

**EASTERN CARIBBEAN SUPREME COURT
ANGUILLA**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO: AXAHCV2021/0025

Between

TAJ LAFIAMO CHARLES CONNOR

Claimant

-and-

COMMISSIONER OF POLICE

1st Defendant

MARVIN HOLAS

2nd Defendant

ATTORNEY GENERAL OF ANGUILLA

3rd Defendant

Before: His Lordship The Honourable Justice Ermin Moise

Appearances:

Mr. Darshan Ramdhani KC with Mr. Devin Hodge of counsel for the Claimant
Dr. Francis Alexis KC with Mr. Sasha Courtney and Mr. Theon Tross of counsel for the defendants

2022: November 4th;
2023: January 25th.

Decision

[1] **Moise, J.:** This is an application for specific disclosure. The claimant seeks an order that the defendants be compelled to disclose the crime report from the investigation into the murder of Conrad Gumbs. The Attorney General of Anguilla has filed an affidavit resisting the application on the grounds that the report contains confidential information. In that regard he invites the court to find that it is not in the public interest to compel the specific disclosure of this document. Having considered the application as well as the affidavit evidence and legal submissions of the parties, I have determined that the document in itself is subject to public interest immunity and it is, as argued on behalf of the Attorney General, not in the public interest to grant the order which is being sought. However, given the peculiar circumstances of this case, I have taken the time to carefully

outline the basis of my decision, as the issues raised are matters which are of some measure of public importance.

The Facts

- [2] The facts of this case, which are relevant to this application, are not at all complicated. However, they do raise significant issues regarding the confidential nature of various aspects of police investigations and the proper procedure to be adopted when the court is to deal with peculiar documents which may be subject to public interest immunity.
- [3] On 12th February, 2020, Conrad Gumbs was shot and killed at Blowing Point, Anguilla. The claimant in these current proceedings (Mr. Connor) was arrested and charged for Mr. Gumbs' murder. At some point during the criminal proceedings, a document referred to as the Crime Report was served on counsel acting on behalf of Mr. Connor. It is alleged that it was subsequently communicated to counsel that this document was disclosed through inadvertence and that in fact the document is a confidential document which ought to be returned to the police. While there appears to be a dispute of fact regarding the manner in which the police came to know that the document had been disclosed, counsel duly obliged and returned the document to the police.
- [4] Subsequent to that, the preliminary inquiry into the charges against Mr. Connor was discontinued. The Attorney General, in his affidavit filed in opposition to the current application, states that the document which was inadvertently disclosed contained information which would reveal the identities of confidential police informants and various lines of investigations pursued by the police. He states that it was determined by the Crown, that the mistaken disclosure of this document in the criminal proceedings had compromised the investigation into Conrad Gumbs' murder. It was on that basis the preliminary inquiry was discontinued.
- [5] However, on 11th June, 2021, Mr. Connor filed this current claim for wrongful arrest, false imprisonment and malicious prosecution. He seeks various orders, including damages, from this court on the grounds that there was no reasonable basis upon which he ought to have been arrested and charged for Mr. Gumbs' murder. The matter had gone through its normal case management procedures and the usual order for disclosure was made. However, Mr. Connor filed

his list of documents on 26th November, 2021 as was ordered by the court. The defendants did not file a list of documents until 12th April, 2022. It will be observed that the crime report was not included in the documents listed by the defendants. In light of that, the current application was filed on 12th July, 2022 seeking specific disclosure of the document.

- [6] In his affidavit in response to the application for specific disclosure, the Honourable Attorney General seeks to invoke public interest immunity as it relates to the document. He states that the crime report is in fact a document which discloses the various lines of investigation conducted by the police in relation to a specific crime. In the current instance, this investigation involved confidential police informants whose names are normally coded in order to protect their identities. He states that the document in question contains information which would likely disclose the identities of specific witnesses. It is the Attorney General's evidence that at least one of those witnesses may be at risk to his life if his identity is made public. He goes on to say that in the particular investigation, some of those confidential informants feared for their lives.
- [7] The Attorney General also goes on in his affidavit to state that the police force has a graded system insofar as it relates to the importance of various informants who provide information to them. In the present case, some of the informants ranked high up on the list of important informants to the police. The risk of disclosure of the identities of those informants would therefore seriously compromise their own safety as well as the performance of the police investigatory function.
- [8] In the particular circumstances of the investigation into Conrad Gumbs' murder, the crime report was initially only circulated among a small number of police officers and prosecuting officials from the Attorney General's office. However, upon disclosure of the police case file on counsel acting for Mr. Connor, it was discovered that the document was inadvertently disclosed. The police officer in charge of the investigation contacted counsel, who personally returned the document in short order.
- [9] The Attorney General states in his affidavit, that after this event, a thorough review of the evidence was conducted. An intelligence analysis of the risks to informants and police investigation was done and it was determined that it was best to simply discontinue the proceedings against Mr. Connor on account of the compromise which had already taken place. It is further stated that to demand disclosure of this document at this stage would further compromise the identities of the informants and the ability of the police to rely on confidential informants in the future.

- [10] I note at this stage that there was no affidavit or other evidence in response to the general assertions of the Honourable Attorney General. His evidence had not been challenged in any way. However, in support of the application for specific disclosure, an affidavit was filed by Ms. Marie Rey, who is a legal clerk employed with the law firm on record for Mr. Connor. Ms. Rey relies on knowledge based on the advice given to her by legal counsel. In her affidavit she states that the crime report had initially formed part of the criminal case file which had been disclosed on Mr. Connor's counsel. However of particular importance are two assertions made at paragraph 9(vii) to (ix) of this affidavit. Ms. Rey states that it was counsel for Mr. Connor in this case, who also represented him in the criminal proceedings, who became aware that the document was disclosed on him during the course of the criminal matter. It was counsel, according to Ms. Rey, who then contacted the police to inform them that the document was contained in the bundle of documents disclosed. At that point, counsel was informed by the police that the document contained confidential information and should be returned. Counsel therefore obliged.
- [11] Apart from the fact that this was a crime report, the affidavit does not contain any information regarding what may have triggered counsel's concern with this document sufficient to have caused him to reach out to the police about it. However, it would seem that counsel was perfectly satisfied that this was a document which should not have remained in his possession. There is also no evidence as to whether counsel had had any discussions with Mr. Connor about the content of the document prior to returning it to the police.
- [12] Notwithstanding this, the statement of claim was filed on 11th June, 2021 which contained references to this very document. Paragraphs 43 to 46 in particular made reference, although vaguely, to some of the content of the document. In the defence filed in response to this claim however, concerns were raised about reference to the document, given the confidential nature of the information contained in it. I make the observation here that it was not until, July, 2022 upon the filing of the application for specific disclosure did anyone seek to address the circumstances surrounding this document. I express some concern about this and will highlight the reasons for this concern later on in this decision. It would suffice at this stage however to say, that on balance the evidence seems to me to be clear that this document contains information about confidential police informants in it.

- [13] Ms. Rey goes on to state in her affidavit that she was informed and verily believes that the document is directly relevant to the information gathered by the police and the decision to charge Mr. Connor for murder. It is also stated there that the disclosure will come at no cost to the defendants and that it is necessary to make the order for disclosure in keeping with the court's powers to deal with cases justly. Ms. Rey does not go on in her affidavit to give any detail as to why she was attesting to the fact that the information contained in the report was relevant. That was the full extent of the affidavit in support of the application for specific disclosure.

The Law

Standard Disclosure

- [14] In accordance with Part 28.4 of the CPR, it is the duty of parties to litigation to disclose all documents which are directly relevant to the matters in question in the proceedings. This duty of disclosure is in itself a public interest. As was noted by Lord Bridge in the case of *X Ltd v Morgan-Grampian Ltd*¹, the duty of disclosure is designed to ensure that "**persons [are] enabled to exercise important legal rights and to protect themselves from serious legal wrongs whether or not resort to legal proceedings in a court of law will be necessary to attain these objectives.**"
- [15] In order to fulfill this mandate, the courts ensure, where possible, that parties do not withhold information which may be relevant to the just disposal of matters which are or may be the subject of litigation. However, one issue in relation to this statement by Lord Bridge, is that it appears to have given consideration to the duty of disclosure arising even prior to the filing of a claim. If the public interest is such that it exists whether or not resort to legal proceedings will be necessary, then it stands to reason that a party may very well be compelled to disclose documents even prior to the commencement of litigation. That may serve the purpose of saving time and costs, if disclosure may assist in even determining whether to commence proceedings in the first place.

¹ (1990) 2 AER 1

Specific Disclosure

- [16] In the event that either party is not satisfied with the disclosure made during the case management process, an application can be brought within the provisions of Rule 28.5 to demand specific disclosure of identifiable documents or a class of documents. The rule states as follows:

28.5 (1.) An order for specific disclosure is an order that a party must do one or more of the following things – (a) disclose documents or classes of documents specified in the order; (b) carry out a search for documents to the extent stated in the order; (c) disclose any document located as a result of that search. (2) An order for specific disclosure may be made on or without an application... (5) An order for specific disclosure may require disclosure only of documents which are directly relevant to one or more matters in issue in the proceedings.

- [17] However, I pause here to note that the rule does not speak to the question of whether an application for specific disclosure can be made prior to filing a claim. I will return to this issue later. However, Rule 28.6 sets out the criteria which the court considers in determining whether an application for specific disclosure should be granted. The rule states as follows:

28.6 (1) 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.

(2) The court must have regard to – (a) the likely benefits of specific disclosure; (b) the likely cost of specific disclosure; and (c) whether it is satisfied that the financial resources of the party against whom the order would be made are likely to be sufficient to enable that party to comply with any such order.

(3) If, having regard to paragraph (2) (c), the court would otherwise refuse to make an order for specific disclosure, it may nonetheless make such an order on terms that the party seeking the order must pay the other party's costs of such disclosure in any event.

(4) If the court makes an order under paragraph (3), it must assess the costs to be paid in accordance with rule 65.12.

(5) The party in whose favour such order for costs was made may apply to vary the amount of costs so assessed...

Public Interest Immunity

[18] However, as has been noted by counsel for both parties, the duty of disclosure is not absolute. In accordance with rule 28.14, a party may give notice of a right to withhold disclosure or inspection of a particular document, or a class of documents. The party wishing to withhold disclosure must swear to an affidavit stating the reasons for withholding disclosure or inspection of the document or documents in question. If the other party is not satisfied with the decision to withhold disclosure or inspection, he or she may apply to the court to demand that the document be disclosed or made available for inspection.

[19] One of the bases upon which a party may withhold disclosure of a document is an old common law principle formerly referred to as Crown Privilege. This is now referred to as public interest immunity, as it is no longer considered to be an absolute privilege of the Crown. This is an immunity available to officers of the Crown in circumstances where the disclosure of a document or a class of documents may be detrimental to the public interest. That common law principle has since been placed on legislative footing in section 24 (3) and (4) of the **Crown Proceedings Act**². In the case of **Arawak Trust Company Limited v. Michael Holden**³ Sir Vincent Floissac, described this public interest as follows:

“That public interest is a public interest of the nation or the public service that departments and organs of central and municipal governments, the police force and statutory boards, authorities and entities should be in positions adequately, efficiently and effectively to perform their statutory and public duties, functions and

² R.S.A. c. C 160

³ CIVIL APPEAL NO.2 OF 1994

responsibilities. This means that information essential to such performance should be transmissible with immunity from disclosure of its source and destination and without fear or danger of harassment, intimidation or involvement in litigation.”

[20] As was explained in the Australian case of ***Sankey v. Whitlam***⁴, public interest immunity may arise in relation to ***“the production of a particular document because it would be against the public interest to disclose its contents, or because it belongs to a class of documents which in the public interest ought not to be produced, whether or not it would be harmful to disclose the content of the particular document.”*** To put it differently, it may be the case that the content of a particular document may be such that it would be too injurious to the public interest to order its disclosure. On the other hand, disclosure of a particular class of documents may be injurious to the public regardless of whether disclosure of the particular document in question would have the same effect.

[21] In the present case, there appears to be little argument that some information contained in the crime report may be classified as confidential and subject to the public interest immunity test. Indeed, as I stated before, the Attorney General’s evidence regarding those issues in this application has not been disputed. There is little doubt therefore that the document contains information on the identity of confidential informants as well as strands of police investigations which the Crown would wish to keep confidential. The information is likely to be such that it would not be in the public interest to allow for full disclosure.

[22] However, given that the immunity is in and of itself not absolute, the question for consideration is whether the circumstances of this case demand that the immunity be lifted so as to allow for disclosure in any event. In ***Arawak Trust Company Limited v. Michael Holden*** Sir Vincent Floissac addressed the balancing act which the court must exercise when addressing the two competing public interests of disclosure on the one hand and immunity from disclosure which may be detrimental to the public interest on the other. He noted as follows:

⁴ (1978) 142 CLR 1 (Aus HC)

“...a claim to public interest immunity from disclosure of documents or information under discovery or interrogatories is determined by balancing two conflicting public interests. The first is the public interest which demands disclosure on the ground that non-disclosure will frustrate or do harm to the administration of justice. The second is the public interest which demands non-disclosure on the ground that disclosure will do harm to the nation or the public service. The success of the claim to public interest immunity depends on whether the harm which will be done by disclosure outweighs or is greater than the harm which will be done by non-disclosure.”

- [23] In order to address those two competing issues it must first be observed that it is the duty of Mr. Connor to show that the court should exercise this discretion in his favour. In the case of ***Asot Michael v. the Attorney General of Antigua and Barbuda et al***⁵ it was noted that *“it is for the party seeking inspection to show that the claim to immunity should be rejected.”* The court does not exercise the discretion on the assumption that the State is clandestine or dishonest in its claim for immunity. The court would therefore demand of the applicant that he satisfies the test of showing that the interest in disclosure outweighs that of immunity. In the case of ***X Ltd v Morgan-Grampian Ltd*** Lord Bingham stated as follows:

“It will not be sufficient, per se, for a party seeking disclosure of a source protected by s 10 to show merely that he will be unable without disclosure to exercise the legal right or avert the threatened legal wrong on which he bases his claim in order to establish the necessity of disclosure. The Judge's task will always be to weigh in the scales the importance of enabling the ends of justice to be attained in the circumstances of the particular case on the one hand against the importance of protecting the source on the other hand. In this balancing exercise it is only if the judge is satisfied that disclosure in the interests of justice is of such preponderating importance as to override the statutory privilege against disclosure that the threshold of necessity will be reached.”

⁵ HCVAP 2008/008

- [24] In the case of *Kevin Huggins v. The ECCB*⁶, the court found that despite the apparent contradiction in the wording of Rule 28.14 of the CPR, the old common law principle that the burden rests with the applicant to rebut a claim of public interest immunity is still the law. In light of this, the applicant's first task therefore is to show that the disclosure or inspection which he seeks is necessary, in that he will be unable to exercise the legal right or to avert the threatened legal wrong which he claims. Even in general, the court would not entertain an application for specific disclosure unless it is shown that the document is even relevant to the just disposal of the claim. It is Mr. Connor's duty therefore to first show that the disclosure of the document is necessary in this regard. His second task is to show that disclosure of the document is of such a significant level of importance, that it would be in the interest of justice to override the Crown's claim to immunity.
- [25] Counsel for Mr. Connor refers the court to the case of *BL Cars Ltd (formerly Leyland Cars) v Vyas*⁷ where it was stated that **"documents are not protected merely because they are confidential. If documents are necessary for the fair disposition of the issues, then disclosure will generally be ordered."** However, whilst I agree with that dictum in general, one must observe that there is a difference between confidentiality and immunity. It would be correct to say that the confidential nature of the information contained in the report may rise to the level of immunity if the disclosure of that information proves to be detrimental to the public interest. However, with only a few exceptions⁸, I am unable to find any general principle in law which states that confidentiality alone is a ground upon which documents can be said to be subject to immunity against disclosure if they are relevant to the proceedings.
- [26] However, what is at stake in this case, is a matter which goes beyond mere confidentiality of the information contained in the report. It is the effect of a breach of that confidentiality on the criminal justice system in general which is at stake. One would not doubt the importance of confidential informants on the capacity of the police to prevent and solve serious crimes. A breach of that confidentiality may put person's lives at risk whilst at the same time affecting the public interest in ensuring that crimes are contained and solved by the police. There may very well be various lines of police investigation which would be best left outside of the disclosure process if to do otherwise

⁶ NEVHCV2017/0124

⁷ [1979] 3 All ER

⁸ such as cabinet minutes for example

would undermine the public interest. It would seem therefore, that even counsel for Mr. Connor was sufficiently concerned with being in possession of this document that, according to Ms. Rey's evidence, it was he who contacted the police to raise the issue in the first place.

- [27] Counsel for Mr. Connor goes on to refer to the case of ***Waugh v British Railway Board***⁹ where Edmund-Davies J. stated the following:

"...we should start from the basis that the public interest is, on balance, best served by rigidly confining within narrow limits the cases where material relevant to litigation may be lawfully withheld. Justice is better served by candour than by suppression. For, as it was put in the Grant v Downs majority judgment... "... the privilege ... detracts from the fairness of the trial by denying a party access to relevant documents or at least subjecting him to surprise"

- [28] However, it is again important to place the authorities referred to by counsel into context. The principles espoused may be of general application, but the distinctions between the individual cases must be considered. In ***Waugh v British Railway Board*** the court was dealing with a different type of immunity. The issue for consideration there was whether a report which was prepared only partially for the purpose of seeking legal advice was in fact privileged and, if so, whether that privilege was to be weighed against the duty of disclosure. It was found that the report contained contemporaneous statements from witnesses which were likely to be the best evidence available to determine the cause of an accident. Given that the report was also prepared for the purpose of ascertaining various facts relating to the cause of the collision, it was not considered to be privileged to the extent that it should not be disclosed to the other side. The defendants were therefore unable to rely on attorney-client privilege in order to prevent the disclosure of the document.

- [29] In my view, public interest immunity, as is being claimed in this case, may carry with it some distinct considerations. No doubt there is a general public policy objective in ensuring that client communications with attorneys remain private. But that nonetheless remains purely for the benefit of the client, who is personally capable of waiving that privilege. However, that is a completely

⁹ [1980] AC 521

different issue from the public interest in ensuring that police informants, whose lives may be at risk, do not have their identities disclosed. This may rise to the level of the internal security of the State to the extent that a waiver of that privilege is itself unlawful. The impact on the criminal justice system and the police's capacity to investigate and solve crimes is a factor which appears to me to carry significant weight. It is not that there is no duty on the part of the police to disclose evidence in their possession which is relevant to the case. However, I would not doubt that some of those lines of investigation may be subject to immunity in the public interest, to the extent that the court should be very slow to demand its disclosure. I find support for this approach in the decision of the House of Lords in the case of ***D v. National Society for the Prevention of Cruelty to Children***¹⁰ where the following was stated:

But when it comes to the point of forensic impact the potentiality of exclusion may enure solely for the benefit of one of the parties or a witness before the court. Such, for example, is the actual impact of legal professional privilege, notwithstanding that it is required generally for the rule of law, forensically its particular incidence is exclusively for the benefit of the client. The client can therefrom waive the exclusion; so that it is properly and conveniently called a "privilege" and grouped with other similar evidence. By contrast, the exclusion of evidence because its adduction would imperil the security of the State enures to the advantage of citizens generally, so that its exclusion cannot be waived by any party or witness before the court: Marks v. Beyfus at p.500. Nor, of course, in such case can secondary evidence be given of the excluded matter. There is no harm in categorising this sort of non-waivable exclusion under the heading of "Public Policy ": provided that it is recognised, first, that the exclusion of any relevant evidence is to be justified on grounds of public policy (which may be the public interest in the efficiency and fairness of the forensic process itself); secondly, that dealing with it in this way merely signifies methodologically that it constitutes the residuum of classes of excluded evidence which cannot be dealt with appropriately under other headings (e.g., hearsay, " the best evidence rule", non-compellability or privilege); and, thirdly, that the label " Public Policy " here does not mean that the courts must necessarily wait upon Parliament or must necessarily refrain from the normal common-

¹⁰ [1978] AC 171]

law process of applying an established rule to circumstances analogous to those in which the rule was established (in the absence of contra-indication on grounds of justice or convenience):

- [30] Two issues can be gleaned from this dictum. Firstly, as I have said, where the immunity may rise to this level, it is not waivable by the defendants. Secondly, the court should be cautious to even allow the disclosure of secondary evidence of this type of information.
- [31] Counsel for Mr. Connor also referred to the case of ***Air Canada v Secretary of State for Trade***¹¹ in support of the proposition that it is no longer a dispositive objection of the Crown to assert confidentiality and potential harm to the public interest as a basis for suppression of documents that are directly relevant to proceedings. I have no doubt that this is an accurate reflection of the law. However, the facts of the case are worth some consideration.
- [32] In that case the plaintiffs took action against the British Aviation Authority and the Secretary of State for Trade in what was alleged to be an unlawful increase in the fees charged to airlines for use of the Heathrow Airport. The plaintiffs then sought specific disclosure of certain documents, including ministerial papers and interdepartmental communication. Despite the proposition put forward by counsel for Mr. Connor in this case, the court in fact denied the application for specific disclosure and upheld the claim of immunity put forward by the defendants. Whilst it is true that a claim of confidentiality and potential harm to the public interest is not dispositive of a claim to immunity, there are a number of issues which arises in the case of ***Air Canada v Secretary of State for Trade*** which are relevant to the issues at hand. I will return to address those issues later. It would suffice to say however, that the case does not diminish the importance of the claim to public interest immunity in any way; especially where internal security issues may be at stake.
- [33] In oral submissions, counsel for both parties referred the court to the case of ***Kevin Huggins v. The ECCB*** where the court agreed with the position that the document should be inspected before a determination is made in relation to the application for specific disclosure. In written submissions, counsel for Mr. Connor also requested that the court considers its own inspection of the crime report prior to determining whether it should be disclosed. Reference was also made to the case of

¹¹ [1983] 2 AC

Conway v Rimmer and Another¹² where the House of Lords made such a directive “*in order to determine whether the facts discoverable by their production would be prejudicial or detrimental to the public welfare in any justifiable sense.*” This court is therefore invited to take a similar approach.

[34] However, I make just two observations in relation to the case of **Kevin Huggins v. The ECCB**. As was stated at paragraph 18 of that judgment, the parties agreed that the court should inspect the document in question. In light of this, the judgment does not address in much detail the test to be applied before the documents can be inspected by the judge. Given that even the court’s inspection of the document is a matter of contention in the present case, I must first give more careful consideration to the applicable test before determining whether the document should be inspected. Secondly, I also observe that the substance of the document in **Kevin Huggins v. The ECCB** was in fact disclosed. What was in issue was that certain portions of the document were redacted. There would have therefore been no question of the relevance of the document to the issues in the proceeding in general. That was perhaps the reason even the respondent was quite prepared to have the court inspect the documents in the first place. The circumstance of Mr. Connor’s application therefore carries with it some distinguishing features.

[35] In support of Mr. Connor’s submission, the court is also referred to the case of **Wallace Smith Trust Co. Ltd. v. Deloitte Haskins & Sells (a firm) and another**¹³ where it was stated that an order for specific disclosure “*should normally only be refused after the court*” has inspected the document itself. It is therefore submitted that this case places a positive obligation on the court in the exercise of its discretion on an application for specific disclosure to examine the Crime Report and consider it in light of the material already in Mr. Connor’s possession.

[36] However, I do wish to make three points in relation to the case of **Wallace**. Firstly in the paragraph referred to by counsel for Mr. Connor, the Court of Appeal specifically put aside for a moment the claim of public interest immunity. In fact, the first instance judge, as well as the Court of Appeal had rejected the claim of immunity. The dictum therefore referred to the general principles to be considered in an application for specific disclosure outside of an immunity claim. The second

¹² [1968] AC 910

¹³ [1996] 4 All ER

observation to be made is that the court there also made it clear that the inspection of the documents should only take place after the applicant has proven that the disclosure of the documents may be necessary for the fair disposal of the case. That burden at all times remains with the applicant. If the applicant discharges that burden, it is then the obligation to inspect the documents arises; if it is that the court is minded to refuse the application nonetheless. The third observation to be made is that the Court of Appeal determined that the judge had misdirected himself in not inspecting the documents prior to refusing the application. That was expressly stated to be on the basis of the fact that unless the documents were protected by some immunity, they was undoubtedly likely to be material which was necessary to the disposal of the case. That burden having been discharged by the applicant, the learned judge ought then not to have refused the application without having first inspected the documents.

[37] I make these observations because it does not appear to me from the submissions put forward on behalf of Mr. Connor that there is any real doubt regarding the public interest immunity being claimed here. In **Wallace**, the statutory basis upon which the documents were derived by the officials of the serious fraud office does not necessarily grant any blanket immunity against disclosure. The Court of Appeal was prepared to accept that in the circumstances of that case the documents were not subject to any immunity. However, in the circumstances of this case, immunity is claimed in relation to the identities of confidential police informants in a murder investigation. That is by no means a trivial issue. Its impact on people's lives and the capacity of the police to solve major crimes may be significant. In fact, it may have been so significant that it raised red flags in counsel's own mind, sufficient for him to have obliged in returning the document to the police.

[38] As it relates to the issues of the court's own inspection of the documents prior to making a decision in a case where public interest immunity is being claimed, I return to the case of **Air Canada v Secretary of State for Trade**, as it highlights some general principles which the court should consider. Firstly, Lord Fraser indicates that there are two separate issues for consideration. The first is that the burden rests with the applicant to show why the documents should be inspected by the court in the first place. If that burden is discharged then the court would privately inspect the documents to consider whether they should be disclosed or inspected by the applicant.

- [39] Lord Fraser noted that the weight of the public interest against disclosure will vary greatly depending on the particular document to which the immunity applies. He goes on to state that ***“in order to persuade the court even to inspect the documents for which public interest immunity is claimed, the party seeking disclosure ought at least to satisfy the court that the documents are very likely to contain material which would give substantial support to his contention on an issue which arises in the case, and that without them, “he might be deprived of the means of ... proper presentation of his case...”*** According to Lord Fraser, this test assumes that there is even a prima facie case to begin with and that there is some material upon which the claim is already grounded.
- [40] Lord Fraser went on to state that whether the claim to immunity is one based on a class of documents or the content of the particular document in question, if the court embarks on the inspection of the document, it would be exercising a discretion without the benefit of submissions from counsel. As such, the court is discouraged from “taking a peep” of the documents ***“on the off chance of finding something useful. It should inspect documents only where it has definite grounds for expecting to find material of real importance to the party seeking disclosure.”***
- [41] This test is said by Lord Fraser to be a strict one. He observes that public interest immunity is not a matter of discretion on the part of the Crown. So important is the issue that the Crown in fact has no discretion to waive immunity on its own volition. I would add that anyone coming into knowledge of that information, whether through inadvertence or otherwise, may very well be subject to the same duty to ensure that it is not disclosed if to do so would damage the public interest. It is for this reason I express some concern regarding the circumstances of this case. In circumstances such as the present case for example, the Crown would be failing in its own duty if it were to waive this immunity if to do so would put the lives of police informants at risk. This would be further compounded by the fact that such disclosure may have a negative impact on people being willing to come forward to give confidential information to the police in the future. It is not merely a matter of the disclosure of what is actually in this document. It is the impact such a situation may have on the future cooperation with the police in their capacity to solve crimes while providing some guarantee to the physical safety of those who may be so inclined to provide such information. The mere knowledge of police informants that this document was disclosed may create an apprehension with regard to cooperating with the police in the future.

[42] In fact, I do not understand from the evidence that it is the norm for the crime report to be disclosed; especially if it contains such confidential information in it. It must surely have been one of the reasons counsel himself thought it fit to contact the police to inform them that this document was found within the bundle of documents disclosed in the criminal case. This court has had the experience of conducting criminal trials and it is more than merely customary for the police to not be compelled to provide such information without compromising the fairness of the process. Even in the civil law jurisdiction, the court frequently presides over litigation regarding wrongful arrest and malicious prosecution, as well as constitutional motions and judicial review of police actions, and frequently finds in favour of claims against the police without the disclosure of such confidential information. Mr. Connor therefore has a heavy bar to climb over in order to persuade the court to even inspect those documents in the first place. As Lord Fraser noted, it is not enough to merely state that there is relevant material in the document. He must show, based on the evidence in this application that the ***“documents are very likely to contain material which would give substantial support to his contention on an issue which arises in the case, and that without them, “he might be deprived of the means of ... proper presentation of his case...”***

[43] In submissions on behalf of the defendants, counsel refers the court to the case of ***Burmah Oil Co, v. Bank of England***¹⁴. Whilst I would accept that there are distinctions between the nature of the documents for which immunity was claimed in that case, Lord Wilberforce noted at 1108 –H that the certificate sworn to by the Secretary of State was lengthy and detailed and represented the results of careful and reasonable considerations. The point being made here by Lord Wilberforce was that the claim to public interest immunity made by the Chief Secretary was not a fanciful one. Thought had been given to the detail of the documents in question and cogent reasons were given as to why it was not in the public interest to disclose the documents; even as a class of documents in general.

[44] For my part, I state from the onset that a similar situation arises in the present case. The affidavit of the Attorney General raises issues which are more than merely fanciful. It sets out in as detailed a manner as one can imagine, the basis for the claim for immunity. This involves disclosure of the various lines of investigation carried out by the police and the manner in which confidential

¹⁴ [1980] AC 1090

informants are used in police investigations in general and how they were carried out in this particular case. He outlines the coded nature of how informants are labeled by the police and, in the peculiar circumstances of this case, the fact that certain specific informants rank high on the list of informants whose lives may be at risk if the document is disclosed. The Attorney General is therefore not making a general assertion here. The claims are very specific and are by no means minor.

[45] Lord Wilberforce then went on to state that ***“[a] claim for public interest immunity having been made on manifestly solid grounds, it is necessary for those seeking to overcome it to demonstrate the existence of a counteracting interest calling for disclosure of particular documents”***. This reinforces my earlier observation that the duty would rest with Mr. Connor to show that the immunity being claimed should not be weighed against the duty of disclosure.

[46] However, I do observe that Lord Wilberforce was in the minority on one point in this decision of the House of Lords. Their Lordships thought it prudent to inspect the documents themselves. Lord Wilberforce thought otherwise. Given counsel for Mr. Connor’s invitation to this Court to inspect the documents prior to making its decision, I would address the grounds upon which the majority viewed this as a prudent course to take in the **Burmah** case.

[47] Lord Edmund-Davies, in his own assessment of the Chief Secretary’s affidavit stated that none of the claims advanced by him in relation to the ten (10) documents in question were of the class of documents which are largely regarded as being totally immune from disclosure. He stated that even where the claim was made good, it does not follow that disclosure may not be ordered. In relation to the Chief Secretary’s Certificate, His Lordship stated as follows:

My Lords, it follows, as I think, that the respondents were wrong in submitting that, if the appellants are to succeed in this interlocutory appeal, they must establish that the Chief Secretary’s certificate is probably inaccurate. On the contrary, disclosure may well be ordered even though its accuracy is not impugned, for the Minister’s view is one-sided and may be correct as far as it goes but is yet not to be regarded as decisive of the matter of disclosure.

[48] This underscores what I have already noted. It is not a question of merely stating that the documents are confidential or perhaps even subject to some measure of immunity. The court may still order its disclosure if to do so would adequately balance the two public interests which arise in such cases. Lord Edmund-Davies went on to address what he thought was a peculiarity in that case when he stated the following:

There is a further feature in this case which it would be pusillanimous to ignore. It consists in the fact that this is not one of those cases where the complete detachment of the party resisting disclosure is beyond doubt. It is true that the Government is not a party to these proceedings, but it would be unrealistic to think that the conduct of Government's servants and advisers nowise enters into this case. Not only is it the fact that, whereas the defendants, left to their own devices, would have complied in full with the plaintiffs' request for discovery, but its only opponent (through the intervention of the Attorney General) is the Government, whose own role must inevitably and inescapably be scrutinised and may be subjected to criticism. Accordingly, since not only justice itself but also the appearance of justice is of considerable importance, the balancing exercise is bound to be affected to some degree where the party objecting to discovery is not a wholly detached observer of events in which it was in no way involved. It cannot realistically be thought that the Government is wholly devoid of interest in the outcome of these proceedings. On the contrary, it has a very real and lively interest, for were the plaintiff to succeed it could only be on the basis that the Bank behaved unconscionably, and the evidence indicates that the Bank was acting throughout in accordance with Government instructions.

[49] I must say for my part, that it is likely in most cases where public interest immunity is being claimed, that the government would not be detached from the outcome of the proceedings. In the case before me there is certainly no detachment in the sense that the substance of the case would put the actions of public servants under scrutiny. Therefore I do express some doubt that Lord Edmund-Davies was establishing any general principle of law here. The distinguishing element in

that case however, was that the government was not a party to the proceedings but intervened in order to prevent the disclosure of a class of documents which the defendant seemed quite prepared to disclose. Those documents did not fall into a category of documents for which immunity is normally upheld with a greater measure of strictness. In the end Lord Edmund-Davis stated that ***“in my judgment, such material as is presently available leads me to the conclusion that this Appellate Committee of your Lordship’s house should now privately inspect the 10 documents earlier referred to. What they contain remains to be seen.”*** In his own contribution on that issue, Lord Keith noted as follows:

There are cases where a consideration of the terms of the Ministerial certificate and of the nature of the issues in the case before it as revealed by the pleadings, taken with the description of the documents sought to be recovered, will make it clear to the court that the balance of public interest lies against disclosure. In other cases the position will be the reverse. But there may be situations where grave doubt arises, and the court feels that it cannot properly decide upon which side the balance falls without privately inspecting the documents. In my opinion the present is such a case.

- [50] Lord Keith was therefore of the view that the doubts which had been raised, at least in his mind, made it necessary to first inspect the documents before making a decision. I took the time to assess the decision in the ***Burmah Oil*** case because it does appear to me to have taken somewhat of a different approach to that taken in the case of ***Air Canada v Secretary of State for Trade***. In my view however, I believe that the decision to inspect the documents in the ***Burmah*** case may have eventually turned on the peculiar facts of that case. I also note that ***Air Canada v Secretary of State for Trade*** was a case which was decided later, with many of the same judges presiding over the appeal. In the ***Air Canada*** case Lord Scarman was also careful to point out that in ***Burmah Oil***, the decision to inspect the documents was based on the doubts in relation to how best to balance the two competing public interests. The test therefore is as properly stated in the case of ***Air Canada v Secretary of State for Trade***. It is Mr. Connor’s burden to prove that the ***“... document [is] very likely to contain material which would give substantial support to his contention on an issue which arises in the case, and that without them, “he might be***

deprived of the means of ... proper presentation of his case..." in order for the court to be satisfied that it should even inspect the documents.

- [51] Before moving on to address my conclusions on the matter, it is important to give some more consideration to the law surrounding confidential information in the course of police investigations. Reference was made to the case of **Marks v. Beyfus**¹⁵ where it was stated as follows:

"Now, this rule as to public prosecutions was founded on grounds of public policy, and if this prosecution was a public prosecution the rule attaches; I think it was a public prosecution, and that the rule applies. I do not say it is a rule which can never be departed from; if upon the trial of a prisoner the judge should be of opinion that the disclosure of the name of the informant is necessary or right in order to shew the prisoner's innocence, then one public policy is in conflict with another public policy, and that which says that an innocent man is not to be condemned when his innocence can be proved is the policy that must prevail. But except in that case, this rule of public policy is not a matter of discretion; it is a rule of law, and as such should be applied by the judge at the trial, who should not treat it as a matter of discretion whether he should tell the witness to answer or not."

- [52] Insofar as it relates to the applicability of the rule against disclosure of informants in subsequent civil proceedings, the Master of the Rolls stated that ***"the rule as to non-disclosure of informers applies, in my opinion, not only to the trial of the prisoner, but also to a subsequent civil action between the parties on the ground that the criminal prosecution was maliciously instituted or brought about."*** As I myself indicated earlier, it is not unusual for successful cases of malicious prosecution to be litigated without the use of the Crime Report, which may contain such information in it.

- [53] The principles established in that case were reinforced in the more recent judgment of the House of Lords in the case of **D v. National Society for the Prevention of Cruelty to Children** where the following was noted:

¹⁵ (1890) 25 QBD 494

The public interest which the N.S.P.C.C. relies upon as obliging it to withhold from the plaintiff and from the court itself material that could disclose the identity of the Society's informant is analogous to the public interest that is protected by the well-established rule of law that the identity of police informers may not be disclosed in a civil action, whether by the process of discovery or by oral evidence at the trial. (Marks v. Beyfus [1890] 25 Q.B.D. 494.)

[54] The court then went on to note that:

“The rationale of the rule as it applies to police informers is plain. If their identity were liable to be disclosed in a court of law, these sources of information would dry up and the police would be hindered in preventing and detecting crime. So the public interest in preserving the anonymity of police informers had to be weighed against the public interest that information which might assist a judicial tribunal to ascertain facts relevant to an issue upon which it is required to adjudicate should be withheld from that tribunal. By the uniform practice of the judges which by the time of Marks v. Beyfus had already hardened into a rule of law, the balance has fallen upon the side of non-disclosure except where upon the trial of a defendant for a criminal offence, disclosure of the identity of the informer could help to show that the defendant was innocent of the offence. In that case, and in that case only, the balance falls upon the side of disclosure.”

[55] This rule appears to me to be one which has been strictly applied, save and except in a criminal trial where the information would help prove that the defendant is innocent. I appreciate that an argument is being made here that not all the information contained in the crime report relates to confidential police informants and that names and identities may possibly be redacted. But the court must also be cautious to ensure that not even secondary information which may lead to such revelations is disclosed. As I have also said earlier, informants may very well be reluctant to give confidential information in the future if the very document in which their information and identities are contained is disclosed in this way.

[56] I turn now to my own conclusions regarding whether the necessary test has been met.

Conclusions

[57] As I have indicated earlier, I am satisfied that the Attorney General has made out a valid claim for public interest immunity in relation to the Crime Report. I also indicated that it does not appear to me that such reports are normally disclosed in the usual course of criminal proceedings. Insofar as it relates to the test highlighted in the case of *Air Canada v Secretary of State for Trade* I have examined the affidavit evidence presented in support of the application. Having done so, I am not satisfied that Mr. Connor has met the threshold in relation to either aspect of that test.

[58] Firstly, the affidavit evidence is somewhat bare as to its assertions of the relevance of the material contained in the Crime Report. Ms. Rey's evidence is based on advice from counsel and all that she states in it is that she was advised that the document is directly relevant to the information gathered by the police and the decision to charge Mr. Connor for murder. It is also stated there that the disclosure will come at no cost to the defendants and that it is necessary to make the order for disclosure in keeping with the court's powers to deal with cases justly. However, this is not the full extent of the test which is required for consideration in a claim where public interest immunity is successfully invoked. Nothing in that evidence seeks to address the question of whether the document is **very likely** to contain material which would give substantial support to his contention on an issue which arises in the case, and that without them, Mr. Connor might be **deprived of the means of ... proper presentation of his case...**

[59] During the disclosure phase, the defendants disclosed the criminal case file on Mr. Connor. The file contained the evidence upon which the police would have relied in pursuing criminal charges against him. When one balances what has been disclosed so far in the present civil claim and the nature of the pleadings in general, there is nothing in the affidavit of Ms. Rey which satisfies me that the disclosure of the Crime Report is likely to contain any additional information, without which, Mr. Connor would be deprived of proper presentation of his case. Nothing in the affidavit actually speaks to this.

- [60] However, it is important to give some consideration to the pleadings itself. I note that there were issues in relation to the document raised in the pleadings. It may very well be argued that since the content of the report was directly pleaded, then it is an issue which makes disclosure of the document relevant. I make two comments in relation to this.
- [61] Firstly, I continue to express my concern with this. This is not meant to be a criticism of counsel in any way. As the law develops circumstances will arise which may sometimes be somewhat difficult to determine the proper approach to be taken; and counsel's approach is not viewed in a negative light. In fact it was commendable of counsel for Mr. Connor to have contacted the police and returned the document when he discovered that it was in his possession. However, something must be said of what transpired afterwards if only to begin the process of establishing the proper approach to be taken as a matter of policy and case management.
- [62] I am satisfied that the document is one which contains information regarding confidential police informants. These documents are not ordinarily disclosed in the criminal or civil court processes. In the case of ***D v. National Society for the Prevention of Cruelty to Children***, even the court is warned against inspecting such documents unless it is absolutely necessary to do so. Therefore, I am of the view that the sensitive nature of this document would have been obvious from the time of its inadvertent disclosure in the criminal trial. It must be observed, that as a matter of law and public policy, not even the defendants have the right to waive the immunity which is attached to such information. Therefore, even counsel who had inadvertently had sight of the document and rightly returned it to the police would do well not to disclose the content of such documents to anyone. In light of this, one would do well to also consider whether the proper approach was to even plead the existence of the document and its content without first giving thought to the issues of immunity which may have arisen in relation to it. That may not have been the proper approach to take, as I am of the view that the substance of the case could have been perfectly pleaded without reference to the document until such time as the issues surrounding its disclosure were addressed.
- [63] Further, having pleaded the existence of the document, the defendants raised concerns about it in the defence, yet no one, including the court, sought to address this issue at an earlier stage in the case management process. Bearing in mind that the disclosure of such a document is not waivable, it would have also been prudent for the avenues available within the CPR to have been utilized at

an earlier stage. The time line for filing disclosure was not complied with by the defendant and the rules in relation to the earlier filing of an affidavit seeking to withhold disclosure were not complied with. Yet it is stated, and I am satisfied that it is correctly stated, that the document contains highly confidential information regarding police informants and various lines of police investigations. Such an issue ought to be dealt with at a much earlier stage in the case management process. It may even be the case that such information ought to be dealt with under seal as the mere knowledge of the inadvertent disclosure of this document can raise alarm bells in the minds of the very informants that the immunity seeks to protect as a matter of policy.

[64] The second point which I wish to make is in relation to the nature of the case itself. I take the point that the pleadings address the existence of the document. However, having examined the pleadings myself I am not satisfied that the substance of Mr. Connor's case necessitates the disclosure of the document. As I indicated earlier, wrongful arrest and malicious prosecution cases are routine in our jurisdiction. Crime Reports are not ordinarily disclosed in them. Yet the court has been perfectly capable of conducting a fair trial and even finding in favour of claimants in such cases. Having examined the pleadings and the witness statements filed so far, I find nothing peculiar about this case which makes it different from any other. In fact I may hasten to say that had the Crime Report not been inadvertently disclosed the circumstances of the case would likely not have been any different.

[65] I considered for a moment that the defendants have contended that the only reason the preliminary inquiry was discontinued was on account of the inadvertent disclosure of the document and the fact that to continue the criminal case would have posed a security risk. On that basis, counsel for Mr. Connor encourages the court to inspect the documents as it would assist in determining whether it would be prudent to order disclosure in order to address this point in contention. It is no doubt Mr. Connor's case that the evidence against him was such that there was no basis for his arrest and prosecution. However, in my view the public interest does not weigh in favour of the court inspecting this document. In my view, in substance what the court will eventually consider is the same evidence which it always considers in such cases. The test in the *Air Canada* case was whether the disclosure of that information would be such that without it **he might be deprived of the means of ... proper presentation of his case**. I am satisfied that the information already disclosed and witness statements already filed, would be sufficient to ensure that Mr. Connor would

not be deprived of the means of proper presentation of his case. The public interest would not best be served by inspecting this document or ordering its disclosure.

[66] The application is therefore dismissed with no order as to costs.

Ermin Moise
High Court Judge

By the Court

Registrar