



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2017: No. 051

BETWEEN:

MAHESH SANNAPAREDDY	1 st Applicant
BERMUDA HEALTHCARE SERVICES LIMITED	2 nd Applicant
BROWN DARRELL CLINIC LIMITED	3 rd Applicant
WF (ANONYMIZED)	Intervener Applicant

-and-

THE COMMISSIONER OF BERMUDA POLICE SERVICE	1 st Respondent
THE SENIOR MAGISTRATE	2 nd Respondent

Before: Hon. Assistant Justice Bell

Appearances: Mr Mark Pettingill and Ms Victoria Greening,
Chancery Legal Limited, for the Intervener Applicant
Mr Mark Diel and Mr Dantae Williams, Marshall Diel
& Myers Limited, for the First Respondent
Mr Delroy Duncan, Trott & Duncan Limited, for the
First – Third Applicants (On Notice)
Non-Appearance – Second Respondent (Not Served)

Date of Hearing: 16 April 2019

Date of Judgment: 2 May 2019

JUDGMENT

Introduction

1. The Intervener asserts that the Bermuda Police Service, (“BPS”) is in contempt of Court and alleges the BPS have breached the terms of the Order of Mr Justice Hellman of 13 February 2017, (“the Order”). The relief they seek is the removal of the alleged offending officer from participating in the Criminal Investigation (“the Criminal Investigation”) which gave rise to the Special Procedure Search Warrants (“SPW’s”). The decision to issue the SPW’s is the subject of these judicial review proceedings.

The Order

2. The paragraph of the Order which the Intervener asserts has been breached by the BPS is paragraph 8 which directs as follows:

“The 1st Respondent whether by himself, serving members of the Bermuda Police Service, servants, agents or whosoever otherwise is prohibited from reviewing and or utilizing for the purposes of the investigation, all and any material seized from the premises of the 2nd and 3rd applicants pursuant to and under the authority of the Special Procedure Search Warrants dated the 2nd and 10th February 2017 respectively, which are exhibited to the affidavit of John Briggs dated the 13th February 2017 pending the outcome of the 1st, 2nd, and 3rd Applicants’ application for leave to apply for judicial review or further order of the court. Copying of any uncopied material is permitted but shall be carried out by staff not involved in the investigation of the offences alleged in the Special Procedure Search Warrants. Material seized includes but is not limited to, hard copy and electronic files, documents of any nature whatsoever, hard drives, back up tapes and downloaded computer information”.

3. The parties did not cross examine the affidavits and accepted that without challenging the evidence in the affidavits, the Court would have difficulty making a determination on any contested facts. The Intervener accordingly proceeded with only the First and Second Affidavits of LG (name anonymized). The

arguments summarised in paragraphs 7 and 14 of the Intervener's Skeleton Argument were not pursued. Counsel for the 1st Respondent, in rebutting the alleged contempt of Court, relied on the First Affidavit of Ian Tomkins and the First Affidavit of Nicholas Pedro.

Contempt

4. Counsel for the Intervener argues that the BPS have disobeyed or failed to comply with the Order and rely on section 5 of the Administration of Justice (Contempt of Court) Act 1979.
5. In order to constitute contempt it would need to be proven that the BPS disobeyed or failed to comply with the Order by reviewing or utilizing material seized from the premises on the execution of the SPW's.
6. It is not disputed that there is no direct evidence of any review or use of any seized material by the BPS. Counsel for the Intervener asks the Court to conclude that the BPS committed contempt relying on facts that they assert amounts to circumstantial evidence of a breach of the Order.

The Evidence

7. It is not in dispute that CI Tomkins met with LG. Her evidence of this interaction is set out in paragraph 3 of her First Affidavit. I have redacted the extract to remove potential personal identifying information, and the redactions are not material to the question of whether there has been contempt:

“On October 5 2018, Inspector Tomkin approached me [redacted] and asked if he could please have a word with me when he came out of his meeting. I didn't know what it was he wanted to talk to me about but assured me (sic) it was work related. At 9:30 am he approached me and [redacted] We sat down and he asked me if I knew anything about the files the Police had seized. At first I said I didn't know what he was talking about. He then went on to say the medical files that had been seized by the

Police from the Brown Darrell Clinic. I told him that yes I knew that some medical files had been seized by the Police. He indicated that my file was one of the files that had been seized and he understood that I had some health issues. This caused me great concern because I wondered how he would know that. He assured me my file was 'in safe hands' with the Police. I told him that I did not feel comfortable knowing that the Police [redacted] had my medical file in their possession. He went on to ask me about the meetings that had taken place at Cathedral Hall with the patients and asked me how I came to know about them or how did I hear about them. I told him that someone had called me to tell me about the upcoming meetings but I did not remember the name of the person who called. He told me again that my file was safe and did I have any more questions I wanted to ask him. I said no and then he said Ok and that this was a personal conversation just between the two of us."

8. CI Tomkins does not dispute that he met LG, and, other than he said, *"I refute any claim that I suggested to Patient #5 that she had some health issues"* his account of what they discussed is generally consistent with her account of the meeting. (Paragraph 21) His unequivocal and unchallenged evidence is that he did not at any time review her file. He states, referring to the patient using the investigating team's anonymizing protocol, *"I have not viewed the patient file for Patient #5, nor any other patient file seized by the BPS under the SPW's. I have at all times complied with the 13th February 2017 Order."* (Paragraph 21)
9. His evidence as to the background and purpose of the meeting with LG is set out in detail in his affidavit and summarized in paragraph 18, namely to ascertain:

"(1) How this patient had been notified that her patient file was subject to seizure under the SPWs; and

(2) Whether the patient's involvement in the intervener came as a result of a breach of the 16 March Order and a breach of the Undertaking."

10. CI Tomkins' evidence is that he was investigating whether or not the Applicants had breached an undertaking provided to the 1st Respondent pursuant to which they had received the un-redacted information supporting the issue of the SPW's. This information included the list of the patient names whose files were the subject of the SPW's. CI Tomkins suspected that the undertaking had been breached when counsel for the Intervener provided counsel for the First Respondent a list of 152 names of patients that the Intervener represented. These patients, without exception, happened to be names of patients whose files were seized under the SPW's. He was concerned that LG had been directly informed of the seizure of her patient files by the Applicants. (Paragraph 19)

11. CI Tomkins' evidence is consistent with LG's evidence – which confirms that he questioned her about:

“...meetings that had taken place at Cathedral Hall with the patients and asked me how I came to know about them or how did I hear about them. I told him that someone had called me to tell me about the upcoming meetings but I did not remember the name of the person who called.” (LG Affidavit, Paragraph 3)

12. The evidence of LG and the evidence of CI Tomkins taken together does not include reference facts capable of supporting a conclusion that the BPS breached the Order. The only documents which needed to be reviewed by CI Tomkins before approaching LG was the list of patient files supporting the SPW's (a list created by the BPS) and the list of patients in the Intervener's representative action (a list created by the Intervener).

13. CI Tomkins denies that he made any comment to LG about her health, but I find that even if he had made the general comment she ascribes to him, that this does not give rise to the conclusion that he must have reviewed her file or medical records. The very fact that she was a patient whose file was seized *ipso facto* means that she was (a) a patient and (b) had number of diagnostic tests. The volume of diagnostic tests ordered for a patient was a qualifying feature for seizure of patient medical records pursuant to the SPW's.

14. I mention briefly the evidence of Acting Superintendent Pedro. His evidence was also unchallenged and went to an internal investigation by the BPS as to whether “*DCI Tomkins had acted, said, or otherwise acted inappropriately*” in the meeting with LG. I observe that LG does not allege that DCI Tomkins behaved inappropriately in her affidavit evidence and the internal investigation did not find any inappropriate behavior to have occurred. (Paragraph 6) As the evidence of Acting Superintendent Pedro is not material to the question of the alleged contempt of the Order, I say nothing further in regard to his evidence.
15. Counsel for the Intervener in their submissions sought to bolster their case by relying on CI Tomkins’ own affidavit as evidence as establishing a breach of the Order. They sought to rely on his evidence surrounding the anonymizing protocol adopted by the investigative team to refer to the patients by number instead of name. Mr Tomkins stated, “*In compiling the list of relevant BHCS and BDC patients, the investigative team created a unique ID number of each patient in order to preserve the anonymity of the patients.*” (Paragraph 12) This, asserts counsel for the Intervener, means that, “*CI Ian Tomkins must have reviewed the material in order to know that LG’s file had been given the unique identification number of #5 ...*” (Skeleton, Paragraph 9)
16. I reject this argument which in any event mischaracterizes the evidence given by CI Tomkins which referred to a unique ID number by patient, not by file. The creation by the BPS of a list to enable the investigative team and any independent medical expert to refer to patients by a number and not by name is not evidence of breach of the Order. If it is evidence of anything, it is simply evidence of a good faith effort by the BPS to ensure patient privacy. This device enables parties to refer to patients by number not name in any documents. The affidavit sworn by CI Tomkins demonstrates consistency in this approach, as throughout he refers to individuals by number and not name.
17. The BPS did not need to review any seized records in order to create such a list. In fact reviewing the files would be of no assistance. The only document that the BPS would have needed in order to create a cross referenced anonymized list of

patients is the list of 265 patient names whose files were the subject of the SPW's.
This list was created by the BPS.

Decision

18. Documents created by the BPS fall outside the scope of the Order. Further, a document created by the BPS will not constitute evidence of breach of the Order unless the document could have been created only by reviewing seized material. The patient list cross referenced with anonymizing numbers is clearly not such a document.

19. I find there is no evidence, direct or indirect, which supports the allegation that the BPS have breached the Order and the Contempt Summons is accordingly dismissed.

20. Unless either party seeks within 7 days to be heard on costs, costs on a standard basis is granted to the 1st Respondent to be taxed if not agreed.

Dated 2nd May 2019

KIERNAN BELL
ASSISTANT JUSTICE