

-THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

CLAIM NO: ANUHCV 2004/0490

BETWEEN:

ASOT MICHAEL

Applicant/Claimant

And

**THE ATTORNEY GENERAL
THE DIRECTOR OF THE ONDCP
THE COMMISSIONER OF POLICE**

Respondent/Defendants

Appearances:

Mr. John Fuller for the Applicant/Claimant

Mr. Gerald Watt Q.C and Dr. David Dorsett for the Respondents/Defendants

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2007: October 18

2008: May 07
.....

JUDGMENT

[1] **Harris J.** This is the most recent of several applications by the Applicant/Claimant Mr. Asot Michael pursuant to the CPR 2000. The application filed October 22, 2007 purports to be pursuant to Part 28.14(5) of the CPR 2000 and seeks several orders including orders for the Respondents to provide standard disclosure, specific disclosure and further information. This application is supported by an Affidavit by Asot Michael.

- [2] This hybrid¹ application arises from an earlier request in writing dated 4th October, 2006 from the applicant to the respondent for further information. Further, by the said request the applicant sought specific disclosure of particular documents from the Respondent. The applicant does not stop here but alleges that the Respondents have failed even further, to satisfy the Court Order made by Justice Belle on the 24th January, 2005 for standard disclosure.
- [3] By application filed on January 29, 2007 the applicant sought an order of the court pursuant to Part 28 and 34 of the CPR 2000 “and/or inherent jurisdiction of the Court”² requesting the following orders³:
- “(i) The Defendants make standard disclosure pursuant to the provision of Part 28.4 of the CPR.
 - (ii) The Defendants make specific disclosure of the document(s) requested under clauses 7, 10 and 16 of the Claimants Request for further information filed on the 4th October, 2006.
 - (ii) The Defendants provide the further information requested by the Claimants Request for Further Information filed on the 4th October, 2006.
 - (iv) The proceedings against the Claimant are stayed pending the making of the orders sought herein by the Court and compliance therewith by the Defendants.”
- [4] The Claimant alleges that the Respondent have failed to comply with their duty for standard disclosure pursuant to Part 28 of the CPR 2000 and their obligation to provide the specific documents and further information requested on the 4th October, 2006.
- [5] The Court heard the application filed on January 29, 2007 and granted the relief applied for⁴ thereby committing the Respondents to comply with the Order within 21 days of the said order or otherwise provide written reasons⁵ for failing so to do.

¹ The request (Oct. 4, 2006) purports to be pursuant to Part 34 CPR 2000, but contains strong elements of Part 28 (disclosure and inspection of documents)

² Notice of Application filed January 29, 2007

³ for convenience it is set out here verbatim

⁴ See para 3 above

⁵ See Part 28.14 of CPR 2000

- [6] By document filed on the 28th September, 2007 the 1st and 2nd Defendants/Respondents, the Attorney General and the Director of the ONDCP respectively, provided its “reasons for withholding disclosure” of certain items requested by the Claimant as detailed in his request of 4th October, 2006.
- [7] Paragraphs 6, 7, 8, 14, 15 and 16 of the “reasons for withholding disclosure” suggest that the Respondents discharged their obligations in relation to the request of the 4th October on these items. On the other items the Respondent has submitted that: (i) That the information or document subject to public interest immunity¹ (ii) That disclosure of the documents/information would *damage the public interest* and therefore not be in the public interest of ensuring the proper administration of Justice² (iii) That disclosure of a particular letter “is likely to hinder ongoing investigation of serious crimes by ‘FIU Bermuda’ (iv) That certain information on the “relevance” of a particular agreement is a matter for the court and not for the Respondent to express an opinion on³ (v) That no further information can be supplied on a particular matter, and that what has been provided is precise and conclusive.

Claimant’s Submissions⁴

Disclosure and the CPR

“Part 28.4 of the CPR 2000 places a mandatory obligation on the Defendants, in light of Justice Belle’s Order for standard disclosure, to disclose “*all documents which are directly relevant to the matters in question in the proceedings*”. The final arbiter of what is or is not directly relevant is the Judge. Consequently, a party is obliged to disclose, under his obligation of general disclosure, documents which are directly relevant. A document is “directly relevant” if (a) the party with control of the document intends to rely on it, (b) it tend to adversely affect that party’s case; or (c) it tends to support another party’s case.”

“In answer to their obligation to disclose documents generally and the documents requested by the Claimant, the Defendants have sought refuge under Part 28.14 of the

¹ See para. 1 of the Grounds for withholding Disclosure filed September 28, 2007

² See para. 2 of the Grounds for withholding Disclosure filed September 28, 2007

³ See para 12 of the Grounds for withholding Disclosure filed September 28, 2007

⁴ This is a verbatim account taken from parts of the Claimant’s submissions of 22/10/07.

CPR. However, to avoid disclosure “**would damage the public interest**”. Those are clear words. Part 28.14 did not use words like “privilege” or the like. It is submitted that the words “**would damage the public interest**” impose a high threshold, which cannot be met by generalized statements or bald reliance on statements such as “investigations” are continuing or disclosure or the further information “is not in the public interest”.

“The Defendants must go further and establish that disclosure of the information “**would damage the public interest**”. Disclosure must therefore be made unless it would, not might, would damage the public interest. And there is therefore nothing in the Defendants’ Response which shows that disclosure of the documents and further information requested in the Request dated 4th October 2006 “**would damage the public interest**”.

“Further Information and the CPR

Part 34 of the CPR deals with requests and applications for further information. Part 34.2 of the CPR 2000 provides:

“An order may not be made under this rule unless it is necessary in order to dispose fairly of the claim or to save costs.

When considering whether to make an order, the court must have regard to -

- (a) The likely benefit which will result if the information is given;*
- (b) The likely cost of giving it; and*
- (c) Whether the financial resources of the party against whom the order is sought are likely to be sufficient to enable that party to comply with the Order.”*

The further information requested by the Claimant is clearly necessary to dispose fairly of the pleaded issues in this claim and will save costs. The Claimant’s case goes to the very core of the investigations established by the Executive Branch of Government and the validity of requests made by the Attorney General and/or unlawful receipt of information from Bermuda. Accordingly, his claim ought not to be thwarted or rendered nugatory simply because his requests affect the investigations and requests to and information from Bermuda.”

PRINCIPLES TO BE APPLIED ON ORDERING DISCLOSURE AND FURTHER INFORMATION

"It is respectfully submitted that in judicial review matters disclosure and further information, which is entirely and solely within the discretion of the court, should only be ordered in limited circumstances if it has been demonstrated that there has been a clear breach of the public body's duty of candor to the court and the justice of the case compels disclosure. Disclosure is generally unnecessary and rare. The words of Lord Woolf MR in *R v Secretary of State for the Home Department, ex parte Fayed* [1997] 1 All ER 228 at 239c-f are apropos:

On an application for judicial review there is usually no discovery because discovery should be unnecessary because it is the obligation of the respondent public body in its evidence to make frank disclosure to the court of the decision making process (see *R v Civil Service Appeal Board, ex p Cunningham* [1991] 4 All ER 310). If it does not, then usually this would be a reason for the court ordering discovery. However, if the giving of notice cannot be required, then for the same reasons it is said the respondent cannot be required to exercise the usual 'cards up approach' and what is more discovery cannot be required either since this would be open to the same objection that it could result in the identification of reasons. In practice thereof what the express prohibition on an appeal and review in s 44(2) does not achieve is achieved by the exclusion of a requirement to give reasons."

"The principles upon which disclosure would be ordered are well settled and was laid down in the House of Lords case of *Inland Revenue Commissioners v National Federation of Self-Employed and Small Business Ltd* [1981] 2 All ER 93. The following extracts from the speeches of their Lordships in *National Federation of Self-Employed and Small Business Ltd* convey the relevant principles:

Your Lordships can take judicial notice of the fact that the main purpose of the new Ord 53 was to sweep away these procedural differences including, in particular, differences as to locus standi, to substitute for them a single simplified procedure for obtaining all forms of relief, and to leave to the court a wide discretion as to what interlocutory directions, including orders for discovery, were appropriate to the particular case (per Lord Diplock at 102h).

¹ This is a verbatim and abridged account of the Defendants/Respondent's written submissions filed December 13th 2007.

On general principles, discovery should not be ordered unless and until the court is satisfied that the evidence reveals reasonable grounds for believing that there has been a breach of public duty, **and it should be limited strictly to documents relevant to the issue which emerges from the affidavits** [our emphasis]. The Revenue in any event will have the right in respect of certain classes of document to plead 'public interest immunity', of which in a proper case the court will be the arbiter: see *Burmah Oil Co Ltd v Bank of England* [1979] 3 All ER 700, [1980] AC 1090 (per Lord Roskill at 114d-e)."

"... no court, in my opinion, would consider ordering discovery against the Revenue in the hope of eliciting some impropriety (per Lord Wilberforce at 100h)."

"I would only add that counsel for the federation urged that something advantageous to his client might emerge on discovery. He submitted that your Lordships ought not to dispose of this appeal on the basis of the affidavit evidence alone. My Lords, the federation started these proceedings on the basis of an affidavit which was fully answered by the two affidavits to which I have just referred. With all respect to counsel's argument for the federation I can see no reason to allow what I am afraid I must necessarily regard as a fishing expedition in the hope of obtaining on discovery something which might counter that which appears so clearly from the affidavits filed on behalf of the Revenue (per Lord Roskill at 121e)."

"Another pertinent principle on the matter disclosure is that an application for discovery will not be granted unless there is a prima facie case for suggesting that an affidavit or other evidence was false, or at least inaccurate (*R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement Ltd* [1995] 1 All ER 611)."

"The Respondents in their affidavits have fully answered the Applicant. What the Applicant seeks now to do is to interject into these proceedings matters and documents that were not referenced or referred to in his original affidavit or in the affidavits of the Respondents. A case in point is with respect to Request 13 where the Applicant asks for details with respect to a "Special Task Force against Corruption and Organized Crime" and certain persons. There was no reference to this Special Task Force or to the persons named in the Respondents' affidavits. It is respectfully submitted that the Applicant is on a fishing expedition and has cast a wide net and let it down for a draught hoping that some evidence of mischief or some other objectionable matter may present itself. It is respectfully submitted that the Applicant has failed to show any prima facie evidence that the Respondents are engaged or have engaged in conduct that invites judicial review, to

wit, (1) illegality, (2) irrationality, or (3) procedural impropriety. The applicant, it is respectfully submitted, cannot engage the court to issue orders for further information and specific disclosure so as to help the Applicant gather evidence for a case he is unable to otherwise maintain.”

“The purpose of judicial review was well stated by Lord Hoffman in delivering the opinion of their Lordships of the Privy Council in *Kemper Reinsurance Co v Minister of Finance and Others* (1998) 53 WIR 109 at 119:

In principle, however, judicial review is quite different from an appeal. It is concerned with the legality rather than the merits of the decision, with the jurisdiction of the decision-maker and the fairness of the decision-making process rather than whether the decision was correct. In the case of a restriction on the right of appeal, the policy is to limit the number of times which a litigant may require the same question to be decided. The court is specifically given power to decide that a decision on a particular question should be final. There is obviously a strong case for saying that, in the absence of express contrary language, such a decision should itself be final. But judicial review seldom involves deciding a question which someone else has already decided. In many cases, the decision-maker will not have addressed his mind to the question at all”.

CPR 2000

- [8] Part 28.14 sets out clearly what the party objecting to the disclosure of the documents is required to do to attract the protection offered therein. To this end the Respondents/Defendants herein, in claiming their right to withhold disclosure or inspection 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 document¹.”
- [9] Further, “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 or duty is claimed.”

¹ Part 28.14 (1) CPR 2000

- [10] Has the document filed by the Respondents on September 28, 2007 and captioned “Grounds for withholding Disclosure Pursuant to CPR 28.14(1)” together with the “Affidavit in Response” filed on December 13, 2007 by Justin L. Simon QC the Attorney General satisfied Part 28.14? I am inclined to the view that it does satisfy CPR 28.14 91) by showing they have a right/duty to withhold disclosure and the ground for that right.
- [11] The parameters of these rights, duties and grounds for their exercise, are affected by rules that include those peculiar to judicial review matters.
- [12] The determination as to whether there has been compliance with any duty under the CPR the Court must consider the nature of the substantive action. In this case it is one of judicial review the of the executives decision to investigate the conduct of certain public officials.
- [13] I am unable to find sufficient grounds for not granting an order permitting the Respondent/Defendants not to disclose the documents and/or to provide the information referred to in the Claimant/applicant’s *request for further information*¹ filed on October 4 2006 or not contained in the Defendant/Respondent’s List of Documents filed on October 2007. The claim that disclosure of the existence of certain documents or the detailed information requested, would damage the public interest is made out.
- [14] To the extent that certain items of request by the Claimant fall under Part 34 as requests for information, I have viewed the request and objections to the provision of the information requested, also in the light of the substantive action, Judicial Review. With respect to requests No’s 1-5, 7-12, 14, and 17 the court grants the order permitting the defendant/Respondent not to disclose the existence of the documents referred to on the grounds provided seriatim, by; the said Defendant/Respondent in it’s document “Grounds for withholding Disclosure pursuant to CPR 28.14 (14)”, and the grounds set out below.

¹ See para. 2 on *hybrid application*

- [15] On the facts before me, I am unable to glean the likely benefit to the Claimant's Judicial Review application which will result if the information is provided. The Respondent/Defendant's in their '*grounds for withholding ...*' have already complied with requests no's 6, 15, and 16. This court order recognizes this and is hereby limited to that information so provided by the Defendant/Respondent in relation to these three (3) requests.
- [16] The Claimants in his application for leave to file for judicial review filed a seventy-eight (78) paragraph Affidavit in Support. The Claimant further filed a 45 paragraph Affidavit in Reply in the application for leave. Further, the Claimant filed a thirty-eight (38) paragraph amended fixed date Claim Form dated December 2, 2004 and a further re-amended fixed date claim form filed October 18, 2006 of 56 paragraphs. The facts have been comprehensively ventilated in this matter.
- [17] I am unable to agree with the Claimant that any of the documents and/or further information, are not either damaging to the public interest, contrary to the public interest of ensuring the proper administration of justice or contrary to public interest immunity. I am not satisfied that the information (or the documents for that matter) is required to dispose fairly of the Judicial Review application and its constituent elements of, illegality, irrationality a procedural impropriety or any other basis. Further, in relation to the same documents I am unable to glean that they are '*directly relevant*' i.e. that they tends to support the claimants case.¹ Even if I accept that the executive harbored a feeling that a certain suspect or class of suspects should be prosecuted, this is not sufficient to establish a realistic prospect of success on the claim for judicial review.² The documents and information requested must relate to the substantive cause and proof of it.

¹ See part 28.1(4)(c) for definition of , "directly relevant" under the CPR 2000.

² See Lord Bingham and Cornwall in the The Honourable Satnarine Sharma v The Deputy Director of Public Prosecutions et al [2006] UKPC 57 ('*Sharma*' case) at para 14 (2)

- [18] Even before applying the CPR 2000¹ and disposing of the matter under the CPR, the Court is of the view that in the context of the nature of the substantive matter - the exercise of the application for disclosure and request for further information are in the nature of a fishing expedition and on this additional ground alone the court may order that the Respondent or any of them are not required to disclose the existence of any further document or information referred to in the Claimants application of 8th October, 2007.
- [19] I accept further, that the decision to and the act of investigating a citizen of Antigua and Barbuda is one for the executive branch of Government. The Claimant has already obtained leave to bring his Judicial Review action and I do not wish to confuse the considerations on such an application with those relevant to the application before me now.² However, contrary to the claimant's earlier submissions dated Feb. 5 2007 at para. 19 thereof, that imply³ the subject investigations are "...instigated ... due to the political standing of the individual...", the Claimant herein did in-fact hold a public office, that of a Minister of Government. This fact I believe, in the context of the substantive Judicial review matter and the specific allegations therein, impacts on and calls into question, the fundamental issue of the relevance of the information and documents requested in relation to this person holding the *public office*⁴ referred to by the claimant and Defendants in this application. (See the **Sharma** case and para. 17, footnote 2 above)
- [20] Keeping the focus, I need only briefly refer to Lord Hoffman in the earlier and oft cited case of **Kemper**, where his Lordship took pains to point out that Judicial Review was concerned with the legality rather than the merits of the decision. Judicial review he said, was concerned with the decision making process rather than whether the decision was correct. The documents and information requested or referred to in this application may, taken at its highest, shed light on the *process* referred to by Lord Hoffman only if the contents turn

¹ Part 28.14(2) does not exclude other grounds for a claim of right to withhold disclosure or inspection. It provides an additional ground and a procedure for pursuing it.

² Albeit there is some overlap between the two. See the case of **Satnarine Sharma** (PC Appeal No. 75 of 2006, Trinidad and Tobago) for learning on the *exceptional remedy* of judicial review of a prosecutorial decision, as opposed to this case, which appears to be a decision to investigate.

³ The paragraph actually deals with a larger issue.

⁴ This is not in the sense of "a *public office in the public service*" referred to in the Civil Service Act of Antigua and Barbuda.

up information relevant to the process as opposed to the correctness of the decision. There is nothing in the claimant's application, taken in its entirety, or more specifically, in the *request* filed on behalf of the claimant, that suggests the contents of the documents and information requested are known to the claimant or even remotely likely to reveal substance in support of the claimant's case. The "*fishing*" nature of the claimant's application and request thereto is self evident.

[21] I wish to convey my appreciation to counsel for their industry and the provision of the written submissions and case law thereto which provided a wide legal backdrop to the matter. For the reasons given and referred to above I make the following order:

ORDER

[22] **IT IS HEREBY ORDERED THAT:**

- (1) The Defendants and each of them are permitted not to disclose the document(s) or existence of it referred to in paragraphs 1- 5, 7-12, 14, and 17 of the Claimant's "REQUEST FOR FURTHER INFORMATION PURSUANT TO PART 34 of the CPR 2000"¹.
- (2) The response provided by the Defendants to the Claimant in relation to the Claimant's requests no's 6, 15, and 16 are hereby held to have satisfied the request.
- (3) The Defendants and each of them are not required to provide the information requested by the Claimant in his request filed on October 4, 2006 and therefore the application for an order compelling the Defendants to give the information requested is hereby dismissed.
- (4) That costs in favour of the Defendants to be assessed under the CPR 2000 unless otherwise agreed between the parties within 14 days of this order.

David C. Harris
Judge
The High
Court of Justice
Antigua and Barbuda

¹ The application/request even though initially brought under part 34 of the CPR 2000, did include requests for document disclosure and inspection, properly applied for under part 28 of the CPR 2000.