

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT**

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

Claim Number: **NEVHCV2017/0124**

Between **Kevin Huggins** Applicant
and
Eastern Caribbean Central Bank Respondents

Before: His Lordship Justice Ermin Moise

Appearances:

Ms. Midge Morton with Ms. Maurisha Robinson of counsel for the claimant/Applicant
Mr. Damian Kelsick with Ms. Danni Maynard of counsel for the defendant/respondent

2019: October, 14th
November 22nd

JUDGEMENT

- [1] **Moise, J:** This is an application in which the claimant seeks an order directing the full and un-redacted disclosure of a report compiled by the respondent, pursuant to rule 28 of the CPR. The respondent opposes the application and claims an entitlement to withhold full disclosure on the grounds of public interest immunity. I have decided that the application should be dismissed with no order as to costs. These are my reasons for doing so.

The facts

- [2] The applicant is a shareholder and previously held the post of Director and Chairman of the Bank of Nevis Limited (the Bank). The respondent, on the other hand, is the principal regulator of domestic commercial banks within the Eastern Caribbean Currency Union. As part of its regulatory functions it is empowered to enquire into the fitness and propriety of persons who serve as directors of commercial banks within the union. This is in keeping with the provisions of section 97(2) of the

Banking Act which mandates that individuals holding the position of director of financial institutions must be fit and proper persons.

- [3] Between 11th and 13th January, 2017, as a result of certain allegations made against him, the applicant became the subject of an investigation by the respondent, which resulted in a recommendation that he be removed as a chairman and director of the Bank. The respondent's recommendation was contained in letter dated 17th July, 2017 and was based on its own conclusion that the applicant was not a fit and proper person to hold such a position. During the course of that investigation, the respondent interviewed a number of persons, including employees of the Bank in which the applicant held the position of director and chairman. A report of those interviews was compiled. However, by way of letter dated 1st March, 2017 the respondent notified the applicant of the substance of the allegations made against him. It appears that a number of letters and emails were exchanged between the respondent on the one hand and the applicant and his counsel on the other. It is not now necessary to repeat the content of these exchanges in any detail. It would be sufficient to say that the respondent was adamant that the information presented to the applicant was enough to enable him to be called upon to give an account of the allegations made against him without full disclosure of what was said in all of those interviews.
- [4] On 3rd April, 2017 the applicant met with representatives of the respondent and sent an email on 17th April, 2017 making a number of representations of his own. He sent a report of his own on 7th April, 2017 giving his account of the events of November to December, 2017. He sent further correspondence seeking disclosure of a number of letters which are not now the subject of this present application. Despite all of this, the respondent communicated its recommendation that the claimant be removed as a director of the Bank, having deemed him to be an unfit and improper person to hold such a position. The Bank has duly acted upon this recommendation.
- [5] The applicant was no doubt aggrieved by this and brought an action for judicial review. In a carefully reasoned judgment, Williams J granted leave to the applicant to file for judicial review on 24th October, 2018. He subsequently filed his Fixed Date Claim in keeping with the order of Williams J.

- [6] As part of the court's case management powers, orders were made for standard disclosure and on 19th July, 2019 the respondent disclosed, among other documents, a redacted report highlighting the interviews carried out during its investigation. In doing so, the respondent stated that it was asserting *"its right to withhold disclosure, by redaction or otherwise, of all parts of the report which discloses, or may disclose, the identity of any persons providing information to the defendant as part of its investigation of the matter."* It went on further to state that *"this right was based on public interest privilege."* It is worth noting however, that the portions of the report eventually disclosed revealed the identities of all persons interviewed. What has been redacted are various portions of the interviews conducted.
- [7] By way of letter dated 22nd August, 2019, solicitors for the applicant wrote to the respondent's legal representatives requested inspection of the full and un-redacted report. The respondent however maintained its right to continue to withhold disclosure and stated that *"[t]he particular public interest immunity relied upon is that enunciated in D v. National Society for the Prevention of Cruelty to Children [1978] AC 171. The ECCB is charged with making investigations in respect to several matters under the Banking Act. It is a critical aspect of that function that persons who make statements confidentially to the ECCB in the discharge of those functions not be discouraged by the risk that their confidential statements will have to be subsequently disclosed. That is the public interest to which we refer."*
- [8] Not being satisfied with this response, the applicant has filed an application seeking further directions from the court. Substantively what the applicant seeks is a ruling on any privileged aspects of the report. However, by way of submissions the applicant seeks to persuade the court that the respondent is not entitled to withhold full disclosure of the report on the grounds of public interest immunity.

The Law

- [9] Perhaps an appropriate starting point in addressing this issue is the provisions of rule 28 of the Civil Procedure Rules 2000 (CPR). This rule provides for the process of disclosure in civil cases. Rule 28.4 states that ***"[i]f a party is required by any direction of the court to give standard disclosure, that party must disclose all documents which are directly relevant to the matters***

in question in the proceedings." This rule is more than merely procedural. It in fact gives effect to what has been determined to be a fundamental public interest which itself ***"demands disclosure on the grounds that non-disclosure will frustrate or do harm to the administration of justice"***¹. Essentially, it has long been recognized that a party is under a duty to disclose all documents which are either in or were in his possession or he now has or has had access to, if these documents are relevant to the issues in the case at hand. Failure to do so may not only affect the other party's capacity to adequately prepare his own case, but may hinder the court in its own duty to ensure that the administration of justice is not undermined in any way.

[10] In the case of ***Arawak Trust Company Limited v. Michael Holden***², Sir Vincent Floissac came to consider the issue of nondisclosure in circumstances not entirely dissimilar to the present case. As it relates to the public interest in the administration of justice, the then Chief Justice made reference to Lord Bridge, who stated the following in the case of ***X Ltd v Morgan-Grampian Ltd***³:

"It is, in my opinion 'in the interest of justice', in the sense in which this phrase is used in s 10, that persons should be 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."

[11] Essentially Sir Vincent, in relying on this authority, expressed the view that the public has an interest in ensuring that an individual is enabled to exercise important legal rights and ought not to be fettered in engaging the court process when serious legal wrongs may have been committed against him. I would add that in this modern era of democracy the public interest is extended even more so to cases where the citizen seeks a review of the exercise of the executive powers against him. If he can show that he has a legal right of access to the court as a result of an alleged wrong committed against him, then there is a general interest in the administration of justice in ensuring that all the information which is necessary to assist him in the prosecution of his case is not unlawfully or unreasonably withheld from him.

¹ See Sir Vincent Floissac's decision in the case of ***Arawak Trust Company Limited v. Michael Holden***

² CIVIL APPEAL NO.2 OF 1994

³ (1990) 2 AER 1

[12] Despite this general duty of full and frank disclosure, the CPR recognizes circumstances under which a party may withhold a right to full disclosure of a particular document or parts thereof. Rule 28.11 for example states that “[w]hen a party has served a list of documents on any other party, that party has a right to inspect any document on the list” with the exception of documents “for which a right to withhold from disclosure is claimed.” Rule 28.14 makes specific provision for the circumstances where a person claims a right to withhold a specific document from disclosure and the procedure to be adopted in such cases. What is important to note, is that despite the general duty contained in part 28 of the CPR, it is recognized that there are certain circumstances under which a party may legitimately withhold disclosure. One such circumstance is where a party claimed this right on the ground of public interest immunity.

[13] In light of this, it is necessary for the court to be satisfied that the two competing public interests of the right to disclosure on the one hand and the public interest immunity on the other are evenly balanced. In its current state therefore what the law requires is outlined in the judgment of Sir Vincent Floissac where he states the following:

“...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.”⁴

[14] This is in effect the approach which the court now employs in determining whether the applicant is entitled to the orders which he seeks. Returning to Lord Bridge’s dictum in the case of ***X Ltd v Morgan-Grampian Ltd*** Sir Vincent referred with approval to the following passage:

“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

⁴ ***Arawak Trust Company Limited v. Michael Holden***

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."

[15] There is no statutory privilege upon which the respondent has based its submissions. However, there is the recognized right to withhold disclosure on the basis of public interest immunity. Insofar as that is the case, Sir Vincent was of the view that Lord Bridge's dictum "***predicates that the party demanding disclosure has shown that he has a legal right or that a legal wrong to him is threatened and that without disclosure demanded, he will be unable to exercise the legal right or to avert the threatened legal wrong.***" The starting point therefore, rests with the applicant's own assertion that he is unable to properly present his case without disclosure of the un-redacted report. This approach was also taken by the court of appeal in the case of ***Asot Michael v. the Attorney General of Antigua and Barbuda et al***⁵. In that case Barrow JA was careful to note that the introduction of rule 28.14 did not fundamentally alter the common law approach in dealing with such cases. The court did not generally require the state (or in this case the regulator) to provide evidence to substantiate its assertion of public interest immunity. That may very well force the exposure of the very information which the respondent seeks to redact. Rather, ***"it is for the party seeking inspection to show that the claim to immunity should be rejected."*** It would seem therefore that it is for the applicant to prove that he will be unable to exercise his legal right to the extent that the public interest in the administration of justice would be undermined.

[16] Prior to the promulgation of the CPR it would seem that the common law required a certificate from a minister or perhaps the attorney general stating that the information was privileged. It would be rare for the court to call the certificate into question. However, Barrow JA did not directly address

⁵ HCVAP 2008/008

certain specifics contained in rule 28 of the CPR. In particular rule 28.14 (5) and (6) states as follows:

(5) a 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.

[17] This rule appears to envisage a different test altogether in that the starting point is for the court to satisfy itself that there is a right to withhold disclosure and if not so satisfied then an order for disclosure must be made as a matter of course. Given that the decision in **Asot** is derived from the court of appeal I am bound to follow that approach. However, it does seem to be somewhat in conflict with rule 28.14(5) and (6). Perhaps this may be reconciled by noting that rule 28 addresses the right to withhold disclosure in general and that public interest immunity is merely a sub-specie of what is contained in that rule. It may therefore be argued that there is an implied right to withhold disclosure on the basis of public interest immunity sufficient to satisfy the requirements of rule 28.14(6) without placing a greater burden of proof on the respondent. In that case, and as Barrow JA noted, the rule did not replace the previous common law approach in dealing with the issue of public interest immunity. In the case of **Kaufman v. Credit Lyonnais Bank**⁶, which was cited by the applicant, the court did note that ***“the burden of showing that production is necessary falls on the plaintiffs as the party applying for production.”*** This burden is to be discharged even prior to the court considering the claim to public interest immunity. In other words, if the document is not necessary for the purpose of saving time and costs, the court would not venture to order its disclosure.

[18] However, even if the court is not obligated to call upon the respondent to present evidence substantiating its claim to immunity, Rule 28 of the CPR has embraced the common law position

⁶ [1995] C.L.C 300

that the court may inspect the document itself in order to arrive at a fair conclusion⁷. That much was accepted by Barrow JA where he states that ***“[i]f the court thought it necessary in a particular case that the judge should have a look at the withheld material to decide if the claim should be sustained, the court would order the private inspection of the documents by the judge.”*** In the case of ***Kaufman***, the court had site of the documents prior to making its decision and concluded that production of the document is ***“likely to be necessary for disposing fairly of the plaintiff’s claims.”*** In the present case the parties agreed that the respondents would file a sealed copy of the un-redacted report. This was filed on 18th October, 2019 and I have had site of its content.

[19] In his affidavit of 30th August, 2019 the applicant states at paragraph 5 that the report ***“in its redacted version was disclosed to me and upon review of the document, it is noted that several portions thereof specifically relate to me and to which I have a right to full disclosure, especially in a judicial review hearing.”*** He states that he was advised by his attorney at law that the respondent had not met the threshold in its claim for public interest immunity. In my view however, the applicant’s contention in paragraph 5 of his affidavit is not generally in keeping with the requirements of the law. The burden is on him to prove that without disclosure of the material he will be prejudiced in presenting his case to the extent that the public interest in the administration of justice in general would be undermined. Having read the un-redacted report, and coming short of myself disclosing any of the material contained therein, I am not satisfied that the disclosure is necessary to enable the applicant to present his case. I come to that conclusion for two reasons.

[20] Firstly, I must observe that what is before the court is an application for judicial review. The court is not embarking on an investigation of the allegations against the applicant itself; but rather the manner in which the respondent went about conducting its affairs as it relates to their own investigation. That is in contrast to the task before the court in the ***Kaufman*** case which was a case in damages against the bank as discretionary manager of the claimant’s investments. The court felt that the documents which were withheld were necessary in order for the claimant’s case to be properly ventilated. However in the present case, what I am called upon to determine is whether disclosure of the redacted portions of the report is necessary to facilitate the claimant’s prosecution

⁷ See rule 28.14(7)

of the judicial review proceedings before the court. At paragraph 14 of his judgment in the **Asot** case, Barrow JA approved of the approach taken by the judge below where he reminded himself that ***“judicial review is concerned with the legality of the decisions of a public authority rather than the merits of a decision; with the jurisdiction of the decision-maker and the fairness of the decision-making process rather than whether the decision was correct.”*** It is within that context that the relevance of the disclosure to the applicant’s case must be considered. Having reviewed the documents I am not satisfied that he is so prejudiced so as to order disclosure of the redacted portions of the report.

[21] Secondly, even without revealing any detail of what was redacted from the report, I am in agreement with the respondents where it is argued that sufficient information has been disclosed to the applicant; at least in order to enable him to proceed with these judicial review proceedings. The main allegation which gave rise to the investigation was made by a Ghanaian national by the name of Geoff Nunoo. There was already an ongoing investigation initiated by the Nevis Financial Services Regulatory Commission which was based in substance on the same allegations. Every aspect of what Mr. Nunoo accused the applicant of was disclosed to him in full and was completely un-redacted. Further to this, the respondents also appeared to have based their decision on the content of a number of emails written to the Deputy Governor of the ECCB by the applicant himself. All of that information is available to him. In substance the nature of the allegations have been disclosed to the applicant, sufficient to allow him to advance his case in these judicial review proceedings; giving due regard to the specific declarations which he seeks. I am satisfied, having inspected the document myself, that the non-disclosure would not trouble the public interest in the administration of justice in any way. The applicant is well capable of advancing his case without the redacted material.

[22] It would be enough to dismiss the application on my findings thus far. However, in the event that I am wrong I would also consider the 2nd issue put forward by the applicant. That is whether the respondent is entitled to claim public interest immunity in the first place.

The claim for public interest immunity

[23] Counsel for the applicant argues that what is being claimed by the respondent is a right to withhold disclosure on the basis of a class-based claim. Counsel relied on Halsbury's Laws of England⁸ where it states that the immunity ***"... may arise because the document belongs to a particular class which on the grounds of public interest must as a class be withheld without production."*** The respondent's reliance on the case of ***D v. National Society for the Prevention of Cruelty to Children***⁹ therefore suggests that it is claiming immunity in relation to statements made to an investigative body in confidence sufficient to invoke a public interest in ensuring that the identify of persons providing such information remains undisclosed. In the case of ***D v. National Society for the Prevention of Cruelty to Children*** it was held that the identity of persons providing such confidential information regarding abuse of children was immune from disclosure as a class. This, according to counsel for the applicant, can be distinguished from the circumstances of the present case where the respondent seeks to claim immunity from disclosing information regarding evidence obtained during an investigation into the fitness and propriety of the applicant according to the Banking Act. Counsel further argues that, in any event, the identities of the interviewees were disclosed. Rather what was redacted were portions of their interviews. There can therefore be no basis for withholding the information.

[24] I do not agree with that submission. Merely disclosing that an individual was interviewed does not necessarily disclose to the applicant that this individual was the particular source of any of the information which was redacted from the report. Nor does it indicate that the information redacted is in any way relevant to the applicant's case or relates directly to him. As to the question of whether the attempt to invoke immunity was class based I note that in ***Kaufman*** the judge stated that the immunity can be claimed on the basis that the documents form part of a class which ought to be immune or alternatively that the documents in question ought to be immune from disclosure as a result of its content. According to the learned Judge ***"[t]he effect of the class-based immunity is that a document is immune from disclosure without reference to its contents, that is irrespective of the question whether disclosure of the contents of the document would be contrary to the public interest."*** As to whether the claim to immunity is class based I also refer

⁸ Volume 11 paragraph 574

⁹ [1978] AC 171

to the case of *Arawak Trust Company Limited v. Michael Holden* where Sir Vincent Floissac stated the following:

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 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.

[25] In that case, the Chief Justice came to consider a claim for immunity from a regulator not entirely dissimilar to the circumstances of the present case. Sir Vincent's conclusions are repeated here as a clear example of the conclusion which I myself have drawn in the present case where he states as follows:

In the present case, the statutory purpose with which we are concerned is the control of the banking and trust businesses in the Virgin Islands. Such control is necessary in the public interest in the preservation of the local and international integrity and reputation of these businesses. The respondent's statutory examination and investigatory functions constitute an integral part of that control.

The effective performance of these examination and investigatory functions must necessarily involve the Inspector's communication and exchange of information to and with persons who can assist him in his examinations and investigations. It is manifestly in the public interest of the nation and the public service that the Inspector should be able to impart and exchange such information in the performance of those functions and should be able to do so without fear or danger of involving himself or the supplier or recipient of the information in any undesired litigation or interrogation. In the present case, the harm which will be done to the nation and the public service by compulsory juridical disclosure of such information and of the identities of the suppliers or recipients thereof is greater than the harm which may be done to the administration of

justice by non-disclosure. For this reason, I would hold that in this case, the public interest which demands non-disclosure in the interest of the nation or the public service overrides the public interest which demands disclosure in the interest of the administration of justice.

[26] I am satisfied that the respondent is a regulator seized with the statutory duty to carry out investigations of the nature of that carried out against the applicant. That much is not in dispute. What this case seeks to do is to review the manner in which this investigation was carried out. Insofar as that is the case, persons providing information to the respondent in order to assist in the execution of the functions contained in the Banking Act should be able to transmit such information with immunity from disclosure of the sources and destination without fear of danger of harassment, intimidation or involvement in litigation. The public must have an interest in ensuring that those who direct the affairs of financial institutions are of utmost integrity and are fit and proper persons to carry out such functions. The respondent is seized with the statutory duty of ensuring that this is the case. The information is therefore of a class which is subject to the public interest immunity claimed by the respondent. Even if the names of all interviewees were disclosed, the redactions ensure that the source of specific information is not disclosed to the applicant. I am of the view that the public interest immunity claimed in this case is well founded.

[27] In the circumstances, I would dismiss the application with no order as to costs. The matter will proceed to further case management from hereon.

**Ermin Moise
High Court Judge**

By the Court

Registrar

