

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVP2021/0015

BETWEEN:

[1] ASOT MICHAEL
[2] JOSETTE MICHAEL
[3] TERESA-ANN MICHAEL

Appellants

and

[1] THE ATTORNEY GENERAL
[2] THE COMMISSIONER OF POLICE
[3] THE MAGISTRATE FOR DISTRICT A

Respondents

Before:

The Hon. Mde. Vicki Ann Ellis
The Hon. Mr. Trevor M. Ward
The Hon. Mr. Paul Webster

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Ms. Clare Montgomery KC with her Ms. Kema Benjamin and Mrs. Chantal Thomas-Marshall for the Appellants
Mr. Gilbert Peterson SC with him Mrs. Carla Brookes-Harris for the Respondents

2022: October 19;
2023: May 9.

Interlocutory appeal - Disclosure in judicial review proceedings – Inspection - Withholding inspection of documents – Whether judge was correct in finding that the respondents had a right to withhold inspection of certain documents - Test for allowing inspection of documents – Whether judge erred by applying a test of necessity in relation to the application for inspection of the withheld documents - Public interest immunity privilege - Burden of proof - Whether the burden shifted to the appellants to

show why the claim to immunity should be rejected in respect of any document(s) required for the fair disposal of the proceedings

The appellants sought and obtained leave to file judicial review proceedings in the court below. They seek administrative orders in respect of the alleged illegal conduct of the respondents and the violation of their constitutional rights as a result of the first respondent's compliance with a request for mutual legal assistance from United Kingdom authorities. On 31st January 2020, the judge made an order for specific disclosure. On 10th February 2020, the first respondent filed a list of documents and, on 18th February 2020, provided the appellants with copies of eight of the documents listed. A number of items on the disclosure schedule, namely items 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 13 and 17, and documents referred to in items 11, 12, 14, 15, 16, 18, 19 and 20 had not been provided for inspection. The appellants wished to inspect all of the documents and accordingly, on 27th February 2020, served a notice of inspection on the respondents. This was resisted by the respondents. As a result, on 11th March 2020 the appellants filed an application seeking the inspection/copying of the documents in the disclosure schedule that were withheld and the documents referred to in items 11, 12, 14, 15, 16, 18, 19 and 20. The respondents thereafter filed an application on 2nd June 2020 seeking permission to withhold inspection of the documents listed in the list of documents filed on 10th February 2020 pursuant to rule 28.14 of the Civil Procedure Rules, 2000. The stated grounds of the application were that the disclosure of the existence of the documents would damage the public interest and that the first respondent has a right or duty to withhold disclosure of the said documents.

The judge heard both applications on 18th December 2020 and delivered judgment on 21st May 2021. In relation to the application for inspection, the judge held that the test was whether the withheld documents were necessary to fairly dispose of the proceedings and that, save for a search warrant dated 30th October 2019, none of the withheld documents were necessary for the fair disposal of the proceedings. On the claim to public interest immunity, the judge held that public interest immunity having been raised, the burden shifted to the appellants to show why the claim to immunity should be rejected in respect of any document(s) required for the fair disposal of the proceedings, which she held to be the search warrant only. Accordingly, the judge made an order for the inspection of the search warrant and permitted the withholding of certain documents in the list of documents.

The appellants, being dissatisfied, sought and obtained leave to file this interlocutory appeal. The appellants filed seven grounds of appeal, which are reducible to two core issues: (1) whether the judge erred in law by applying a test of necessity in relation to the application for inspection of the withheld documents; and (2) whether the judge erred in law by holding that, the first respondent having raised public interest immunity, the burden shifted to the appellants to show why the claim to immunity should be rejected in respect of any document(s) required for the fair disposal of the proceedings.

Held: allowing the appeal, setting aside the orders of the judge at paragraph [43] of the judgment in the court below save for the order for inspection of the search warrant dated 30th October 2019 and making the orders at paragraph 48 of this judgment, that:

1. The test on an application for specific disclosure in a given case is whether disclosure appears to be necessary in order to resolve the matter fairly and justly. However, different considerations apply on an application to withhold inspection (whether by virtue of a right or duty to withhold inspection) and especially when the claim is grounded in public interest immunity. The learned judge therefore erred in applying a test of necessity in addressing the appellants' application to inspect. Since the first respondent was claiming a right to withhold inspection, the proper question was whether the first respondent had satisfied the court that he had a right or duty to withhold inspection of the documents. Further, since the assertion of the right or duty to withhold was grounded in public interest immunity, the proper test was whether the public interest in preserving the confidentiality of the documents outweighed the public interest in securing justice.

Part 28 of the **Civil Procedure Rules, 2000** considered; **R (on the application of Hoareau and Another) v Secretary of State for Foreign and Commonwealth Affairs** [2018] EWHC 1508 considered.

2. A claim to public interest immunity can only be justified if the public interest in preserving the confidentiality of the document outweighs the public interest in the fair administration of justice. If disclosure would not risk serious harm to the public interest, the public interest immunity claim must fail. However, if disclosure would pose such a risk, the court must perform a balancing exercise to determine whether an order for disclosure should be made.

R (on the application of Solange Hoareau and Another) v Secretary of State For Foreign And Commonwealth Affairs [2018] EWHC 3825 (Admin) applied; **R v Chief Constable of the West Midlands Police, ex parte Wiley**; **R v Chief Constable of the Nottinghamshire Constabulary, ex parte Sunderland** [1995] 1 AC 274 applied.

3. The default rule is that a party served with a list of documents has a right to inspect any document on that list. This notwithstanding, a party can claim a right to withhold disclosure or inspection of a document or part of a document subject to the court being satisfied that the claim is justified. The burden is on the party asserting the right to withhold inspection to satisfy the court that they have a right or duty to withhold inspection of the documents. The learned judge erred in law in treating the claim to public interest immunity as established merely on the first respondent's say so, and then shifting the burden to the appellants to show that inspection was necessary for the fair disposal of the proceedings. However, if after careful scrutiny of the evidence before her, the judge was satisfied that the first respondent had established a prima facie claim of public interest immunity, then the appellants may have been required to show that the material was likely to give substantial support to their case, had they wished to invite the court to inspect the material before determining whether it should after all be deployed.

Rules 28.11(1) and 28.14 of the **Civil Procedure Rules, 2000** applied; **Asot Michael v The Attorney General of Antigua and Barbuda et al** ANUHCVP2008/008 (delivered 2nd July 2008, unreported) distinguished.

4. CPR 28.14(1) does not impose any time limit on asserting a right to withhold inspection. The judge was therefore not precluded from entertaining the application to withhold inspection even though the first respondent did not assert public interest immunity at the time of serving the list of documents or within seven days of being served with the notice to inspect.
Rule 28.14 (1) of the **Civil Procedure Rules, 2000** applied.

JUDGMENT

- [1] **WARD JA:** This is an interlocutory appeal against the orders of the High Court Judge (“the judge”) made upon the hearing of two applications. The first was an application for inspection of certain documents identified in the respondents’ list of documents, which was served on the appellants pursuant to court orders for specific disclosure; the second was a public interest immunity application filed by the first respondent in response to the application for inspection.

Background

- [2] A brief summary of the relevant background will serve to put into context the circumstances under which these applications came to be made. The appellants sought and obtained leave to file judicial review proceedings, in which they seek administrative orders in respect of the alleged illegal conduct of the respondents and the violation of their constitutional rights as a result of the first respondent’s compliance with a request for mutual legal assistance from United Kingdom authorities. On 31st January 2020, the judge made the following order for specific disclosure:

- i. There be disclosure to the Applicant (sic) of whether any information has been transmitted by the defendants to the Applicants in compliance with the request in the Mutual Assistance Criminal Matters Act in relation to [a] Cartier Watch, any vehicles and bank accounts held in the name of the Claimants.
- ii. The disclosed information to provide information to (sic) whom the information was transmitted and when such transmission occurred.
- iii. Such disclosure to be made within ten days.
- iv. Fixed Date Claim is adjourned to 11th March 2020 at 11:45 a.m.”¹

¹ Court of Appeal Electronic Hearing Bundle Volume 2, pages 197- 198.

[3] On 10th February 2020, the first respondent filed a list of documents and, on 18th February 2020, provided the appellants with copies of eight of the documents listed. A number of items on the disclosure schedule, namely items 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 13 and 17, and documents referred to in items 11, 12, 14, 15, 16, 18, 19 and 20 had not been provided for inspection. Items 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 13 and 17 of the disclosure schedule that were withheld comprised of various letters from the Crown Prosecution Service and UK Home Office to the first respondent; various letters passing between the first respondent and the Director of the Office of National Drug and Money Laundering Control Policy ("ONDCP"); a search warrant dated 30th October 2019; a letter from the Commissioner of Police to the first respondent dated 8th November 2019; Claim No. ANUHCv2019/0627 Director of ONDCP v Caribbean Union Bank and affidavit in support filed on 14th November 2019; Claim No. ANUCv2019/0629 Director of ONDCP v Global Bank of Commerce and affidavit in support filed on 14th November 2019. In relation to the documents referred to in items 11, 12, 14, 15, 16, 18, 19 and 20, these included documents identified in a letter of the first respondent to Mr. Richard Thomas dated 10th December 2019; documents identified in the witness statement of Erita Griffith dated 3rd December 2019; documents identified in the letter of the first respondent to Mr. Richard Thomas dated 5th December 2019; documents identified in the witness statement of Debra M. Williams dated 10th December 2019; the enclosures referred to in the documents identified in items 16, 18 and 19 of the respondents' list of documents; and documents identified in the witness statement of Vinema Jarvis.

[4] The appellants wished to inspect and or copy all of the documents and accordingly, on 27th February 2020, served a notice of inspection on the respondents. This was resisted by the respondents. As a result, on 11th March 2020 the appellants filed an application seeking the inspection/copying of the documents in the disclosure schedule that were withheld and the documents referred to in items 11, 12, 14, 15, 16, 18, 19 and 20, pursuant to rules 26.4, 28.5(1), 28.5(4), 28.11 and 28.13 of the **Civil Procedure Rules, 2000** ("CPR").

- [5] On 30th March 2020, the appellants applied to amend their Fixed Date Claim Form, pursuant to CPR 20.1 and 56.11(2)(c), on the basis that the disclosed documents, including those made available for inspection on 18th February 2020, revealed that the first respondent had transmitted information and evidence to the United Kingdom authorities in the knowledge that the appellants were already challenging the legality of such transmission, causing further breaches of the appellants' fundamental rights protected by the Constitution of Antigua and Barbuda.²
- [6] The respondents thereafter filed an application on 2nd June 2020 supported by an affidavit of the first respondent, seeking permission to withhold inspection of the documents listed in the list of documents filed on 10th February 2020 pursuant to CPR 28.14. The stated grounds of the application were that the disclosure of the existence of the documents would damage the public interest and that the first respondent has a right or duty to withhold disclosure of the said documents.
- [7] The judge heard both applications on 18th December 2020 and delivered judgment on 21st May 2021. In relation to the application for inspection, the judge held that the test was whether the withheld documents were necessary to fairly dispose of the proceedings. Having identified the central issue in the proceedings to be the legality of the decision of the first respondent to comply with the United Kingdom authorities' Letter of Request and/or the Supplemental Letter of Request for mutual legal assistance, the learned judge held that, save for a search warrant dated 30th October 2019, none of the withheld documents were necessary for the fair disposal of the proceedings.
- [8] In relation to the claim to public interest immunity, the judge held that while the first respondent had raised the matter of public interest immunity, that was not necessarily conclusive. However, public interest immunity having been raised, the burden shifted to the appellants to show why the claim to immunity should be rejected in respect of any document(s) required for the fair disposal of the

² Cap. 23 Antigua and Barbuda Constitution Order 1981.

proceedings, which she held to be the search warrant only. Accordingly, the judge made the following orders:

“It is ordered that:

a. The inspection of the search warrant issued on 30th October 2019 is permitted. Such inspection to be held within 21 days.

b. The defendants permitted to withhold from inspection the documents listed as items 1,2,3, 4, 5, 7, 8, 9,10,13 and 17 in the list of documents filed on 10th February 2020.

c. The defendants permitted to withhold from inspection the documents and/or documents identified in items 10, 11, 12, 14, 15, 16, 18 and 19 in the list of documents filed on 10th February 2020.

d. Costs to be heard by this court at the next hearing.”³

The appellants’ submissions

[9] The appellants filed seven grounds of appeal:

Ground 1: The trial judge erred in law by applying a test of necessity which limited the appellants’ right under CPR 28.11 to inspect documents already disclosed

[10] In relation to the judge’s ruling on the application to inspect, the appellants contend that the judge erred in law by applying a test of necessity which is the test related to disclosure but not to the separate and distinct concept of inspection. The effect of this was to reverse the burden of proof. The appellants argue that the party seeking inspection of disclosed documents has a general right to inspection pursuant to CPR 28.11. Once the documents were disclosed, that general right to inspect can only be overridden where the party seeking to withhold documents from inspection satisfies the court that they have a right or duty to do so pursuant to CPR 28.14(6). The appellants submit that the judge erred in law by taking the approach that where a party merely asserts that he has a right or duty to withhold documents from disclosure, the burden shifts to the party seeking inspection to undermine or displace that assertion.

³ ANUHCv2019/0632 / ANUHC2020/199- Asot Michael et al and The Attorney General et al (delivered 21st May 2021, unreported) at paragraph 43.

Ground 2: The trial judge erred in law by not applying the procedures in the CPR and in the decision in *ex parte Wiley*.⁴

[11] The appellants contend that the judge erred in not applying CPR 28.11 and 28.14 and in not taking into account the appellants' non-compliance with rule 28.11 and 28.14 in that: (1) the respondents did not claim a right to withhold disclosure or inspection when they purported to comply with the order for specific disclosure; (2) to the contrary, the respondents invited inspection of all the disclosed documents between specified hours on any normal working day; (3) the respondents represented in their letter dated 18th February 2020 that (a) they had complied with the court's order of 31st January 2020 and (b) copies of the disclosed documents had been sent to the appellants' attorneys that day when in fact copies of only eight documents had been sent; (4) the respondents did not permit inspection of the disclosed documents within 7 days per CPR 28.11(3) and (4), and did not claim a right to withhold disclosure or inspection within those 7 days.

[12] In relation to the respondents' claim to public interest immunity, the appellants submit that implicit in the assertion of public interest immunity is a recognition that the documents in respect of which privilege is claimed are relevant and material to the issues for determination. As such, the relevant test is whether the public interest in preserving the confidentiality of the material outweighs the public interest in securing justice. This balancing exercise involves a three-stage process which must be undertaken, first by the party asserting public interest immunity when determining whether to claim public interest immunity, and ultimately by the judge adjudicating on the claim. The court must consider:

- (1) Whether the material in relation to which public interest immunity is asserted is relevant to an issue in the proceedings;
- (2) Whether there is a real risk that disclosure of that material would cause substantial harm to the public interest;
- (3) If so, whether, in balancing the public interest in the administration of justice against the harm to the public interest that would be

⁴ R v Chief Constable of the West Midlands Police, *ex parte Wiley*; R v Chief Constable of the Nottinghamshire Constabulary, *ex parte Sunderland* [1995] 1 AC 274.

occasioned by disclosure, an order for disclosure should be made.⁵

- [13] The appellants contend that the learned judge erred in law by failing to perform this balancing exercise. Had the judge applied the correct test to the correct party, she would have asked whether the respondents had discharged the burden on them to satisfy the court that it is necessary to withhold the documents from inspection. Instead, the judge, basing herself on the authority of **Asot Michael v The Attorney General of Antigua and Barbuda et al**,⁶ erroneously held that where a claim for public interest immunity is made by a minister, the burden shifted to the appellants to show why the claim should be rejected in respect of any relevant document (which she held was, in this case, only the search warrant). The appellants say that the decision of the Court of Appeal was made per incuriam and does not reflect the principle identified in subsequent authorities that the court's duty is to scrutinise carefully any claim to public interest immunity.

Ground 3: The judge should have held that the respondents had failed to establish a right to withhold from inspection items 1-10, 13 and 17 and documents referred to in items 11, 12, 14, 15, 16, 18, 19 and 20.

- [14] The nub of the complaint here is that the judge erred by adjudicating on the parties' respective applications on a false factual basis, in that, she erroneously assessed the issues in the case – and so, the relevancy of the documents to those issues – by reference to the appellants' claim and not their amended claim. It is further said that when assessing the parties' respective applications in relation to the disclosed documents, the judge erred as identified in Grounds 1 and 2 above and also failed to apply the following principles, namely, that public interest immunity does not generally attach to classes of documents so as to mandate them being withheld from inspection- each must be considered on its own merits. Secondly, that there is no blanket rule of withholding documents from the subjects of criminal investigations. Had the judge applied the correct legal and factual framework, she should have

⁵ Rawlinson & Hunter Trustees S.A (as trustee of the Tchenguiz Family Trust) v Director of the Serious Fraud Office [2015] 1 WLR 797 per Moore- Bick LJ at paragraph 35.

⁶ ANUHCVP2008/008 (delivered 2nd July 2008, unreported).

held that the respondents failed to establish a right to withhold from inspection the documents identified above which they had disclosed in their list of documents and then withheld from inspection.

Grounds 4-5: In the alternative, the judge erred in considering that discovery related only to the judicial review aspects of the claim and holding that disclosure was not required for the fair disposal of that part of the claim.

- [15] The appellants argued that the trial Judge mischaracterised the nature of the appellants' amended claim as simply a judicial review concerned with the 'jurisdiction of the decision-maker and fairness of the decision-making process rather than whether the decision was correct'.⁷ She failed to take into account the special nature of constitutional rights claims and those judicial review cases which require the determination of factual matters. In so doing, her reliance on **Kemper Reinsurance Co. v Minister of Finance and others**,⁸ was misplaced as this case was concerned with the very different issue of the distinction, in principle, between judicial review and an appeal on the merits of a decision. The case contains no discussion of the character of judicial review in convention or constitutional rights cases as explored by the House of Lords in the later case of **Tweed v Parades Commissioner for Northern Ireland**.⁹ This erroneous approach affected all aspects of the appealed decision. The fair disposal of the claim therefore required disclosure of the documents sought.

Ground 6: The judge erred in not finding that the first respondent had failed to apply any meaningful consideration to his application as a whole

- [16] The appellants submitted that the trial Judge failed to give adequate weight to the fact that there was no evidence that the first respondent had discharged his obligation to consider, with care, the content of each of the documents he sought to withhold and whether, in respect of that content, a right or duty to withhold inspection arose. Her finding that "given that the appellants had

⁷ Asot Michael et al Supra n.3, at paragraph 17.

⁸ [1998] 3 WLR 630.

⁹ [2006] UKHL 53; [2007] 1 AC 650.

previously had sight of the search warrant it was difficult to see how the inspection of the search warrant would cause substantial harm to the public interest” as asserted by the first respondent in his application to withhold it from inspection, demonstrates the absurdity of the first respondent’s claim that inspection of the search warrant would be contrary to an overriding public interest. The judge should have, but failed to then to consider whether the first respondent’s application as regards the search warrant demonstrated a failure by the first respondent to apply any meaningful consideration to whether there was a proper basis for the respondents’ cross-application to withhold documents from inspection as a whole and, if so, whether that application was an abuse of process. Further it was relevant for the judge to have considered that the first respondent only belatedly asserted that he had a duty to withhold inspection of all the documents disclosed in the list of documents even though he had already permitted inspection of eight of them. Additionally, the trial Judge failed to give proper weight to the fact that the cross-application was made almost three months after the list of documents was filed, illustrated the substantive weakness of the application and that it was nothing more than a “formulaic after-thought”; particularly in light of the first respondent’s original invitation to the appellants to inspect all of the items in the list of documents. The trial Judge failed to give adequate weight to the fact that there was no evidence that the first respondent had discharged his obligation to consider, with care, the content of each of the documents he then sought to withhold and whether, in respect of that content, a right or duty to withhold inspection arose.

Ground 7: The judge erred in not ordering the respondents to provide further disclosure given their failure to discharge their duties of candour, good faith and co-operation.

- [17] The appellants submitted that the respondents’ conduct throughout the discovery process was in breach of their duties of candour and good faith and co-operation. As such, the judge should have ordered them to serve sworn statements describing both: (1) their disclosure exercise and (2) all additional facts relevant to the amended claim and all additional relevant documents.

[18] The appellants invite this Court to allow the appeal, and remit the case to the trial court for further directions in accordance with its decision on appeal, namely that:

“(1) the Respondents’ Cross-Application to withhold documents from inspection is refused;

(2) the Appellants’ Application is allowed in its entirety, and that unless the Respondents produce the documents identified in the List of Documents, including those documents referred to within items 11, 12, 14, 15, 20 on that List, for inspection and copying, the Defence filed by the Respondents be struck out; and

(3) within seven (7) days, the Respondents (a) serve affidavits describing their disclosure exercise and confirming their compliance with their duties of candour, good faith, and cooperation, including those related to the First Respondent’s instructions to the Director of the ONDCP and the subsequent applications for production orders by the ONDCP; and (b) disclose to the appellants any further facts, by way of affidavit, and documents required to be disclosed pursuant to the respondents’ duties.”¹⁰

The respondents’ submissions

[19] The respondents submit that the sole issue on this appeal is whether the judge was correct in finding that the respondents had a right to withhold inspection of certain documents listed in their list of documents filed on 10th February 2020.

[20] The respondents submitted that this Court should affirm the decision of the judge for the following reasons:

- i. Due to the nature of the claim filed by the appellants the inspection of the documents is not necessary to dispose fairly of the claim.
- ii. The core of the Appellants’ claim centres on the legality of the decision of the First Named Respondent to comply with the Letter of Request and/or Supplemental Letter of Request.
- iii. The documents are not relevant to the matters in question to the proceedings.
- iv. Since the documents are not relevant to the proceedings they should not be disclosed and as such public interest immunity does not arise with respect to these documents.

¹⁰ Court of Appeal Electronic Hearing Bundle Volume 1-Appellants’ Submissions, at paragraph 52.

- v. That ordinary rules of disclosure do not apply to judicial review proceedings.
- vi. The Respondents have adduced cogent evidence to satisfy the claim that the inspection of the document is contrary and injurious to the public interest.
- vii. The rule is the party seeking inspection of the documents must demonstrate that the public interest claim cannot be substantiated.”¹¹

Issues

- [21] The several grounds of appeal are reducible to two core issues on this appeal: (1) whether the judge erred in law by applying a test of necessity in relation to the application for inspection of the withheld documents; and (2) whether the judge erred in law by holding that, the first respondent having raised public interest immunity, the burden shifted to the appellants to show why the claim to immunity should be rejected in respect of any document(s) required for the fair disposal of the proceedings. We are not here concerned with the merits of the judge’s decision but with the legal principles she applied when arriving at her decision.

Discussion

Disclosure in judicial review proceedings

- [22] The correct approach to disclosure in judicial review cases involving human rights issues is set out in **R (on the application of Hoareau and Another) v Secretary of State for Foreign and Commonwealth Affairs**.¹² The case involved two applications pursuant to Part 54 of the UK Civil Procedure Rules: (1) an application by the claimants for specific disclosure pursuant to Part 31 of the UK Civil Procedure Rules and (2) an application by the claimants for further information pursuant to Part 18 of those rules. Lord Justice Singh described the relevant principles in the following way:

“Disclosure is not automatic in judicial review proceedings. In this respect, judicial review differs from ordinary civil litigation... It is usually both unnecessary and inappropriate for the court to resolve factual disputes. The issues are usually ones of law.

¹¹ Court of Appeal Electronic Hearing Bundle Volume 1-Respondents’ Submissions, at paragraph 8.

¹² [2018] EWHC 1508.

That said, factual issues can arise, for example, in deciding what happens when an argument is made that a public authority failed to follow rules of procedural fairness. Cases under the Human Rights Act may call for a different approach to be taken for the resolution of factual disputes depending on the nature of the issue. Quite often the question of proportionality in a human rights case may require the court to engage in a judgment which calls for an evaluation of the facts to see, for example, whether a fair balance has been struck between the rights of the individual and the general interests of the community.

Nevertheless, even in the human rights context it is usually unnecessary for the court to resolve disputes of fact as distinct from forming an evaluation of those facts. In those cases where the court does have to consider whether to order specific disclosure - as the House of Lords made clear in *Tweed v Parades Commissioner for Northern Ireland* [2006] UKHL 53, [2007] 1 AC650, para.3 -

“3...The test will always be whether, in the given case, disclosure appears to be necessary in order to resolve the matter fairly and justly.” (Lord Bingham of Cornhill)”

- [23] The test on an application for specific disclosure as articulated in **Hoareau**, citing **Tweed**, is not dissimilar from that set out in our CPR. Part 28 governs the disclosure and inspection of documents which are or have been in a party's control. So far as is relevant to the issues on this appeal, CPR 28.5 (1) provides for specific disclosure. Importantly, CPR 28.6 (1) stipulates that when deciding whether to make an order for specific disclosure, the court must consider whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs. Disclosure is effected by each party making and serving on every other party a list of documents in Form 11, identifying the documents or categories of documents in a convenient order or manner as concisely as possible.

- [24] When it comes to the inspection and copying of documents, CPR 28.11 governs the procedure. It provides:

“Inspection and copying of listed documents

28.11(1) 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) for which a right to withhold from disclosure is claimed; or
- (b) which are no longer in the physical possession of the party who served the list.

(2) The party wishing to inspect the documents must give the party who served the list written notice of the wish to inspect documents in the list.

(3) The party who is to give inspection must permit inspection not more than 7 days after the date on which the notice is received.

(4) If the party giving the notice undertakes to pay the reasonable cost of copying, the party who served the list must supply the other with a copy of each document requested not more than 7 days after the date on which the notice was received.”

[25] CPR 28.11(1) makes it clear that a party served with a list of documents has a right to inspect any document on that list. That is the default position. This notwithstanding, CPR 28.14 permits a party to claim a right to withhold disclosure or inspection of a document or part of a document subject to the procedure set out in that rule. The rule bears setting out in full:

“Claim of right to withhold disclosure or inspection of document

28.14 (1) A person who claims a right to withhold disclosure or inspection of a document or part of a document must –

(a) make such claim for the document; and

(b) state the grounds on which such a right is claimed;

in the list or otherwise in writing to the person wishing to inspect the document.

(2) A person may however apply to the court, without notice, for an order permitting that person not to disclose the existence of a document on the ground that disclosure of the existence of the document would damage the public interest.

(3) A person who applies under paragraph (2) must –

(a) identify the document, documents or parts thereof for which a right to withhold disclosure is claimed; and

(b) give evidence on affidavit showing –

(i) that the applicant has a right or duty to withhold disclosure; and

(ii) the grounds on which the right on duty is claimed.

(4) Unless the court orders otherwise, an order of the court under paragraph (2) is not to be

(a) open for inspection by; nor

(b) served on;

any person.

(5) person who does not agree with a claim of right to withhold inspection or disclosure of a document may apply to the court for an order that the document be disclosed or made available for inspection.

(6) On hearing such an application the court must make an order that the document be disclosed unless it is satisfied that there is a right to withhold disclosure.

(7) If a person –

- (a) applies for an order permitting that person not to disclose the existence of a document or part of a document; or
- (b) claims a right to withhold inspection;

the court may require the person to produce that document to the court to enable it to decide whether the claim is justified.

(8) On considering any application under this rule, the court may invite any person to make representations on the question of whether the document ought to be withheld.”

[26] This case falls within the rubric of CPR 28.14 (7)(b) since what is claimed is not a right to withhold disclosure of the existence of a document but a right to withhold *inspection* of documents already disclosed pursuant to the court’s order for specific disclosure. Reading rule 28.11(1) with rule 28.14(1), the position is that a party served with a list of documents has a right to inspect any document on that list unless the party serving the list of documents claims a right to withhold inspection and the court is satisfied that there is a right or duty to withhold disclosure and or inspection. The burden is on the party asserting the right to withhold inspection to satisfy the court that they have a right or duty to withhold inspection of the documents.

[27] CPR 28.14(1) requires the party seeking to withhold inspection to adduce evidence on affidavit that the applicant has a right or duty to withhold disclosure/inspection, setting out the grounds on which the right or duty is claimed. At paragraph 6 of the first respondent’s affidavit in support of the notice of application to withhold inspection,¹³ he asserted such a right and duty to withhold inspection of all the documents on the list on the grounds of public interest and confidentiality. He added: ‘[t]his right is invoked pursuant to CPR 28.14. Further, the Respondents have not demonstrated a plausible ground on

¹³ Court of Appeal Electronic Hearing Bundle Volume 2 pages 374-376.

which it can be said that the disclosure is necessary for the just disposal of the proceedings.’¹⁴

[28] The first respondent went on to state that the disclosure of the nature and or identity of the documents ought to suffice at this stage since the foreign requesting state was merely at the stage of investigation. He further asserted:

“9. I further state that the documents are confidential at this stage and as such it would be clearly inimical to the public interest to disclose the contents of documents to the parties who themselves are the subjects of an investigation. The public interest element is grounded in the fact that the State of Antigua and Barbuda has an obligation under the Mutual Assistance in Criminal Matters Act 1993 as amended to guard the contents of these documents.

10. I am advised by counsel and verily believe that the duty of the First named Applicant is the duty to keep the Request confidential from the targets that is (sic) (Respondents/Claimants) of the criminal investigation. The public interest demands that the confidentiality of the documents be maintained. The public has an interest in the unimpeded investigation of criminal offences.”¹⁵

[29] Pausing there to sum up the position: before the learned judge, the first respondent sought to justify the claim to withhold inspection on grounds of public interest immunity and confidentiality. He also contended that the appellants had not demonstrated a plausible ground on which it could be said that the disclosure is necessary for the just disposal of the proceedings.

[30] Taking the last assertion first, it should be said that the test of necessity applies when the judge is considering whether to make an order for specific disclosure. We agree with the appellants that the learned judge erred in applying a test of necessity in addressing the application to inspect. Different considerations apply when a claim is made to withhold inspection (whether there is a right or duty to withhold inspection) and especially when that claim is grounded in public interest immunity. Those considerations are discussed below.

¹⁴ Ibid.

¹⁵ Court of Appeal Electronic Hearing Bundle Volume 2 pages 374-376, paragraphs 9-10.

Applicable legal principles on a public interest immunity application

[31] The appellants take issue with the judge's orders in relation to the public interest immunity application on two bases. First, they contend that the procedural rules set out in CPR 28.11 and 28.14 were not applied by the judge and not followed by the respondents when asserting public interest immunity. Secondly, and more substantively, the judge wrongfully placed the burden of proof on the appellants to show that the withheld documents were not necessary for the fair disposal of the claim.

[32] A helpful summary of the relevant legal principles that come into play on a public interest immunity application in response to a disclosure application can be found in **R (on the application of Solange Hoareau and Another) v Secretary of State For Foreign And Commonwealth Affairs**¹⁶ ("**Hoareau No. 2**") Lord Justice Singh stated:

"17. The relevant legal principles are, as we understand it, uncontentious and we need only summarise them here. What is contentious is the application of those principles to the facts of this case. PII is a ground for refusing to disclose a document which is relevant and material to the determination of the issues. A successful claim for PII renders a document immune from disclosure, depriving both the court and the parties of relevant material... A claim to PII can only be justified if the public interest in preserving the confidentiality of the document outweighs the public interest and the fair administration of justice.

18. The PII process involves three stages: see *Al Rawi v Security Service & Ors* [2012] 1 AC 531 ("*Al Rawi*") at [24]:

- (a) the relevant minister must decide whether the documentary material in question is relevant to the proceedings in question, i.e. that the material should, in the absence of PII considerations, be disclosed in the normal way: see *R v Chief Constable of the West Midlands ex parte Wiley* [1999] AC 275, 280F - 281C ;
- (b) the minister must consider whether there is a real risk that it would cause serious harm to the public interest if the material were placed in the public domain;
- (c) the minister must balance the public interest in non-disclosure against the public interest in disclosure of the material for the purpose of doing justice in the proceedings, and, if

¹⁶ [2018] EWHC 3825 (Admin).

appropriate, state in a PII certificate that it is in the public interest that the material be withheld.

19. However, it is the court which is the ultimate decision-maker. It will consider whether the risk to the public interest that would be caused if the document were placed in the public domain can be mitigated sufficiently by other steps such that the balance of public interest favours some form of limited disclosure. These steps include all the case management tools available to the court, such as hearings in private, summaries, redactions, restricting the number of copies to be taken and the use of a confidentiality ring. The latter can also take various forms; for example it may be confined to lawyers only and not include their lay clients. There is no such thing as a class claim to PII any longer; the balancing exercise is undertaken by reference to the contents of the particular document in question.

20. Factors relevant to the balancing exercise include:

- (a) the seriousness of the claim in which disclosure is sought ;
- (b) whether the Government is itself a party or alleged to have acted unconscionably;
- (c) the significance and relevance of the evidence to the case;
- (d) the importance of the public interest claimed;
- (e) the nature and degree of risk that disclosure presents; and
- (f) the nature of the litigation..."

[33] In summary, the test on a public interest immunity application is whether the public interest in preserving the confidentiality of the documents outweighs the public interest in the fair administration of justice. If disclosure would not risk serious harm to the public interest the public interest immunity claim must fail. However, if disclosure would pose such a risk, the court must perform the **ex parte Wiley** balancing exercise.¹⁷ As part of that balancing exercise, in addition to the factors listed in the preceding paragraph, the judge is also obliged to consider whether such risk could be sufficiently mitigated by some form of limited disclosure or other mitigation, including redactions and summaries or limiting the material to counsel only. This approach is not inconsistent with our CPR as rule 28.14 (7) (b) gives the judge the authority to call for and inspect the document(s) which a party seeks to withhold in order to

¹⁷ Hoareau No.2, Supra n.16 at paragraph 25.

determine whether the claim is justified. We were told by Mr. Gilbert Peterson SC, counsel for the respondents, during the course of the hearing that this course was suggested to the learned judge; it does not seem to have been favoured.

[34] The judge's approach therefore falls to be assessed to determine whether it was in alignment with the foregoing principles.

[35] At paragraph [16], the judge identified the task before her in relation to the inspection application in the following terms:

*"[16] CPR 28.11 proves that "where 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) for which a right to withhold from disclosure has been claimed: or (b) which are no longer in the physical possession of the party who served the list." The defendant having, albeit belatedly, asserted the right to withhold the documents the court is obliged or required to consider whether inspection is required in order for the court to fairly dispose of these proceedings. In this regard the court considers the purpose of judicial review proceedings and underlying issues for which the court is required to make a finding."*¹⁸ (Emphasis added)

[36] The underlined words in the passage quoted is an articulation of the test that applies when considering whether to order specific disclosure. The judge then went on at paragraphs [18] and [19] to identify what she considered to be the underlying issues and to address her mind to 'whether the withheld documents are necessary to fairly dispose of these proceedings'. Applying that test, the judge determined at paragraphs [20] to [27] that, with the exception of the search warrant, inspection of the documents was not necessary for the fair disposal of the matter. The judge then turned attention to the claim to public interest immunity as a discreet subject.

[37] Clearly, the judge seems to have isolated the application to inspect - to which she applied the test of necessity - and seemed to place the onus of proving necessity on the appellants. This was not correct. Since the first respondent was claiming a right to withhold inspection, the proper question was whether

¹⁸ ANUHC2019/0632 / ANUHC2020/199- Asot Michael et al and The Attorney General et al-(delivered 21st May 2021, unreported).

he had satisfied the court that he had a right or duty to withhold inspection of the documents. Further, since the assertion of the right or duty to withhold was grounded in public interest immunity, the proper test was whether the public interest in preserving the confidentiality of the documents outweighed the public interest in securing justice.¹⁹

[38] It is apparent that the judge's approach to the public interest immunity issue was informed by the Court of Appeal's decision in **Asot Michael**. In that case, the appellant had applied to the High Court in judicial review proceedings for standard and specific disclosure and further information. These applications were resisted by the respondents who provided written reasons for withholding certain documents on grounds of public interest. The judge upheld the respondents' claim to withhold disclosure. The issue before the Court of Appeal was whether the respondents were required to adduce evidence to prove disclosure would damage the public interest. The Court first examined the reasons why the judge refused the appellant's application, stating:

"[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."²⁰ (Emphasis added)

[39] The Court of Appeal then addressed the substance of the appellants' complaint:

"[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 public interest if 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

¹⁹ See ex parte Wiley, Supra n.4.

²⁰ ANUHCVP2008/008- Asot Michael v The Attorney General of Antigua and Barbuda et al (delivered 2nd July 2008, unreported), paragraph 17.

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... To the contrary, the treatment, for instance, in **Blackstone's Civil Practice 2006** 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 exercise 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."²¹

[40] The judge was clearly influenced by paragraphs [21] to [23] of the Court of Appeal's judgment. But she also addressed her mind to the provisions of CPR 28.14(3) in holding that the first respondent's evidence on affidavit was sufficient to raise a claim to public interest immunity. She was entitled to form that view. Contrary to the appellants' submissions, the judge did not fail to apply the principles that public interest immunity does not generally attach to classes of documents so as to mandate them being withheld from inspection and that there is no blanket rule of withholding documents from the subjects of criminal investigations. Both of these principles were expressly recognised by the judge at paragraphs [39] and [42] respectively.

[41] However, citing **Conway v Rimmer and another**,²² the judge went on to recognise, that raising the issue of public interest immunity was not conclusive:

"[37] In the circumstances of this case the first defendant has raised the matter of public interest immunity. The fact that the matter has been raised is not necessarily conclusive. However, the matter of public interest immunity having been raised the burden shifts to the

²¹ Ibid, paragraphs 21-23.

²² [1968] AC 910.

claimants to show why the claim to immunity should be rejected in respect of any of the document(s) required for the fair disposal of the proceedings, in this case the search warrant.”²³

[42] Having shifted the burden to the appellants, the judge then examined the submissions of the appellants as to why the claim to public interest immunity should not be granted. This course seems to have been adopted in purported reliance on the passage in the **Asot Michael** case quoting **Blackstone’s Civil Practice 2006**.

[43] Ironically, it is noted that in that case, Harris J properly placed the burden of justifying the application to withhold disclosure on the Attorney General. The Court of Appeal observed that the judge concluded that the respondents had satisfied the requirements of CPR 28.14.²⁴ It does not appear, therefore, that there was any issue in that case as to which party bore the burden of satisfying the requirements of CPR 28.14; the issue related to the evidence that would suffice for the purpose of discharging that burden. As to the balancing exercise, the Court of Appeal recognised the **ex parte Wiley** principles but held that the reason why the judge was not required to go on to perform the **ex parte Wiley** balancing exercise in that case was that he had correctly concluded that the appellant’s applications for disclosure and further information were in the nature of a fishing expedition.²⁵

[44] The learned judge in this case was well aware of the **ex parte Wiley** balancing act principles which she rehearsed at paragraph [33] of her judgment but did not apply them. It may be that her finding that the appellants had failed to show why the claim to public interest immunity should fail explains why she did not perform that balancing exercise. But this is conjecture as the judge did not state a reason for not doing so, although she had acknowledged that **ex parte Wiley** represented the legal principles governing claims to public interest immunity.

²³ ANUHCVP2008/008 (delivered 2nd July 2008, unreported), paragraph 37.

²⁴ Ibid, paragraph 17.

²⁵ Ibid, paragraph 23.

[45] In this regard, the learned judge erred in law. The proper question to have asked herself was whether the first respondent had satisfied the court that he had a right or duty to withhold inspection of the documents. Further, since the assertion of the right or duty to withhold was grounded in public interest immunity, the proper test was whether the public interest in preserving the confidentiality of the documents outweighed the public interest in securing justice; the onus of proving which lay with the first respondent. The judge was required to scrutinise the claim to public interest immunity and not simply treat the claim as established merely on the first respondent's say so, and then proceed to shift the burden to the appellants to show that inspection was necessary for the fair disposal of the proceedings. It is only where, upon careful scrutiny of the contents of the affidavit and exhibits filed by the first respondent, the judge was satisfied that the first respondent had established a *prima facie* claim of public interest immunity, that the appellants may have been required to show that the material was likely to give substantial support to their case, had they wished to invite the court to inspect the material before determining whether it should after all be deployed.²⁶ On this basis the appeal succeeds, and the judge's order must be set aside.

[46] For completeness, it should be said that the fact that the first respondent did not assert public interest immunity at the time of serving his list of documents or within seven days of being served with the notice to inspect did not debar him from subsequently asserting it. CPR 28.14(1) does not impose any time limit on asserting a right to withhold inspection. The judge was therefore not precluded from entertaining the application.

Disposition

[47] Mr. Peterson SC submitted that in the event the appeal is allowed, the appropriate disposition would be to set aside the order, with directions that the learned judge hold an *in-camera* hearing to review the documents and determine whether they may be disclosed with redactions. Ms. Clare Montgomery KC, counsel for the appellants on the other hand, maintained that

²⁶ See *Al Rawi and others v Security Service and others* [2011] UKSC 34, at paragraph 102.

there should only be open inspection. While conceding that the Court has jurisdiction to remit the matter to the judge to perform the balancing exercise, Ms. Montgomery KC submitted that a remittal must be for a full hearing on whether there is a proper claim for public interest immunity.

[48] Given the basis on which the appeal has been allowed, and mindful of the provisions of CPR 28.14(7)(b), which empowers the court to require the production of the documents to the court to enable it to decide whether the claim is justified, and the factors that bear upon the balancing exercise which the court must perform, coupled with other case management tools and mitigation measures available to a court considering a claim to public interest immunity, as discussed in **Hoareau No.2**, the order of this Court is that:

- (1) Save for the order for inspection of the search warrant dated 30th October 2019, the orders of the judge at paragraph [43] of the judgment are set aside.
- (2) The matter is remitted to a judge of the High Court for a full hearing on whether there is a proper claim for public interest immunity, bearing in mind the provisions of CPR 28.14 (7)(b), and in accordance with the principles set out in **ex parte Wiley**; and **Hoareau No. 2** and the guidance by the court in this judgment.
- (3) There shall be no order as to costs on the appeal.

I concur.
Vicki Ann Ellis
Justice of Appeal

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Deputy Chief Registrar

