[2020] JMSC Civ 37

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015HCV05030

BETWEEN	**GEORGE NEIL**	**CLAIMANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**1ST DEFENDANT/ APPLICANT**
AND	**OFFICE OF UTILITIES REGULATION**	**2ND DEFENDANT**
AND	**SPECTRUM MANAGEMENT AUTHORITY**	**3RD DEFENDANT**

IN CHAMBERS

Ms. Althea Jarrett, Deputy Solicitor General and Ms. Apryl July instructed by the Director of State Proceedings for the 1st defendant/ applicant.

Ms. Kaydian Wood for the 3rd defendant.

Mrs. Kaydian Smith-Newton, Legal Officer, Ministry of Science Energy and Technology present.

8 January and 6 March 2020

Claim of Public Interest Immunity – Duty of the court to balance competing aspects of the public interest in the administration of justice versus limiting disclosure to preserve national security – Minister's Certificate should be given significant weight but is not conclusive – Three stage test to determine effectiveness of Certificate, relevance of documents sought to be withheld and whether documents if relevant should not be disclosed to avoid substantial harm to the public interest

D. FRASER J

THE APPLICATION

[1] On 23 October 2019, the 1st defendant filed an ex parte application seeking, amongst others, the following court orders, that:

(1) The defendant be permitted not to disclose the existence of letter dated February 18, 2003 from the then Minister of National Security Peter Phillips to the then Minister of Commerce and Technology Phillip Paulwell. [During the hearing of the application, it was conceded that the existence of the letter was already disclosed by the 2nd defendant in its list of documents filed on October 11, 2019. Thus, counsel stated that the application was being amended for the defendant to be permitted to withhold disclosure of the letter or at least to withhold disclosure of bullet point 2 of that letter.]; and

(2) The defendants be permitted not to disclose the names and signatures of the authors of the following documents: -

(a) Letter dated June 16, 2014 from the Jamaica Constabulary Force to the Office of Utilities Regulations.

(b) Letter dated January 2, 2015 from the National Intelligence Bureau to the Office of Utilities Regulations.

(c) Letter dated January 21, 2015 from the National Intelligence Bureau to the Office of Utilities Regulations.

(d) Letter dated April 17, 2015, from the National Intelligence Bureau to the Office of Utilities Regulations.

(e) Letter dated February 28, 2017 from the Office of Utilities Regulations to the Commissioner of Police.

(f) Letter dated March 28, 2017 from the Jamaica Constabulary Force to the Office of Utilities Regulations.

(g) Letter dated April 4, 2017 from the Jamaica Constabulary Force to the Office of Utilities Regulations.

(h) Letter dated March 27, 2017 from National Intelligence Bureau to the Deputy Commissioner of Police.

[2] The grounds on which the orders were sought may be summarised as follows:

i) By virtue of rule 28.15(2) of the Civil Procedure Rules (CPR) the Attorney General was exercising her right and duty to seek the court's permission, *ex parte*, not to disclose certain information on the basis that such disclosure would damage the public interest;

ii) The correspondence from the Jamaica Constabulary Force (JCF), particularly the National Intelligence Bureau contains sensitive national intelligence findings in relation to the claimant and it was feared that disclosure of the names and signatures of the members of the JCF signing to those findings, would put their lives and that of their family members in danger; and

iii) The aforesaid letter dated February 18, 2003 contained secret and confidential matters involving the national security of Jamaica that in the public interest should not be disclosed.

[3] The application was supported by affidavits of Marlene Aldred, Solicitor General and Maria Myers-Hamilton, Managing Director of the Spectrum Management Authority.

THE SUBMISSIONS

[4] In support of the application, counsel made the following submissions, that:

(1) Given the 1st defendant's role as guardian of the public interest the Attorney General has the duty and the right to bring this application in light of what is accepted as the Attorney General's unique responsibility in this area of the law. (See ***R v Chief Constable of West Midlands Police Ex parte Wiley*** [1995] 1 AC 274 per Lord Bridge of Harwich at page 287 and **Disclosure 5th Ed.** by Paul Matthews and Hodge M Malek Q.C para.12.18);

(2) A person may object to the disclosure or inspection of a document, a class of documents or part of a document on the ground of public interest immunity. It involves the balancing of two competing aspects of the public interest – a) the public interest in the proper administration of justice by making all relevant materials available to all parties to litigation; and, b) the public interest in withholding and not releasing information which could be harmful to the State and the public service if disclosed. (See ***Al Rawi and others v Security Services and others*** [2012] 1 All ER 1 at paras. 140 to 143 per Lord Clarke SCJ and ***R v Chief Constable of West Midlands Police Ex p. Wiley*****,** supra**,** (pp. 296 and 298)**;**

(3) The threshold test for when public interest immunity may be claimed is whether the disclosure will cause *'substantial harm'* to the public interest. **(*R. v Chief Constable Ex p. Wiley*****,** supra**,** (p. 281);

(4) The Minister's Certificate is not conclusive and it is for the court to perform the balancing exercise and make a final determination on whether a claim for public interest immunity is to be upheld. (See ***R v Chief Constable Ex p. Wiley*****,** supra**,** (p. 296 -297);

(5) In **Disclosure 5th Ed.** by Paul Matthews and Hodge M Malek Q.C, the learned authors identify national security as a category of public interest immunity;

(6) The application by the 1st defendant for this court to uphold the Minister's claim of public interest immunity in withholding the names and signatures of the members of the JCF who signed the letters/intelligence reports listed at items (a) to (h) of the notice of application is well founded, meritorious and supported by authority;

(7) There is no request to have the designations removed, only the names of the JCF members. Further, given that the identities of the large number of officers from various arms of the JCF involved in preparing the reports have not been disclosed, it is reasonable to seek to protect the senior officers who were the signatories to the letters/intelligence reports and who in any event would not necessarily have themselves been involved in the investigations;

(8) The just determination of the claimant's claim for constitutional redress does not necessitate the disclosure of the names and signatures of the JCF members who signed the letters/intelligence reports;

(9) While the Minister did not explicitly say that the disclosure of the letter of February 18, 2003 would harm the public interest, he did say that it is a secret and confidential letter containing secret and confidential matters involving the national security of Jamaica. The fact that the letter is so described, is sufficient to enable the court to place significant weight on the Minister's certification that it is in the public interest that disclosure be withheld for such a secret and confidential letter. There is value in the long line of authorities in placing some weight on a ministerial certification that it is private, confidential and relates to national security;

(10) The court is invited to adopt the following three stage process outlined in **Disclosure 5th Ed.** by Paul Matthews and Hodge M Malek Q.C page 415 at para. 12.21; and

(11) The court is further invited to view the documents in making the aforementioned determinations and to rely on the dicta of Lord Clarke in ***Al***

Rawi, supra*,** at para. 145(iii) and the case of ***Major General Antony Anderson, Chief of Defence Staff, Jamaica Defence Board v Independent Commission of Investigations [2018] JMFC Full 4 (see para. 176).

ANALYSIS

[5] Rule 28.15 of the CPR governs the procedure to be adopted when a claim of right to withhold disclosure or inspection of a document is to be made. Paragraphs 1, 2, 3, 6 and 7 provide:

> (1) A person who claims a right to withhold disclosure or inspection of a document, class of document or part of a document must –
>
> (a) make such claim for the document; and
>
> (b) state the grounds on which such right is claimed, in the list or otherwise in writing to the person wishing to inspect the document.
>
> (2) A person may however apply to the court, without notice, for an order permitting that person not to disclose the existence of a document on the ground that disclosure of the existence of the document would damage the public interest
>
> (3) A person who applies under paragraph (2) must –
>
> (a) identify the document, documents or parts of documents 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 such right or duty is claimed.
>
> (4) …
>
> (5) ...
>
> (6) On hearing such an application the court must make an order that the document be disclosed unless it is satisfied that there is a right to withhold disclosure.

> (7) Where a person –
>
> (a) claims a right to withhold inspection; or
>
> (b) applies for an order permitting that person not to disclose the existence of, a document or part of a document, the court may require the person to produce that document to the court to enable it to decide whether the claim is justified.
>
> (8) …

[6] I accept that as guardian of the public interest the 1st defendant has the duty and the right to make this application. (See ***R v Chief Constable of West Midlands Police ex parte Wiley*** [1995] 1 AC 274 per Lord Bridge of Harwich at page 287 and **Disclosure 5th Ed.** by Paul Matthews and Hodge M Malek Q.C para.12.18). It is also self-evident that it was appropriate to make this application *ex parte* as its purpose would be automatically defeated if the hearing was *inter-partes*.

[7] Public interest immunity is a ground for refusing to disclose a document which is relevant and material to the determination of issues involved in civil or criminal proceedings. A claim to public interest immunity can only be justified if the public interest in preserving the confidentiality of the document outweighs the public interest in securing justice. (Per Lord Templeman in ***R v Chief Constable Ex p. Wiley*** at p. 280).

[8] Paul Matthews and Hodge M Malek Q.C. learned authors of **Disclosure 5th Ed.** state at page 415 para. 12.26 that:

> A document may attract public interest immunity where it contains information relating to a method or technique in current or future operations, or the identity or appearance of current or former members of the security and intelligence services, so that disclosure could put the individual in danger or impair his ability to operate efficiently.

[9] The affidavit of the learned Solicitor General exhibited the Certificate of the Minister of National Security dated 17th October 2019 which provided the substantive grounds on which the orders were sought. In the Certificate he states that after reviewing the letters, which now form the subject matter of this application, he

concluded that the names and signatures of the authors of the letters referred to at paragraph [1] (2) (a) – (h) and the letter dated February 18, 2003 referred to at paragraph [1] (1) should not be disclosed on the basis of public interest immunity. The basis of his conclusion in relation to the names and signatures was fear for the lives of the signing officers and their families due to the sensitive national intelligence findings contained in the letters. The basis of his conclusion in relation to the letter of February 18, 2003 was that it was a secret and confidential letter containing secret and confidential matters involving the national security of Jamaica.

[10] In the affidavit of Maria Myers-Hamilton it was indicated that all Domestic Mobile Spectrum Licences issued are *"generally subject to terms and conditions imposed by or under the spectrum licence, any provision of the Act, [Telecommunications Act, 2000], any regulations made thereunder and to the Laws of Jamaica."* Her affidavit also stated that *"The Telecommunications Act imposes an obligation of secrecy with respect to "all confidential information relating to applicants and applications for spectrum licences, and the management and operation of spectrum licensees"."* The significance of this affidavit, is that it showed that none of the information sought to be withheld from disclosure in relation to the letter of February 18, 2003, would be evident on the face of any licence granted.

[11] The leading authorities in this area make it clear that while the courts should and do show due regard to the determination of the executive when a claim for Public Interest Immunity (PII) is made, it is the court which has the final responsibility to determine whether that claim should be upheld. (See ***R v Chief Constable Ex p. Wiley*** p. 296 and ***Al Rawi and others v Security Services and others*** para. 142). In some circumstances such as in ***Balfour v Foreign and Commonwealth Office*** [1994] 2 All E R 588 where the appropriate certificate of the Minister had set out particulars of the nature and content of the material attracting immunity and the reasons for the claim that demonstrated an actual or potential risk to national security, the court effectively treated the certificate as conclusive. In the instant case whilst the Certificate issued by the Minister of National Security should be

accorded significant weight and a court should not lightly decline to honour its import, it is not conclusive of the question of immunity from disclosure. That has been readily acknowledged by the applicant, which, in light of the guidance offered by the authorities, has invited the court to view the documents to make the appropriate determination.

[12] It should be bourne in mind at this point, that in applications claiming PII, it is not that there is a conflict between two different public interests. Rather the court is engaged in balancing two different aspects of the public interest: one which reflects the requirements of the administration of justice and the other national security aspect of the interest which militates against disclosure. In instances where the latter aspect outweighs the former, then it is inevitable that the preservation of the document should follow so as to protect what has been held to be the dominant public interest. Where the determination is made in the reverse, then it is the public interest which requires disclosure. In the regard I adopt the observations of Lord Woolf in ***R v Chief Constable Ex p. Wiley*** at p. 298.

[13] Though in ***Al Rawi and others v Security Services and others*** Lord Clarke ended up in the minority in the outcome of the appeal, his summary of the law as it relates to PII is clear and accurate and provides the court with a roadmap to the resolution of this application. At paragraphs 144 – 145 he stated:

> **[144]** It is common ground that the current state of the law on what is now called PII is set out in R v Chief Constable of West Midlands Police, ex parte Wiley [1995] 1 AC 274. In that case, the House of Lords held that there was no justification for a claim for immunity for the entire class of documents generated by an investigation into a complaint against the police.
>
> **[145]** I would accept the submission made by Ms Rose that the following principles correctly state the approach to PII as it has stood until now:
>
> "i) A claim for PII must ordinarily be supported by a certificate signed by the appropriate minister relating to the individual documents in question: Duncan v Cammell Laird per Viscount Simon at p 638.

ii) Disclosure of documents which ought otherwise to be disclosed under CPR Part 31 may only be refused if the court concludes that the public interest which demands that the evidence be withheld outweighs the public interest in the administration of justice.

iii) In making that decision, the court may inspect the documents: Science Research Council v Nassé at pp 1089-1090. This must necessarily be done in an ex parte process from which the party seeking disclosure may properly be excluded. Otherwise the very purpose of the application for PII would be defeated: see the Court of Appeal judgment at para 40.

iv) In making its decision, the court should consider what safeguards may be imposed to permit the disclosure of the material. These might include, for example, holding all or part of the hearing in camera; requiring express undertakings of confidentiality from those to whom documents are disclosed; restricting the number of copies of a document that could be taken, or the circumstances in which documents could be inspected (eg requiring the Claimant and his legal team to attend at a particular location to read sensitive material); or requiring the unique numbering of any copy of a sensitive document.

v) Even where a complete document cannot be disclosed it may be possible to produce relevant extracts, or to summarise the relevant effect of the material: Wiley at pp 306H-307B.

vi) If the public interest in withholding the evidence does not outweigh the public interest in the administration of justice, the document must be disclosed unless the party who has possession of the document concedes the issue to which it relates: see Secretary of State for the Home Department v MB [2007] UKHL 46, [2008] AC 440 per Lord Hoffmann at para 51."

The Three Stage Test

[14] The three stage process outlined in **Disclosure 5th Ed.** by Paul Matthews and Hodge M Malek Q.C at para. 12.21, based on dicta from Bingham J as he then was in ***Air Canada v Secretary of State for Trade No. 2*** [1983] 1 All E.R. 161 at 165 -166, commends itself to the court. It requires that in considering whether PII applies a judge should:-

(1) satisfy himself from the certificate/affidavit/witness that:

(a) the class of documents concerned is capable of attracting the immunity;

(b) there is no reason to believe that the actual documents do not fall within the class aimed; and

(c) both the documents and the claim have been properly considered by an appropriate person;

(2) determining whether there is a public interest in production by reason of both:

(a) relevance to matters in question, and

(b) necessity for disposing fairly of the case;

(3) balancing the public interest in withholding the document against the public interest in producing them.

The Letters/ Intelligence Reports

[15] The Minister's Certificate indicates that his basis for claiming public interest immunity in respect of the identity of the signatories to these letters is that they contain sensitive national intelligence findings in relation to the claimant and it is feared that disclosure of the identities of the members of the JCF signing to those findings would put their lives and the lives of their family members in danger. From those assertions it is clear to the court that, though he did not use the particular phrase the Minister was of the view that the identity disclosure if not prevented, would cause "substantial harm to the public interest", which is the test for a finding of PII.

[16] I have reviewed the letters/intelligence reports. They do indeed contain sensitive national intelligence findings in relation to the claimant and related interests. I am satisfied from the Ministerial Certificate that these letters/intelligence reports are capable of attracting PII and that the Minister has properly considered them and the claim in which disclosure is sought to be withheld.

[17] The next consideration for the court is therefore whether there is public interest in the production of the documents by reason of relevance and the necessity for disposing fairly of the claim. These letters/intelligence reports are clearly relevant given that they form the foundation of the designation that is at the fulcrum of the constitutional challenge brought by the claimant. However this application is specific to seeking leave to withhold disclosure of the identities of the signatories and not the documents themselves. So the question at this stage is really narrowed to whether the identities of the signatories is relevant to the claim, it being acknowledged that the contents of the documents themselves are.

[18] My ruling on this second stage of the process is necessarily cautious as the full extent and details of the case being advanced by the claimant will not be known until all the evidence is filed for the hearing; a process which is obviously not yet complete. However, the court notes that the claimant's claim is for constitutional redress in the form of damages and declarations on the basis that the designation that he is "a person with an adverse trace" is a breach of his constitutional right to freedom of association guaranteed under section 13(3) (e) of the Constitution and his right under section 13(3)(h) to equitable and humane treatment by any public authority in the exercise of their functions.

[19] Based on the pleadings and other information available to the court at this time, I agree with the submission of the applicant that the just determination of the claim does not require the disclosure of the names and signatures of the JCF members who signed the letters/intelligence reports. The question seems to be whether by ascribing that designation to the claimant based on intelligence, it has resulted in a breach of the claimant's constitutional rights as indicated. If this conclusion is correct then there would be no need to balance any competing aspect of the public interest as there would be no public interest in the disclosure of the identities.

[20] In the event that the nature of the claim turns out to be such that a plausible argument can be made that the identities of the signatories have some relevance, I will go on to consider the third aspect of the process: balancing of the different

aspects of the public interest that would then arise. As the contents of the reports themselves are not sought to be withheld, it will be observed by those who peruse them that not all the information they contain nor is every report adverse. However in respect of all the letters I find that the fear that disclosure of the identity of the members of the JCF who signed to those findings could place the lives of those officers and their family members in danger is a legitimate one. This is not a case where as contemplated by ***Al Rawi and others v Security Services and others,*** *"safeguards may be imposed to permit the disclosure"* of the identities. I wish to stress that this finding is not because the court has formed a view one way or another as to the cogency of the information in the various reports as it relates to the claimant.

[21] My finding is based on the fact that the nature of the work of the intelligence services is such that, if the identities of the officers within those services are disclosed, in the words of Paul Matthews and Hodge M. Malek Q.C. the learned authors of **Disclosure 5th Ed**. cited earlier, *"that disclosure could put the individual in danger or impair his ability to operate effectively."* The concern is therefore of general application as a recognised occupational hazard and is not specifically related to, or to be taken as a commentary on the claimant in particular. It also requires no great stretch of principle to appreciate that the fear quite legitimately can extend to the family members of such JCF members. In the context of that recognised occupational hazard, it is clear to me that if disclosure of the identities of the signatories to those letters/intelligence reports is not withheld, substantial harm to national security would result. Therefore the aspect of the public interest that should prevail is that related to national security.

The Letter of February 18, 2003

[22] The application as now framed is for the defendant to be permitted to withhold disclosure of this letter or at least to withhold disclosure of bullet point 2 of that letter.

[23] I have reviewed the letter. It is labelled as "SECRET" and relates to national security considerations being shared by the Minister of National Security with a colleague Minister who had responsibility for telecommunications. In ***R v Chief Constable of West Midlands Ex p. Wiley*** Lord Templeman stated at page 281 that *"As a general rule the harm to the public interest of the disclosure of whole or part of a document dealing with defence or national security or diplomatic secrets will be self-evident."* I am satisfied from the Ministerial Certificate that this letter is capable of attracting PII and that the Minister has properly considered it and the claim in which disclosure is sought to be withheld.

[24] It does appear that some aspects of the letter may be relevant to the claim in terms of being supportive or explanatory of some of the actions of the authorities in relation to the claimant. To that extent the need for the balancing act between different aspects of the public interest does arise. I do not however consider that the entire letter needs to be withheld from disclosure as the information it contains, apart from that in bullet point two, though sensitive, reflects a common sense approach to the issues raised and at this point is already in the public domain.

[25] In relation to bullet point two, it contains general information which I do not find to be relevant to the claim. Further even if it was, apart from the general statement just quoted from ***Ex p. Wiley***, I would again rely on an extract from **Disclosure 5th Ed**. at page 415 para 12.26 cited earlier, where it is stated in relation to national security that, *"A document may attract public interest immunity where it contains information relating to a method or technique in current or future operations.* That is precisely the information that is captured in the second bullet point. Therefore for the reasons that the information in bullet point two is not relevant to the claim and if it was disclosed substantial harm to national security would result, I am impelled to hold that disclosure of bullet point two of this letter should be withheld.

DISPOSITION:

[26] In the premises the court makes the following orders:

(1) The defendants are permitted to withhold disclosure of the names and signatures of the authors of the following documents:-

(i) Letter dated June 16, 2014 from the Jamaica Constabulary Force to the Office of Utilities Regulations.

(ii) Letter dated January 2, 2015 from the National Intelligence Bureau to the Office of Utilities Regulations.

(iii) Letter dated January 21, 2015 from the National Intelligence Bureau to the Office of Utilities Regulations.

(iv) Letter dated April 17, 2015, from the National Intelligence Bureau to the Office of Utilities Regulations.

(v) Letter dated February 28, 2017 from the Office of Utilities Regulations to the Commissioner of Police.

(vi) Letter dated March 28, 2017 from the Jamaica Constabulary Force to the Office of Utilities Regulations.

(vii) Letter dated April 4, 2017 from the Jamaica Constabulary Force to the Office of Utilities Regulations.

(viii) Letter dated March 27, 2017 from National Intelligence Bureau to the Deputy Commissioner of Police.

(2) The defendants are permitted to withhold disclosure of the information contained in the second bullet point in the letter dated February 18, 2003 from the then Minister of National Security Dr. Peter Phillips to the then Minister of Commerce and Technology Mr. Phillip Paulwell.