervene to prevent the use of documents made available for inspection by mistake where justice requires, as for example in the case of inspection procured by fraud.
>
> vi) In the absence of fraud, all will depend upon the circumstances, but the court may grant an injunction if the documents have been made available for inspection as a result of an obvious mistake.
>
> vii) A mistake is likely to be held to be obvious and an injunction granted where the documents are received by a solicitor and:

a) the solicitor appreciates that a mistake has been made before making some use of the documents; or

b) it would be obvious to a reasonable solicitor in his position that a mistake has been made;

and, in either case, there are no other circumstances which would make it unjust or inequitable to grant relief.

viii) Where a solicitor gives detailed consideration to the question whether the documents have been made available for inspection by mistake and honestly concludes that they have not, that fact will be a relevant (and in many cases an important) pointer to the conclusion that it would not be obvious to the reasonable solicitor that a mistake had been made, but is not conclusive; the decision remains a matter for the court.

ix) In both the cases identified in vii) a) and b) above there are many circumstances in which it may nevertheless be held to be inequitable or unjust to grant relief, but all will depend upon the particular circumstances.

x) Since the court is exercising an equitable jurisdiction, there are no rigid rules."

[36] The court at para. 23, in discussing the principle in para. 16 vii) b) above, referred to the case of **Pizzey v Ford Motor Co** [1994] PIQR 15 (1993) where Mann LJ (with whom the other members of the court agreed) said this:

"Cases of mistake are stringently confined to those which are obvious, that is to say those which are evident. This excites the question: evident to whom? The answer must be, to the recipient of the discovery. If the mistake was evident to that person then the exception applies, but what of a case where it is not evident but would have been evident to a reasonable person with the qualities of the recipient? In this context the law ought not to give an advantage to obtusity and if the recipient ought to have realised that a mistake was evident then the exception applies. ... The critical question is thus whether a reasonable person with the qualities of Ms Kwong would have realised that Miss Mair made a mistake. The relevant quality of Ms Kwong is that she is a solicitor."

[37] The principles identified in **Al Fayed** were referred to and applied, at paragraph 39, in the recent Privy Council case of **The Attorney General v The Jamaican Bar Association** [2023] UKPC 6, where the Board at para. 39 acknowledged that an attorney may occasionally disclose privileged material unwittingly, or by mistake. It confirmed that "[t]he rule at common law is that if a person receives another person's privileged material by an obvious mistake, then it must be returned: see *Al Fayed v Metropolitan Police* [2002] EWCA Civ 780".

[38] It is important to note that there is no allegation of fraud in the obtaining of the Letter or otherwise in this case. Accordingly, it can be distilled from **Al Fayed** that the next enquiry which ought to be conducted is whether it would have been obvious to a reasonable solicitor in the position of the recipient of the Letter, that an obvious mistake had been made on the part of counsel for the applicants in disclosing it. In considering whether the mistake is obvious, the court should apply the two-limbed test set out in **Al Fayed** at 16(vii).

[39] The difficulty which arises from unintentional disclosure in most cases, including the one under consideration, stems from a party's attempt to comply with the disclosure obligations imposed on it as a part of the litigation process. Part 28 of the CPR provides a regime for disclosure and inspection of documents. Parties have a duty to disclose documents that are directly relevant to the litigation, and which are or have been under their control. Rule 28.8 provides that each party must make and serve on every other party a list of documents in the format as provided by prescribed form 12 and "identify the documents or categories of documents in a convenient order and manner and as concisely as possible".

[40] Rule 28.12(1) of the CPR provides that:

> "When a party has served a list of documents on any other party, that party has a right to inspect any document on the list, except documents-

(a) which are no longer in the physical possession of the party who served the list; or

(b) for which a right to withhold from disclosure is claimed."

It is the latter category which is of interest for our purposes.

[41] Prescribed form 12 contains the following language:

> "I claim a right to withhold disclosure and inspection of the documents listed in Part 2 of Schedule 1 on the basis stated in the Schedule."

Part 2 of Schedule 1 contains the headings "Details of document or class of documents" and "Reason for claiming a right not to disclose". The applicants, in their form 12 as filed, provided the following responses in these fields:

> "Correspondence between the Defendants, their Attorney-at-Law, advisors, agents and witnesses to enable them to discuss and take advice in relation to the issues arising in the action and to enable them to defend the action.
>
> The Defendants object to the production of these documents on the ground that they consist of privileged documents."

[42] As Mann LJ stated, in **Pizzey v Ford**, "the law ought not to give an advantage to obtusity" on the part of the recipient. In a similar vein, I am of the view that the law should not give an advantage to a litigant who does not exercise due care in guarding from disclosure documents in respect of which he intends to rely on LPP. In the instant case, the burden is on the applicants to establish that the Letter was inadvertently disclosed. Counsel for the applicants asserted that it was inadvertently disclosed, but there is no evidence on behalf of the applicants of the precise manner in which the alleged error occurred.

[43] In his affidavit filed on 18 May 2023, Clifton Campbell, an attorney-at-law and partner in the firm of Archer, Cummings & Company, chronicles the process of disclosure and inspection following the relevant orders made at the case management conference on 17 December 2018. It is unnecessary to reproduce all the detail he has provided, but

he confirmed that, initially, there was no physical inspection of the documents disclosed in the list of documents, but the applicants provided those documents by email. There were issues which proved to be problematic such as potentially missing pages of documents and email exchanges in respect of these issues, which resulted in Matthew Palmer, attorney-at-law of Archer, Cummings & Company, attending the Attorney General's Chambers on 15 September 2022 to conduct a physical inspection of the applicant's list of documents. Based on Mr Campbell's description of the chronology of the events, the process could not be reasonably described as efficient in its execution.

[44] Critically, Mr Campbell avers at para. 48 of his affidavit that he was informed by Mr Palmer and verily believes that the PDF file containing the Letter was attached to an email dated 8 July 2022, sent to Mr Palmer by Ms Shawnie Harrison, a secretary in the litigation division of the Attorney General's Chambers. The Letter was one of only two PDF file attachments to the email and, therefore, fully visible. It is further averred that this was part of a series of three emails sent by Ms Harrison that were meant to provide inspection.

[45] Mr Campbell, at para. 49 of his affidavit, provides the following explanation of the reason Mr Palmer did not believe privilege was being claimed for the Letter:

> "49. Ms. Cummings was informed by Mr. Palmer and we verily believed that Ms. Whyte [Ms Kristina Whyte, Crown Counsel of the Attorney-General's Chambers] and Ms Harrison did not indicate any error of disclosure, even when he wrote back to indicate that we were missing documents that they had tried to send us and following the back and forth on conversation on inspection. Considering this, he did not believe that the letter was privileged or that privilege was being claimed although it was not individually listed in their List of Documents. He believed that the two documents were meant to be traveling together."

[46] On the question of whether there was an obvious mistake, I do not agree with the submissions of the applicants that this is a case where a reasonable attorney would conclude that the Letter was disclosed in error and that its inspection was inadvertently

permitted. The Letter on its face is plainly relevant. It relates to the medical treatment of the respondent. The respondent's attorneys-at-law had previously been provided with medical evidence in respect of the respondent's treatment. The disclosure of the Letter was, therefore, not an obvious error simply because it was addressed to the legal officer of the Ministry of Health and/or that it contained details of a course of treatment of the respondent, which may be potentially damaging to the defence of the applicants. Furthermore, Counsel for the respondent were entitled to assume that the Letter which was sent as an attachment to a covering email, was transmitted as a result of a conscious and considered decision by the attorney instructing the secretary to do so. As noted in para. 16 iii) of **Al Fayed**, the attorney inspecting the document "...is in general entitled to assume that any privilege which might otherwise have been claimed for such documents has been waived".

[47] I was, therefore, of the opinion that the applicants would not be entitled to the relief they sought because on a balance of probabilities, the attorneys-at-law for the respondent did not appreciate that a mistake had been made in the disclosure of the Letter. Additionally, it would not have been obvious to a reasonable attorney-at-law, in their position, that a mistake had been made.

[48] Having regard to my finding in the preceding paragraph, it is unnecessary to proceed any further. However, it is of note, even for academic interest only, that even if I had found that the disclosure of the Letter was an obvious mistake, I would have arrived at the same conclusion in refusing the relief sought by the applicants to prohibit the use of the Letter. It is clear from the authorities that even where there is an obvious mistake in the disclosure of privileged documents, the court still has to consider whether, ultimately, it is just and equitable to prevent the use of the material. In **Al fayed** at para. 25, the court made the point as follows:

> "25. We would also add that, as is recognised in paragraph 16 ix) above, there may be many circumstances where it would not be just to grant an injunction on the facts of a particular case. One such case might be where B's solicitor

> sends the documents for consideration by B before considering them himself and B learns a fact from the document which it would be unjust to prevent him from using in the litigation, even though it would have been apparent to B's solicitor that a mistake had been made. All depends upon the circumstances of the particular case."

[49] It is my view that it would be "inequitable or unjust" to deny the respondent the ability to rely on the Letter since the Hospital lost the respondent's original docket and created a new one. It is, therefore, impossible for the respondent to determine whether there is material missing from the re-constructed docket, which is capable of supporting his case. The Letter contains details of the respondent's treatment which was within the exclusive knowledge of the servants and agents of the hospital and may have been contained in the original docket. Furthermore, the maker of the Letter is the same doctor whose medical certificate was served on the respondent and whose evidence the respondent intends to rely on. This information from that same witness (who is also an agent or servant of the applicants) may assist the court in determining the claim by helping to explain the circumstances which led to the respondent's injuries, subject, of course, to the fulfilment of the legal requirements for the admissibility of the Letter itself during the trial if the witness cannot attend in person.

[50] For these reasons, an appeal of the master's exercise of her discretion to permit the use of the letter would have had no real chance of success, and, accordingly, leave to appeal on this ground was refused. However, the order for the use of the Letter in the terms granted by the master needed an appropriate qualifier, which this court had added in its orders.

<u>The hearsay issue</u>

[51] The hearsay rule is often described as difficult and one of the least understood of the rules of evidence. In the text Phipson on Evidence, eleventh edition, the learned authors, at chapter 15 para. 632 and page [268], state that:

> "conspicuous uncertainty exists amongst practitioners, magistrates and judges as to what evidence does and does not fall within the hearsay rule."

In that same paragraph, a general statement of the rule is offered, which I agree represents the essence of the rule and is in the following terms:

> "Former oral or written statements of any person whether or not he is a witness in the proceedings, may not be given in evidence if the purpose is to tender them as evidence of the truth of the matters asserted in them."

[52] Halsbury's Laws of England/Criminal Procedure, Volume 28 (2021), para. 622(17) under the heading, Hearsay and original evidence: general principles, provides the following formulation, which I also found to be helpful in highlighting the issue we had to resolve:

> "A fact is proved by original evidence when it is proved by oral testimony in the proceedings from witnesses who have first-hand knowledge of that fact. If a witness lacks first-hand knowledge (that is, if he did not personally perceive or experience the fact or event in question, but has merely heard or read about it through statements made by others) any evidence he purports to give on that matter will be second-hand evidence and thus hearsay. (footnotes omitted)."

[53] Prior to the advent of the CPR, the practice was for a witness in a civil trial to give all his evidence in chief orally from the witness box. It is during this evidence-in-chief phase of the trial that issues relating to the exclusion of evidence as being hearsay would typically arise. Under the relatively new CPR regime, a witness statement, signed by the person making it and containing what it is intended that that person will give orally, is filed and served on the other party. Rule 29.8(2) of the CPR provides that, where that witness who gives the statement is called as a witness, his or her witness statement shall stand as evidence-in-chief unless the court orders otherwise. The consequence of this provision is that it is necessary for there to be a challenge to any portion of the witness statement, which a party alleges breaches the hearsay rule, before the witness statement is ordered to stand as that witness' evidence-in-chief.

[54] Rule 29.5(2) of the CPR provides that "[t]he court may order that any inadmissible scandalous, irrelevant or otherwise oppressive matter be struck out of any witness statement". That clearly means that the witness statement should contain admissible evidence only, and such evidence must be evidence which could be given by the witness, without challenge, if he was giving his evidence orally.

[55] Para. 7 of App 9 to the Chancery Guide (7th ed), referred to by Sir Terence Etherton C in **JD Wetherspoon plc v Harris and others** [2013] EWHC 1088 (Ch), offers guidance in this regard and provides as follows:

> "A witness statement should simply cover those issues, but only those issues, on which the party serving the statement wishes that witness to give evidence in chief. Thus it is not, for example, the function of a witness statement to provide a commentary on the documents in the trial bundle, nor to set out quotations from such documents, nor to engage in matters of argument. Witness statements should not deal with other matters merely because they may arise in the course of the trial."

[56] In the disputed paragraphs, Shanett Sortie and Selton Sortie Snr referred to the Letter and it is of significance that they reproduced portions of the contents thereof. It is patently clear that neither of them has direct knowledge of the assertions made in the Letter and would not be able to give such first-hand evidence. Their evidence in this regard is, therefore, inadmissible hearsay.

[57] I did not find any merit in the submission of Ms Cummings that the inclusion in the disputed paragraphs of what was stated in the Letter was not for the purpose of asserting the truth of what was stated therein but to show only the fact that it was stated. The importance of this distinction was stated by Morrison P (Ag) (as he then was) in **National Water Commission v VRL Operators and Others** [2016] JMCA Civ 19, at para. [9], as follows:

> "[9] As is well known, evidence of a statement made by someone not called as a witness may or may not be admissible. If what it is intended to prove by the evidence is

> the fact that the statement was made, then it will, generally speaking, subject to considerations of relevance and any other exclusionary factor, be admissible for that purpose. However, if the evidence is tendered to establish the truth of what is contained in the statement, it is hearsay evidence and as such generally inadmissible."

[58] The relevant fact (matter), which the respondent seeks to prove, is that the applicants were negligent. The only reasonable conclusion to which I was impelled is that the objective of the disputed paragraphs was to give evidence in proof of the truth of this fact and, accordingly, it is hearsay and inadmissible. The case of **Subramaniam** does not assist the respondent in these circumstances. The Letter is only of value in the claim for its contents. Therefore, the evidence in a witness statement of its existence, without the admission of its contents in proof of the matters in dispute (which counsel submitted is a good reason for its admission) can be of no relevance to the trial judge. Accordingly, if the purpose of the disputed paragraphs is not to prove a fact in issue or for some other proper purpose, then, being of no probative value, they are irrelevant to the issues in dispute and should be struck out.

[59] Concerning the court's approval for the respondent to rely on the contents of the Letter, it should be noted that it is open to any party to seek to tender evidence contained in a document, without the need to call the maker, under and by virtue of section 31E of the Evidence (Amendment) Act and pursuant to the CPR, by giving the required notice. Section 31E (3) provides that it is open to the parties so notified to object and to require the makers of the statements or documents to give oral evidence. Ms Cummings confirmed to the court that she has filed a notice of intention to tender the Letter and thus, counsel is pursuing an alternative method of putting the information in the disputed paragraphs before the court. Nevertheless, this procedure is not automatic, and this provides the reason we formulated our order 6, which varied the master's order 2 in the manner we did. I have also not placed any weight on Ms Cummings' submission that we should consider the likely un-cooperativeness of Dr Woodham-Auden in deciding on issues of admissibility. There is no property in a witness, and Ms Whyte indicated to the court that Dr Woodham-Auden is not a witness whom the applicants intend to call. Ms

Cummings is aware of the appropriate tools at the respondent's disposal, which can ensure that the evidence of Dr Woodham-Auden is placed before the court.

[60] There would, therefore, be a real chance of success of an appeal on the basis that the master wrongly exercised her discretion in refusing to strike out the disputed paragraphs. Consequently, permission to appeal the order of 18 April was granted, and the hearing of the application concerning that order was treated as the hearing of the appeal from it.

Conclusion and disposition

[61] In respect of the expert issue, there was no real chance of success in arguing this ground, so permission to appeal the order of 17 April 2023 was not granted. In relation to the privilege issue, the master was also correct not to disallow reliance on the Letter, but such permission ought to have been qualified. The exercise of her discretion in this regard was substantially correct, save for the omission of a qualifier which this court has added. Accordingly, there was no basis for this court to grant permission for leave to appeal that order. Regarding the hearsay issue, the master wrongly exercised her discretion in refusing to strike out the disputed paragraphs, save for the statements of fact contained therein, which are properly admissible, which this court has identified in its orders. For these reasons, the applicants would have had a real chance of succeeding on one issue; hence the permission to appeal the order of 18 April 2023 was granted and the hearing of the application for permission to appeal that order treated as the hearing of the appeal.

[62] It was on these bases that we made the orders contained in para. 6 herein.