ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2008/008

BETWEEN:

ASOT MICHAEL

Appellant

and

[1] THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA
[2] THE DIRECTOR OF THE ONCD
[3] THE COMMISSIONER OF POLICE

Respondents

Before:

The Hon. Mr. Denys Barrow, SC — Justice of Appeal

On written submissions

Mr. Anthony Astaphan, SC and Mr John Fuller for the Appellant
No submissions were received from the Respondents

2008: July 2

Civil procedure – procedural appeal – Rule 28.14 Civil Procedure Rules 2000 – public interest immunity - entitlement of the Crown to withhold disclosure of information on the ground of public interest – whether the Crown required to adduce evidence to prove disclosure would damage the public interest – Costs on application for administrative order – basis for awarding costs against applicant - Rule 56.13 Civil Procedure Rules 2000

The appellant had applied to the High Court for orders for standard disclosure, specific disclosure and further information in judicial review proceedings. The Court made these orders in favour of the appellant requiring the respondents to comply with the orders or provide written reasons for not complying. The respondents provided written reasons for withholding disclosure of certain documents stating that it was in the public interest that certain documents were not disclosed. Harris J upheld the respondents' claim that they were entitled to withhold certain documents on the ground that it was in the public interest

to do so and made an order for costs against the appellant. The appellant appealed against the decision of Harris J and his award of costs. Counsel for the appellant contended that the respondents could not withhold disclosure of documents on the ground of public interest as no evidence had been adduced to prove there would be damage to the public interest if disclosure was ordered.

Held:

1. The respondents had a right to withhold documents on the ground of public interest immunity and the judge was required unless there were good reasons to do otherwise, to accept as true the Attorney General's affidavit in support of the claim to public interest immunity. The Crown may certify that disclosure of a document is withheld in the interest of the public without adducing evidence to prove that disclosure would be damaging to the public interest. In an appropriate case where the court thinks it necessary that the judge should have a look at the withheld material to decide whether a claim for disclosure should be sustained, the court may make an order for the private inspection of the documents by the judge:

   Belize Printers Association Limited v Minister of Finance and Home Affairs (2004) 4 Bz. L. R. 23 considered and applied.

2. An order for costs may not be made against an applicant for an administrative order unless the court considers that the appellant has acted unreasonably in making or pursuing the application: Rule 56.13 CPR 2000. A claim for judicial review is a claim for an administrative order and in the absence of finding that the appellant had acted unreasonably, it was not open to the judge to order costs against the appellant. The judge's order of costs against the appellant was set aside.

3. There would be no order as to costs of the appeal.

JUDGMENT

[1] **BARROW, J.A.**: This procedural appeal in pending judicial review proceedings is against the decision of Harris J refusing to order the respondents to disclose certain documents and to provide further information. In the judicial review proceedings the essence of the appellant's contentions is that criminal investigations commenced by the respondents into the affairs and conduct of the appellant are tainted with and motivated by partisan political considerations and are oppressive and unfair.

The declarations sought

[2] After listing the declarations that the appellant seeks, and thereby detailing the substance, objects and bases of the appellant's challenge, counsel for the appellant indicated that, so far as this appeal is concerned, the most important declarations and orders sought were to the effect that there exists no statutory or proper legal authority and no factual or legal basis under the Laws of Antigua and Barbuda[1] for a request by the Attorney General of Antigua and Barbuda for assistance from the authorities in Bermuda. Neither was there any authority or basis, the appellant contended, for any inspection or taking of documents or copies thereof or production order in relation to the appellant's bank accounts and financial information at the Bank of Nova Scotia in St. Johns, Antigua.

[3] Thus, the appellant contends and seeks to have declared, the request, or any request, made, or which may be made, by the first respondent for assistance from Bermuda in relation to or concerning the appellant is or would be in excess of or without authority and unlawful.

[4] Similarly, the appellant maintains, any actual or intended inspection, taking of information, documents or copies thereof or production order or intended inspection, taking of information, documents or copies thereof or production order made, or which may be made, by the ONDCP or by the Commissioner, whether by themselves, their servants and/ or agents or whomsoever, in relation to or concerning the appellant and/ or his accounts at the Bank of Nova Scotia, is or would be unlawful.

[1] The appellant referred specifically to the Mutual Assistance in Criminal Matters Act No 2 of 1993, the Proceeds of Crime Act No 13 of 1993, the Money Laundering Act NO 9 of 1996 as amended or the Office of National Drug and Money Laundering Control Policy Act No 11 of 2003.

The withholding of disclosure and further information

[5] The appellant had applied to the High Court for orders for standard disclosure, specific disclosure and for further information. The court made orders in favour of the appellant, requiring the respondents to satisfy the requests of the appellants or to provide written reasons for not doing so. In response the respondents stated they had complied with the order in relation to certain items and provided written reasons for withholding further information on and disclosure of certain specified items. As regards the withholding of further information and disclosure the judge summarised the respondents' claims to be as follows. (1) The information and documents are subject to public interest immunity. (2) Disclosure of the documents and information would damage the public interest and therefore would not be in the public interest of ensuring the proper administration of justice. (3) Disclosure of a particular letter is likely to hinder ongoing investigation of serious crimes by 'FIU Bermuda'. (4) Certain information on the relevance of a particular agreement is a matter for the court and not for the respondents to express an opinion. (5) No further information can be supplied on a particular matter, and what has been provided is precise and conclusive.

[6] After setting out the background and summarising the arguments on both sides in his reserved judgment,[2] Harris J upheld the respondents' claim that they should be allowed to withhold disclosure and further information on the grounds that it was in the public interest to do so and, also, that the applications were in the nature of a fishing expedition.

The appellant's case

[7] As formulated by the appellant, the issues for this court to decide include whether the judge misdirected himself "when he failed to properly consider the true nature of the appellant's application, and "when he failed to properly apply the relevant

[2] Claim No ANUHCV 2004/0490 (judgment delivered 7th April 2008)

principles of law". The appellant also contends the judge "erred in law and/ or misdirected himself when he held that the Appellant's request was a fishing expedition and dismissed the appellant's request and application for further information and disclosure." The appellant further takes issue with the award of costs against him.

[8] In eleven sub-paragraphs counsel for the appellant state the errors in law and misdirections of which they say the judge was guilty. Then, they relate the history of the disclosure issue and the request for further information. Three investigations were launched by the respondents, counsel state, and this fact is part of the contention that "the evidence generally reveals a political dispute". This contention flows from the fact that the appellant is a Member of Parliament in Antigua and was a senior member of the last Government, defeated in March 2004. Counsel state that "The new Government would, apparently, for its own political purposes, like to be able to support general allegations of corruption, and criminal activity generally, on its predecessor's Rule."[3]

[9] A significant part of the appellant's case on appeal focuses on the **Mutual Assistance in Criminal Matters Act** (No 2 of 1993) as being the only statutory power relied on by the respondents that could permit the Government of Antigua and Barbuda to give and receive assistance to Commonwealth countries. This Act, counsel submit, has no application to the dependent territory of Bermuda and, therefore, requests by and to the Bermudan authorities were unlawful. As appears from the declarations that the appellant seeks, it is a primary contention of the appellant that the request for information and assistance from Bermuda is unlawful and that the court should quash any request for assistance from the authorities in Bermuda and any decision made by the respondents to inspect and to obtain documents and information as to the appellant's financial and bank account records.

[3] Submissions on behalf of the appellant filed 11th June, 2006 at paragraph [11]

[10] The rule of law requires that there be no political interference in any investigation or prosecution, counsel for the appellant submit, citing **Attorney General of Antigua and Barbuda** v **Lake**[4] and **The Honourable Satnarine Sharma** v **Carla Browne–Antoine, Deputy Director of Public Prosecution et al.**[5] Counsel further submit that "It also requires that the first respondent be held to the highest standards in his obligation to comply with the provisions of the law in any investigation or prosecution. The State is bound by the rule of law and it is not entitled to get hold of whatever private and confidential documents it so wishes in direct and wholesale violation of laws and treaties, which confer rights as well as obligations for the protection of persons affected. The court will demand that the rule of law be fully observed by the Executive. [See **Connelly** v **DPP** [1964] 2 WLR 1145 and **R** *v.* **Horseferry Road Magistrates Court, ex p. Bennett** [1994] 1 AC 42]."[6]

[11] "In principle," the submission continues, "where a decision is made by the executive to conduct investigations into an individual, and the reason why such investigations are instigated is due to the political standing of the individual, then the decision is susceptible to challenge as being an abuse of, or exceeding, the executive's power."[7]

[12] These submissions form the foundation of counsel's contention that "the documents and further information requested were directly relevant to the pleaded issue of improper motive for and political interference in the establishment of the several investigations raised by the appellant. But the Learned Judge misunderstood the appellant's case. In paragraph [19] of his judgment … the Judge incorrectly characterized the Appellant's case as political simply on the basis that the Appellant once held public office. This, the appellant submits, was not the true nature of his case. As a result of this [mischaracterization] the judge

[4] [1999] 1 WLR 68
[5] [2006] UKPC 75
[6] Submissions of behalf of the appellant filed 11th June, 2006 at paragraph [20]
[7] Supra, at paragraph [21]

led himself into serious error into believing that the documents and information were not relevant to the issues in this case. Consequently, the Learned Judge erred when he refused to order disclosure of the documents and the further information requested by the appellant."[8]

Relevance of the request for assistance

[13] If I understand the submissions correctly, counsel are saying that once it is appreciated that the request to Bermuda was unlawful and that it flowed from politically motivated and inspired investigations, and given that the appellant has obtained leave to apply for judicial review of this request "the Appellant was entitled to seek disclosure of all relevant documents and information relating the mutual requests referred to in the pleadings and affidavit evidence. The failure to disclose and provide the information would render any trial on these issues manifestly unfair!"[9]

[14] The judge correctly reminded himself,[10] by reference to the statement of Lord Hoffman in **Kemper Reinsurance Co v Minister of Finance**[11] that judicial review is concerned with the legality of the decisions of a public authority rather than the merits of a decision; with the jurisdiction of the decision-maker and the fairness of the decision-making process rather than whether the decision was correct. The appellant showed an appreciation of this fact in framing the core declarations and orders he seeks in terms of the unlawfulness of the decisions.

[15] Guided by that principle, I have a difficulty in appreciating how the documents and information the appellant seeks could at all be relevant to the appellant's case that the decisions to launch the investigations and the decisions to request assistance from Bermuda were improper, because they were politically motivated and

[8] Supra, at paragraph [23]
[9] Submissions of the appellant at paragraph [25]
[10] At [20]
[11] (1998) 53 WIR 109 at 119

inspired, and were unlawful, because they were outwith the scope of the relevant legislation. Counsel for the appellant argue that information as to the identities of the persons concerned in making the decision to launch the investigations and the terms of reference of the investigations is directly relevant, but offer no basis for the argument. Given that all current members of the executive who took the decision to investigate the conduct and affairs of the appellant were necessarily his political adversaries, I fail to see how the identities of the particular members of the executive who participated in taking the decision can be relevant to the case he is advancing. The appellant's claim is that the investigations were launched because of party political motives; not because of personal hostility or animus on the part of given individuals. Similarly, I cannot see how the terms of reference of the investigations could be relevant to the appellant's case that the decisions to investigate were politically motivated and therefore unlawful.

[16] As regards the documents containing the request for assistance from Bermuda, these can be no more than the implementation of the decision to request assistance and they are utterly unnecessary as evidence of the fact that the decision was taken to make the request, since the making of the decision is an accepted fact and that decision is a major target of the appellant's application for judicial review. It is inconceivable that they could evidence any political motive behind the decision to request the assistance. I think the judge was right when he identified the appellant's application as a fishing expedition.

Grounds for withholding disclosure

[17] The main reason why the judge refused the appellant's application was because he accepted the respondents' right to withhold disclosure of some documents on the ground of public interest. In his judgment, Harris J considered rule 28.14 of the **Civil Procedure Rules 2000**, which deals with the right to withhold disclosure, the requirements to satisfy, the affidavit of the Attorney General supporting the claim

of right to withhold disclosure, and the relevant considerations. The judge concluded that the respondents had satisfied the requirements.

[18] The appellant's challenge to the judge's decision addresses itself not to the merits but to the legal basis of his decision, by contending that the respondents failed to adduce any evidence capable of establishing that disclosure and the provision of further information would damage the public interest. Counsel contend that because there was no such evidence, the judge erred in upholding the respondents' claim. "Further and/ or alternatively," counsel submitted, "if which is denied, there was evidence, it is clear from the Judge's judgment that he did not perform the judicial exercise of a balancing act required whenever immunity is claimed to ensure that the immunity claim is made out and/ or that a fair hearing and the Appellant's rights were protected. See the authorities referred to extensively in **Bennett** v **Commissioner of Police**[12] [1995] 1 WLR 488 at pages 495 (f) to 499 (f)."[13]

[19] A useful statement of the law on the issue of withholding disclosure of documents appears in **Belize Printers Association Limited v Minister of Finance and Home Affairs**.[14] The Belize High Court explained:

> "It used to be that the executive branch of government, which is still conducted in the name of "the Crown", enjoyed an absolute right to refuse to produce a document for inspection in the course of legal proceedings.[15] This was called "Crown privilege".[16] If a minister of government certified to the court that it was contrary to the public interest for a document or class of document to be disclosed that was conclusive on the matter.[17] No court could order production of the document.
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> "Crown privilege was a part of the fundamental constitutional law of England and the colonies of the United Kingdom, of which Belize was one.

[12] The Appellant relies only on the citations and learning referred to in **Bennett** and not on the actual case!
[13] Submissions at paragraph [38]
[14] (2004) 4 Bz. L.R. 23
[15] **Duncan v Cammell, Laird** [1942] A.C at 632 and 633
[16] See the observation at Viscount Simon L.C. in **Duncan v Cammell, Laird** at p. 641 that the expression is an unhappy one because the withholding of documents on the ground of public interest is not a branch of privilege.
[17] Ibid at 642

It was an incident of the royal prerogative, deriving from the time when the Sovereign was sovereign and ruled in her personal capacity. It was consonant with the conceptions of that age that ministers of Her Majesty's government should exercise in Her name the right to absolutely decide what documents of state should be disclosed to persons who were not privileged to have access to such documents. It was meet that this should be so.

"Lord Denning MR, in sketching this era, stated that ministers of Her Majesty's government used to claim privilege against producing even the most trivial of documents, such as police traffic accident reports or reports of naval officers of collisions at sea; see **Air Canada v Secretary of State for Trade** [1983] 2 A.C. 394 at 407 E to H.

"The era ended with the enactment of the **Crown Proceedings Act** in 1947 in England, (and in 1953 in Belize) which removed the Crown's immunity from suit that was the matrix of Crown privilege. Under this new dispensation it was natural that the Crown could now be required to produce documents. Section 28 of the **Crown Proceedings Act**, Chapter 167 of the Laws of Belize provided that the court may order the Crown to produce documents. The removal of the Crown's immunity from suit began the modern era of democratic government and the primacy of the rule of law which has as one of its underpinnings equality before the law. This era has seen such developments as the susceptibility of administrative decisions to be quashed for failure to comply with the rules of natural justice (**Ridge v Baldwin** [1964] A.C. 40), the amenability of ministers of government to injunctive orders (**M v Home Office** [1994] 1 A.C. 377), and the liability of ministers to being imprisoned for disobedience to an order of the court to pay money (**Gairy v Attorney General of Grenada** [2001] UKPC 30).

"But the abolition of Crown privilege in its plenary form did not lay open the workings and the papers of government to the scrutiny of whosoever chose to inquire or require. The Crown Proceedings Act (s. 28) expressly preserved the common law that protected against disclosure in the public interest. It took a couple of decades after the passing of that Act for the House of Lords to scale down Crown privilege to its present state.[18] And even after that decision by their lordships it continued and it continues today to be accepted that the broader interest of the public mandates that some aspects of the business of government must be exempt from public scrutiny. Papers relating to defence and national security were obvious areas that the law recognized should almost invariably be exempt from public disclosure. Records of cabinet proceedings and cabinet and ministerial papers were another area where it was well recognized that it

[18] **Conway v Rimmer** [1968] A.C 910

was in the public interest that disclosure should be denied.[19]

> "In place, therefore, of Crown privilege there was recognized to exist the right of Government to claim that it was in the interest of the public as a whole that documents should not be disclosed because such disclosure would be prejudicial to the public interest in areas such as defence, international relations or confidentiality. This became known as a claim for "public interest immunity".[20]

[20] Of particular relevance to the instant appeal is the following statement of the law:[21]

> "In this regard it is the well established judicial approach to accord a particular gravitas to the certificate of the minister. In **Conway v Rimmer**, at 957 A, Lord Fraser said:
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> > "If a responsible Minister stated that the production of a document would jeopardize public safety it is inconceivable that any court would make an order for its production".
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> Lord Denning M.R. said in **Air Canada** at 408 H:
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> > "Although the certificate is no longer conclusive, it is to be given great weight. It is not to be overridden unless the court is of opinion that the disclosure of the document is necessary for fairly disposing of the matter or, to put it another way, necessary for the due administration of justice".
> >
> > "It is recognized that their Lordships were speaking to the assertion by the minister that it is necessary in the public interest to withhold production of documents and thus to his judgment, whereas the point presently in issue is as to the truthfulness of what the Financial Secretary said occurred. I do not think that should make any difference as to the weight to be given to the certificate since that weight is given because of the responsibility and trust that attach to the office. The court will presume in favour of the due discharge of the duties of the office."[22]

[21] In the instant appeal the challenge to the judge's decision is that there was no evidence presented to prove there would be damage to the public interest if

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[19] Ibid, 952 D

[20] **Burmah Oil Co Ltd. V Bank of England** [1980] A.C 1090 at 1113 H.

[21] (2004) Bz. L.R at 29 to 30

[22] As Lord Morris' speech in **Conway v Rimmer** at 957 F reveals, the court is not blind to the possibility that it may b shown that objection to the production of a document was taken on behalf of the Crown in bad faith or was actuated by irrelevant or improper considerations or founded upon a false factual premise. Theses things, of course, would have to be shown.

disclosure was ordered. The short answer to that contention, as the extracts from the **Belize Printers** case show, is that it has not been the practice for the court to require evidence. If the court thought it necessary in a particular case that the judge should have a look at the withheld material to decide if the claim should be sustained, the court would order the private inspection of the documents by the judge. This is the course that the court took in the **Belize Printers** case.

[22] It is my understanding that the rules contained in the **CPR 2000** that now regulate the making of the claim for public interest immunity have not substantially altered the common law practice. Counsel have not referred to any authority or text that suggests otherwise. To the contrary, the treatment, for instance, in **Blackstone's Civil Practice 2006**[23] indicates that the practice continues to be that the court will rely on the minister's certificate and that it is for the party seeking inspection to show that the claim to immunity should be rejected.

[23] It seems to me that the appellant must fail with his contention that the judge erred in not requiring the respondents to provide evidence to prove that disclosure would be damaging to the public interest. The judge was required, unless there was good reason to do otherwise, to accept as true the Attorney General's affidavit in support of the claim to public interest immunity. The balancing act that counsel for the appellant submits the judge should have performed, between the claim to immunity and the right to a fair hearing, was not required in the circumstances of this case because the judge found, with justification in my view, that the appellant's applications for disclosure and further information were in the nature of a fishing expedition. In short, there was nothing to balance.

Costs

[24] Rule 56.13 of **CPR 2000** states "the general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers

[23] At para. 48.67

that the applicant has acted unreasonably in making the application or in the conduct of the application." A claim for judicial review is a claim for an administrative order[24] and the appellant's claim, therefore, fell within the general rule. The judge not having found that the appellant had acted unreasonably in making or pursuing the applications, it was not open to him to order costs against the appellant. Accordingly, I set aside that order.

[25] In the result, I dismiss the appeal in relation to disclosure and further information but allow the appeal in relation to costs. There will be no order as to costs on this appeal.

Denys Barrow, SC
Justice of Appeal

[24] Rule 56.1(1)(c)and (2)