IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. 486 OF 2011

BETWEEN:

THE ATTORNEY GENERAL

Plaintiff

AND:

MARTIN BRIDGER

Defendant

Appearances:	Mr. Martin Griffiths Q.C. and Mr. Douglas Schofield of Attorney General's Chambers for the Plaintiff Mr. Paul Murphy of Stuarts Walker Hersant for the Defendant
Before:	Hon. Justice Richard Williams
Heard:	12th July 2013
Draft Judgment circulated:	30th July 2013
Written Submissions:	3rd August 2013, 15th August 2013, 16th August 2013 & 19th August 2013
Date of Judgment:	21st August 2013

JUDGMENT

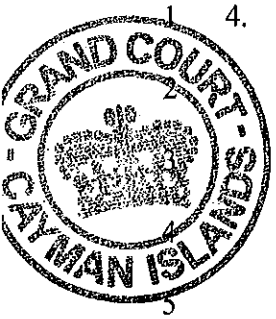
Application

1. I have before me the Defendant's Summons dated and filed on 22nd March 2013. In the Summons the Defendant seeks leave to adduce in evidence his third affidavit and exhibits sworn on 16th November 2012. However, although not

mentioned in the Summons, the Defendant is also seeking leave to file the Affidavit of Lord Ian Blair sworn on 23rd October 2012. It appears that both affidavits were served on the Plaintiff on 20th November 2012. At the outset of the hearing Mr. Murphy made an oral application to amend the Defendant's Summons to permit the Court to also consider admitting the Blair affidavit. Mr. Griffiths Q.C., commendably and not for the first time in these proceedings, took a pragmatic view and did not oppose the amendment. I gave leave to amend and will also consider whether to admit the Blair affidavit.

2. The relevant proceedings primarily concern an application brought by Originating Notice of Motion by the Attorney General for an order restraining Martin Bridger permitting any party in Cause No. 255 of 2009 ("the Kernohan proceedings") to inspect or take copies of any documents referred to in his disclosure list in those proceedings dated 19th of October 2011, without the Attorney General's written consent.

3. The Attorney General submits that the said documents are subject to legal professional privilege. Mr. Bridger now submits that Mr. Kernohan should have the opportunity to inspect the documents. Mr. Bridger is of the view that if the Attorney General succeeds in his application concerning the documents it will have "*far-reaching consequences*" on his ability to successfully defend the misfeasance of office claims brought by Mr. Kernohan against him and the Second Defendant and the Second Defendant's Contribution Notice.



4. It is contended that the issue I will have to determine, after I have resolved the issues concerning additional affidavit evidence, is whether Mr. Bridger should be allowed to disclose to Mr. Kernohan, in the separate Kernohan proceedings, documents which are contended to be legally privileged and over which privilege has not been waived.

5. The factual background in relation to the Kernohan proceedings is set out in a ruling delivered by me on 27th January 2012. With that in mind, I do not intend to rehearse the same again herein.

Chronology Relevant to the Summons Before the Court

6. When considering the Summons before me it is important to have regard to the chronology of events in order to put matters into context. Due to some inaccurate representations made in attorney correspondence and apparently in the media[1] concerning the reasons for the delay in the hearing of this matter, correspondence was sent, on my instructions, from the Clerk of the Court to the parties' attorneys on 25th March 2013 ("the March letter"). That letter set out a chronology prepared by me from the papers in the Court file.

7. Having carefully considered the further written submissions filed by the Defendant's attorneys dated 16th August 2013, the Court is still of the view that it is important to understand at this stage why there has been such a delay in these

[1] For clarification – The representations to the media have not been made by the attorneys representing Mr. Bridger or the attorneys representing the Attorney General.

proceedings. It is necessary to set out the reasons for the delay on the record for the purposes of this and the related substantive judgment on the privilege issues that will follow. One has to be aware of the sequence of events in order to put the current state of affairs into context and "to give full effect to the ruling." Accordingly, I make substantial reference to the content of that chronology herein, but at the same time have regard to the written submissions received from the parties following the circulation of the draft judgment.

8. The relevant chronology commences prior to the September hearing. In order to enable the Plaintiff to properly prepare for the privilege hearing the Defendant was required to set out in affidavit evidence:

(i) the basis for disputing the Plaintiff's claim that the relevant documents were privileged;

(ii) the basis that the Defendant contends that the privilege had been waived or lost; and

(iii) any facts relied upon in opposition to the Plaintiff's Notice of Originating Motion. With this in mind, at paragraph 4 of my written ruling delivered on 27th January 2012 in the application by Mr. Kernohan to be joined to these proceedings I stated:

> *"At this stage, on the papers before me, I have no particularised written submissions or evidence from Mr. Bridger to counter the contention that the documents are privileged, or why any privilege has been waived, these will need to be filed and served well in advance of the hearing of the Originating Motion"*

At paragraph 27 therein I stated:

> *"It will be for Mr. Bridger to have the Court take into account any facts which tend to suggest that there never was a privilege, or to contend that, if ever there was privilege, there are facts which mean that it has been lost. He will need to file affidavit evidence that prove those facts."*

9. Despite this clear indication, the Defendant did not file any such evidence. As a consequence, a Summons was filed by the Plaintiff on 20th April 2012 seeking orders in relation to the filing of such affidavit evidence. The Summons was issued with a hearing date of 10th August 2012. On 8th August 2012 the parties reached a Consent Directions Order. The Order provided that, in preparation for the hearing due to commence on 11th September 2012, the Plaintiff file further evidence by or on 13th August 2012. The Order provided that the Defendant was to file his evidence addressing the above issues by 24th August 2012. Finally, the Order provided that the parties thereafter could file any additional evidence upon which they intended to rely at the hearing by 31st August 2012.

10. The Plaintiff filed his evidence, complying with the time limits set out in the consent order. Regrettably, the Defendant did not file and serve his evidence until 28th August 2012, four days after the due date. Despite this, the Plaintiff still ensured that he filed his additional evidence on 31st August 2012, the due date set out in the Consent Order. That was not the end of the Defendant's non-compliance with the Consent Order. The Defendant failed to file any additional

evidence by 31st August 2012, and the Plaintiff was entitled to attend September's privilege hearing with the expectation of receiving no further affidavit evidence from the Defendant. However, that did not turn out to be the case, because on Friday, 7th September 2012, only two days before the hearing and one week after the deadline agreed to in the Consent Order, the Defendant attempted to file two additional affidavits which had been in his possession for some time. One of the affidavits was sworn by Mr. John Yates, retired Assistant Commissioner of the Metropolitan Police Service. Mr. Griffiths Q.C. indicated that he felt that this affidavit evidence from Mr. Yates had been "*sprung*" on his client and that his client had been "*ambushed*" because, due to the proximity of the hearing, he had been unable to take instructions and "*canvas*" the contents with Mr. Yates. The Defendant was indulged by the Court and permitted to rely upon those affidavits. The extract from my note book on 12th September 2012, day two of the hearing, reads:

> *"In relation to the affidavit from Mr. Yates if Mr. Griffiths feels that he needs to have an opportunity to speak to Mr. Yates and file any affidavit in reply I will give leave for him to do that. I'd like to conclude the submissions and finish this hearing. If that affidavit is filed then both parties can have the opportunity to put in brief written submissions if anything arises out of that affidavit. At that stage I will then give my judgment."*

11. On 13th September 2012, towards the end of the privilege hearing, the Defendant sought to also file the Second Affidavit of Martin Bridger. Despite the Defendant's failure to comply with the timetable for filing affidavits set out in the

Consent Order, the Court further indulged him by giving him leave to file the affidavit. Mr. Griffiths Q.C. took a pragmatic view and eventually did not oppose the application, but only on the basis that the Plaintiff could consequently submit a further affidavit. In my notebook I recorded:

> *"Leave given to file, but 28 days given to the Attorney General to consider whether he wishes to file any evidence in reply to the late affidavit filed by Mr. Bridger - if he chooses to do that, then each party will have liberty seven days after that to file any very brief written submissions related that."*

12. On 4th October 2012, a letter was received by the Court from the Plaintiff confirming that he would be filing an affidavit. Shortly thereafter, on 9th October 2012 the Plaintiff, with leave, filed a hard copy of an affidavit sworn by John Yates in reply to the contents of the John Yates affidavit which Mr. Bridger had been given leave to file during the hearing.

13. On 9th October 2012, my secretary emailed both parties on my instructions offering them the opportunity to file, by 19th October 2012, brief written submissions dealing with the contents of the affidavits recently filed with leave. The email stated that I would then review and prepare my ruling on the issues raised in the privilege hearing upon my return to the jurisdiction at the end of October 2012.

14. On 10th October 2012 Mr. Akiwumi emailed the Court stating that he would like to take up the opportunity of filing further submissions.

15. On 19th October 2012 the Defendant's attorneys filed written submissions dealing with the content of the recently filed affidavits. However, on the same date, the Defendant's attorneys submitted, without leave, a Third Affidavit of Martin Bridger with a considerable number of exhibits. The affidavit was undated. In his accompanying letter, the Defendant's attorneys stated that the third affidavit would be filed at Court early the following week once he had received an original sworn copy from Mr. Bridger. At no time did the Defendant's attorneys mention that he would be applying for leave to file the affidavit. It is this affidavit which forms a part of the subject matter of the Summons which is now before me for my determination.

16. On 19th October 2012, on my instruction, my secretary emailed the Defendant's attorneys stating:

> *"The Judge has not given a direction or leave to file this additional affidavit and is not sure on what basis it is filed. The Judge has not read this affidavit.... The Judge has instructed me to return the affidavit, as no application has been made or leave given to file it as this stage of the proceedings. Please arrange to have the affidavit collected."*

17. Later on 19th October 2012, Mr. Akiwumi sent an email to my secretary stating:

> *"Given the nature of your missive, we seek leave to file further evidence which is directly responsive to the affidavit filed on the Plaintiff's behalf. We do not consider that an application of this nature will take more than 15 minutes. In any event it is our view that, in at least three respects material should have been provided*

by the Plaintiff which is directly contrary to the Plaintiff's case. By copy we invite the Plaintiff to indicate its availability for a hearing to consider this short matter. Ms. Yasmin[2] please can you indicate by return whether you are able to accommodate."

18. On 22nd October 2012, the Defendant's attorneys emailed my secretary stating:

"Can you please indicate whether Mr. Justice Williams will hear an application on Mr. Bridger's behalf for permission to adduce this third affidavit."

In my absence, my secretary replied by email the same day indicating that I was out of office for the week and to:

"Please wait for a response from Yasmin in this regard."

My secretary followed this email up with a further email on 24th October 2012 reminding the Defendant's attorneys that the inappropriately 'filed' affidavit should be collected from the Court.

19. On 25th October 2012, Mr. Akiwumi sent an email to the Listing Officer in which he stated:

"...having already invited Mr. Schofield to provide you with his availability, in respect of which request there has been a deafening and significant silence, please will you take the necessary steps to have this matter listed for a hearing as previously requested and as a matter of utmost urgency."

[2] Yasmin Ebanks, the Listing Officer.

20. The Listing Officer replied in an email to Mr. Akiwumi on the same date reiterating that I was out of the office until Monday and that she would take directions from me upon my return, no doubt on the matters raised in Mr Akiwumi's email, and then revert to Counsel. The Listing Officer went on to say that:

> *"In the meantime I look forward to receiving counsel's dates to avoid. Please bear in mind that the Hon. Judge has a full list next week and if the hearing is contested please provide me with a realistic time estimate."*

21. Mr. Akiwumi promptly replied stating he could make himself available anytime over the next fortnight.

22. On 26th October 2012 Mr. Schofield emailed Mr. Akiwumi, copying in the Listing Officer, in which he rightly stated:

> *"Since evidence and arguments are closed, and a Ruling pending, it would be in order, I suggest, for Mr. Akiwumi to file a summons and send a listing form."*

The Defendant's attorneys replied expressing an incorrect view that a Summons was not required and requested Mr. Schofield's dates to avoid over the next two weeks. On the same date Mr. Schofield replied indicating that he was available on November 1, and November 5-9.

23. The 26th October 2012 date is an important one because, in a letter dated 21st March 2013 from the Defendant's attorneys addressed to the "Court House," they stated:

> *"On 19th of October 2012 we served an unsigned copy of the 3rd Affidavit on the Court and Attorney General. On the same day, Mr. Justice Williams' Secretary indicated that the 3rd Affidavit would be returned to ourselves as 'no application [had] been made or leave given to file it at this stage of the proceedings.'*
> *We immediately responded to this email requesting that the court accommodate a 15 minute hearing to consider the matter.*
> *After the weekend, and on 22nd of October 2012, we sent a further request asking whether Mr. Justice Williams would be able to hear an application for our client to adduce his 3rd Affidavit in evidence. Mr. Justice Williams' secretary responded that the Learned Judge was out of the office that week and we should wait for a response from Ms. Yasmin Ebanks (listing officer) in this regard.*
> *On 25 October 2012 we sent a detailed email to Ms. Ebanks outlining the situation and requesting that the matter be listed urgently. Ms. Ebanks responded on the same day, confirmed that Mr. Justice Williams was out of office that week and that she would "take directions from the Hon. Judge and revert to counsel."*

The above representations fairly detail the exchanges but, significantly, the letter then went on to incorrectly state that following 26th October 2012:

> *"We have received no further communication from the court office or Mr. Justice Williams regarding this matter."*

The letter also went on to state that no directions had been received from the Court and added that the Defendant's attorneys:

> *"...do not accept that it is necessary to serve a summons when the court has given us an assurance that the learned judge will provide directions in due course.*
> *However, given the chronology of the case and the fact that the AG's Office clearly considers that it is necessary to file a summons in relation to this issue, we will file and serve a summons to prevent unnecessary argument over what may be considered a pedantic and inconsequential point.*
> *...we will file and serve a summons (a draft copy of which is attached) and the listing questionnaire on 22 March 2013."*

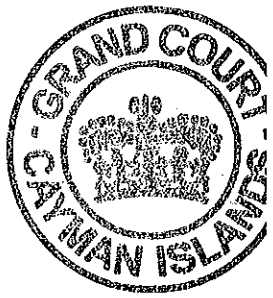
The Defendant's attorneys made no mention in the 21st March 2013 letter about the Summons filed in November 2012[3], let alone of any communications made by them after filing pressing for it to be issued and a hearing date endorsed.

24. Consideration of the communications between 26th October 2012 and 21st March 2013 shows that the Defendant's attorneys' assertion that the Court has failed to communicate at all and give directions during that period is inaccurate. Between 26th October 2012 and 21st March 2013, apart from any possible oral communications, there had been at least four significant and relevant emails sent from the Listing Officer to them.[4] The inaccurate content of Defendant's attorneys' letter gives the wrong impression that the delay in the listing and

[3] The filing of the Summons on 13th November 2012 was after the Listing Officer had mentioned to the Defendant's attorney on 25th October 2012 that she would take directions from the Judge on his return to the office in the following week.
[4] 30th October 2012, 15th November 2012 and two emails on 26th February 2013.

hearing of the leave application was due to an alleged total lack of communication from the Grand Court.

25. In fact, on 30th October 2012, only four days after the date on which Mr. Akiwumi had said he had received his last communication from the Court, the Listing Officer, having spoken to me upon my return, wrote to both Counsel stating that she was *"reviewing the chain of emails"* and asked *"Am I to expect an application filed with the court?"* The Listing Officer was clearly referring to a formal application by summons, for that is the appropriate manner in which to bring such an application.[5] This is only four days after she had read the email from Mr. Schofield containing his correct view that a summons should be filed.

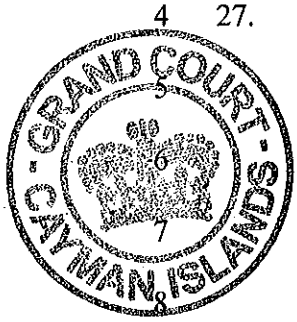


26. In the Defendant's written submissions filed after the circulation of the draft judgment, the Court's attention has been drawn to a Summons and Listing Form filed on 13th November 2012. The Defendant, albeit at this later stage in November and after receipt of the written communication from the Listing Officer dated 30th October 2012, was now following the correct procedure. Regrettably, a copy of that Summons and Listing Form is not contained within the Court file. Having had the existence of the Summons highlighted in the Defendant's written submissions, the Court has conducted a review of the filed documents in the Court's electronic JEMS system. Having done so, the Court has located a copy of

[5] In ***Charlesworth v Relay Roads Ltd. and Others*** [2000] 1 W.L.R.230 refers to the application for an order that "The trial be reopened to enable further evidence to be adduced and further argument to be adduced as being *"issued."* ***In Robert Sydney Acosta v Alfred Owen Longsworth, Aura Jones and Margaret Turton*** [1965] 1 W.L.R. 107 the application refers to the Defendant *"lodging a motion"* after the close of the case to re-open and adduce evidence in denial.

the Summons and Listing Form in JEMS, but the Summons appears not to have been issued.

27. On 15th November 2012, Mr. Akiwumi appropriately wrote to the Listing Officer stating that he was following up on an email to her, to ask when the application in relation to the affidavit could be heard and rightly drawing the Listing Officer's attention to the fact that a Summons and Listing Form had been filed on 13th November 2012.



28. It is unclear to the Court why after November 2012 the Defendant's attorneys made no further reference to the November Summons, failed to efficiently progress the November Summons, continued to invite the Court to hear the matter without a summons contending that a summons was not required for such an application and eventually filed a further summons in March 2013 rather than ensuring that the November Summons was properly issued.

29. The Listing Officer replied by email to Mr. Akiwumi on 15th November 2013 stating:

> *"I received a bundle that was sent to Williams J. The Hon. Judge has asked to be provided with skeleton arguments and authorities concerning the filing of evidence at this stage of the proceedings. The Judge further stated that no leave has been given to file the affidavit. I am not sure if the summons that you filed on 13th November is seeking such leave. Please also note that the affidavit has not been dated. You will need to file an amended affidavit with*

the Registry. Also a copy of the amended affidavit should be placed in the mentioned bundle."[6]

30. It is not clear why the Listing Officer would direct the Defendant's attorneys to file an "amended" affidavit before leave had been given to file. What she should have told them was to provide an unfiled affidavit which the Court could consider at the leave hearing.

31. Following receipt of the Listing Officer's email and directions, on 20th November 2012, the Defendant filed the said affidavit at the Registry. On the same date, the Defendant also filed a second additional affidavit without leave, an affidavit that had been sworn by Lord Blair on 23rd October 2012 in connection to the Kernohan proceedings. No mention of this affidavit was contained in the un-issued Summons filed shortly before, namely on 13th November 2013. On the same date the Defendant's attorneys sent a letter to Mr. Schofield stating:

"Please find attached a further sealed copy of the Third Affidavit of Martin Bridger as it was brought to our attention that the original Third affidavit that was served on you was undated. You will note that this affidavit has now been re-sworn and dated 16th November 2012 and was filed in Court today. We also enclose a sealed copy of the affidavit of Lord Blair that was received by us today and filed in Court today."

32. On 29th November 2012, Mr. Murphy of Stuarts Walker Hersant, emailed Mr. Schofield and my secretary referring to attached draft written submissions and

[6] See paragraph 23 above – This is another instance of the Court making contact with the Defendant's attorneys in the period 26th October 2012 to 21st March 2013.

stating that a hard copy would follow. The hard copy was filed on 30th November 2012. On 29th November 2012, Mr. Murphy sent a second email stating:

> *"I omitted to add in previous email that we also intend to serve addendum submissions either tomorrow or early next week."*

This is significant, as by the March 2013 letter from the Court to the parties, these addendum submissions have not been received and this has contributed to the delay, as the Plaintiff stated he had been waiting for them before responding.

33. After the filing of the Summons in November there was no need for any directions to be given to the parties from the Judge. The mention made by the Listing Officer in her email of 25th October 2012 that she would take directions from the Judge on his return into the office was at a time when the application had not been brought in the normal and formal way, namely by the filing of the Summons. The directions were directions from the Judge to the Listing Officer, not directions from the Judge to the parties. The Listing Officer understandably did not, in my absence, feel able at that time to list the matter as requested by Mr Akiwumi in his email of 25th October 2012, without receiving direction from me to her as to how she should proceed before she reverted to Counsel. I did speak to the Listing Officer upon my return and she did, as a consequence, contact Counsel on 30th October 2012. Once the Summons was filed all that was needed was for the parties to do was to file their written submissions/addendum submissions and to obtain a hearing date in the normal way from the Listing Officer. If a Summons is not issued because a hearing date is not forthcoming, the parties have a

responsibility and are expected, in particular the party bringing the Summons, to keep on communicating with the Listing Officer to obtain the same. The Listing Officer, with her extremely heavy work load, would no doubt find any such reminder to be useful and appropriate.

34. A post-it note on the Court File written by the Listing Officer in December 2012 reads:

> *"Not available for the rest of the year. Available all of January 2013. Mr. Schofield is expected to file a skeleton argument."*

It is not clear from the note which Counsel this refers to. However, it likely refers to the Plaintiff's attorney as the Listing Form dated 13th November 2013, which the Court has now seen having recovered it from the JEMS system after the preparation of the draft judgment, notes no dates to avoid for the Defendant's attorneys, but 26-30 November 2012, 3-5 December 2012 and 17 December to 15 January 2013 as dates to avoid for the Plaintiff's attorneys. The consequence of the Plaintiff's counsel's non-availability was that the hearing in relation to additional affidavit evidence could not be heard until mid-January 2013 at the earliest. Having for the first time, following the preparation of the draft judgment, seen the Summons filed on 13th November 2012, it can be fairly put that a part of the reason for delay at that time was the failure of the Listing Officer, after having had the dates to avoid further clarified in December 2012, to then try to fix an available hearing date for or soon after the middle of January 2013.

35. Having mentioned the case to the Listing Officer on 1st February 2013 and then on 12th February 2013 having inquired with the Listing Officer to see if a hearing date had been given, and upon being informed that there had been no written communications received from the attorneys concerning the progressing of this application since December 2012, on the latter date I directed the Listing Officer to again contact both Counsel. On 26th February 2013 the Listing Officer wrote to both attorneys by email asking:

> *"Can you please advise where we are with this matter."* [7]

On the same date, Mr. Akiwumi replied in an email in which he stated only the following:

> *"Still waiting for the Judgment!"*

This was an unexpected reply, as the Defendant's attorneys should have recognised that I was unable to complete the judgment on the privilege issues until either I had heard an application for leave to file the additional affidavit evidence or the Defendant had indicated that he no longer sought to pursue such an application. The email from the Defendant's attorneys gave the impression that the Defendant may no longer be pursuing the application in relation to the affidavit. As a consequence, the Listing Officer replied to Mr. Akiwumi on the same date asking if the Summons to adduce affidavit evidence was therefore no

[7] See paragraph 23 above – This is another instance of the Court making contact with the Defendant's attorneys in the period 26th October 2012 to 21st March 2013.

longer necessary.[8] To which another unexpected reply was received from Mr. Akiwumi stating:

"I am not sure about that.

This gave the impression, especially in light of the passage of time since the last communication from the Defendant's attorneys at the end of November 2012, that they were now not sure whether the Defendant was proceeding with his application.

36. On 13th March 2013 at 11:38 a.m., the Plaintiff's attorneys sent an email to the Defendant's attorneys in which they asked, having read the Defendant's attorneys' above-mentioned email exchanges with the Listing Officer, whether the Defendant still intended to proceed with an application concerning the affidavits. They went on to seek confirmation that, if there was an intention to proceed, a summons would be filed and a listing would be obtained. It appears that at this time Mr. Schofield should have been and was aware[9] of the unissued November 2012 Summons. Mr. Schofield indicated that the application would be opposed. Mr. Schofield said that there had been an indication that further written submissions would be forthcoming (from the email of Mr. Murphy dated 29th November 2012).[10] Mr. Schofield indicated that he was still waiting for those submissions before responding. Mr. Schofield asked when any addendum

[8] See paragraph 23 above – This is another instance of the Court making contact with the Defendant's attorneys in the period 26th October 2012 to 21st March 2013.
[9] See paragraph 40 below - reference to draft summons.
[10] See paragraph 32 above/

submissions would be served and asked why it had taken so long since 29th November 2012 for that to happen.

37. On 13th March 2013 at 1:56 p.m., an email with an attached letter from Campbells, the attorneys representing Mr. Kernohan, was sent to my secretary and copied into the parties. Campbells were enquiring about the lack of progress concerning the ruling on the privilege issues and when it might be handed down. Due to the fact that I was not in a position to draft the judgment until the issue in relation to the additional affidavit evidence had been resolved, and due to the fact that the reason why that issue had not been resolved was because of the way that the parties were litigating the case, I instructed my secretary to write to Campbells inviting them to contact the attorneys who I felt would be better placed to explain the reasons for the delay.

38. On 13th March 2013, Campbells, upon receipt of an email from my secretary, wrote to the attorneys seeking an explanation.

39. On 19th March 2013 Campbells wrote to the Chief Justice concerning the privilege ruling, it appears still unaware of the reasons for the delay, as the attorneys had not responded to Campbells' written request to them. It appears from the content of the letter that Campbells were implying that the Court was at fault for not complying with its obligation to deliver a judgment within a reasonable time.

40. On 20th March 2013 Mr. Schofield sent an email to Campbells, in which he stated:

> *"In response to your question, the Defendant, in Cause 486/11 filed additional evidence without leave or consent well after the conclusion of last September's hearing. The Defendant indicated that a Summons would be filed, and a date fixed for argument about whether the Defendant's additional evidence should be admitted. We did receive a draft summons later in November, and we provided dates for a Listing Form (dates which have since been superseded), but the Defendant has not yet progressed that motion. The question of whether additional evidence should be admitted, therefore, remains unresolved."*

Mr. Schofield went on to say that:

> *"The matter is, therefore, delayed while the Defendant decides either to progress, or to abandon his intention to seek leave to file additional evidence. It is also necessary for the Defendant to file the addendum submissions promised in November, so that his submissions are complete before any response to them can be considered...*
>
> *.... For our part, we do not think it is necessary for his Lordship to be involved. Justice Williams is clearly unable to proceed until the materials upon which he is to make his decision have been settled. We have pressed the Defendant on this, but no progress has been made either with the listing of the Defendant's Summons or the service of the Defendant's addendum submissions."*

41. On 21st March 2013, almost one month after the Listing Officer had contacted both parties by email on 26th February 2013 to ascertain the parties' position in

relation to the application, Mr. Murphy sent an email to my secretary, the Listing Officer, Mr. Schofield and to Campbells stating an intention to serve a summons and informing her that a Listing Form had been sent to Mr. Schofield for completion. Mr. Murphy asked that the Listing Officer confirm an early date, and to take into account the convenience of both parties. The email made no reference to a summons already having been filed in November 2012.

42. On 21st March 2013, the Defendant's attorneys sent the above-mentioned letter in which they incorrectly stated that the Defendant's attorneys had received no communications from the Court since 26th October 2013.

43. The Defendant filed the Summons now before me on 22nd March 2013. The Defendant failed to make any mention of the Blair affidavit in the Summons.

44. Following the filing of the Defendant's Summons both parties appropriately exchanged correspondence with the Listing Officer in an attempt to find a date for this hearing. The Listing Officer, having regard to the parties' dates to avoid, notified them of the 12th July 2013 hearing date in late April/early May 2013. As evidenced by the length of this hearing, the suggested 20 minute time estimate given by both parties in the Listing Form dated 21st March 2013 was unrealistic.

45. Upon considering some of the inaccuracies in the letter dated 21st March 2013 addressed to the Court House from the Defendant's attorneys, I felt it necessary that the Court reply to correct the same and to inform the parties, by reference to a

chronology, of the reasons why the Court believed the delay had occurred. The March letter, sent by the Clerk of the Court, to the parties expressed my concern at the content of the Defendant's attorneys' letter. The March letter reflected my still held view that the representations concerning lack of communication from the Court between November 2012 and 21st March 2013 made by the Defendant's attorneys were fundamentally inaccurate, especially as they may lead any reader to believe that the blame for the delay 'lay at the door' of the Grand Court. Even if the Listing Office was not being proactive, the Defendant had an obligation to progress his own application during that five month period by seeking updates from the Listing Office and making reasonable ongoing representations to the Listing Officer for a date to be given if one was not forthcoming.

46. I am still firmly of the view that the delay stems back to the Defendant seeking to file a further affidavit towards the end of the privilege hearing, as well as serving three other affidavits, including one from John Yates, on the Friday before the Tuesday hearing, all in non-compliance with directions and without leave, with the consequence that the Plaintiff was unable to take proper instructions on the same prior to the hearing. Despite the Defendant's unappealing approach to filing affidavit evidence for the hearing, leave was reluctantly given by me at two different stages during the September hearing enabling him to file the affidavits, but only on the basis that the Plaintiff be able to file an affidavit in response. Therefore, I accept that it could also be said that the delay has partly arisen due to the Court's willingness, on more than one occasion, to afford additional

opportunities to the Defendant to file affidavit evidence very late on and in an unstructured manner despite there being in place clear consent directions.

47. The Plaintiff, after the oral hearing, duly filed an affidavit in response in full compliance with my direction. However, as already mentioned, the Defendant then tried to file two additional affidavits, again without leave of the Court, well after the close of evidence and submissions. It is these two affidavits which are the subject matter of this judgment. Upon initial 'filing', it appears that the Defendant's attorneys did not feel it appropriate to draw to the attention of the Registry that leave would be required. It also appears that, before the Court had informed the Defendant's attorneys that they required leave to file additional affidavit evidence, the Defendant believed that the Court would accept the affidavit evidence and incorporate it into its determinations without granting leave for them to be filed and without any reference to the Plaintiff. What flows from this approach to the litigation has prevented the Court from being in a position to move forward with the judgment on the privilege issues. A further consequence is that the Court has now been placed in the most unsatisfactory position of having to draft a significant judgment concerning the privilege issues over ten months after the relevant hearing.

48. Due to my concerns that the application was not being progressed efficiently and my view that I now needed to get involved and that firm case management had become necessary, I gave directions. Therefore, apart from a detailed chronology,

the March letter from the Court also contained my direction that as the Defendant had not filed any addendum submissions, despite Mr. Murphy's written indication in November 2012, I expected nothing further to be filed by the Defendant. The March letter noted that Mr. Schofield should now feel in a position to reply to the submissions already filed and that his written submissions should be filed at least three days before the hearing of the freshly filed Summons for leave.

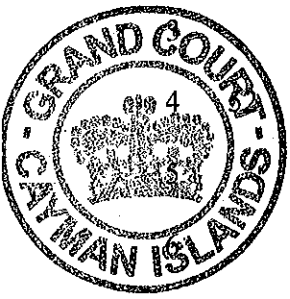
49. The March letter also contained my direction that both parties should provide the Listing Officer with their dates to avoid by or on 28th March 2013 and a realistic time estimate for the hearing. The Defendant failed to contact the Listing Officer until an email from his attorneys was sent on 8th April 2013. Mr. Murphy only provided his dates to avoid in an email on 10th April 2013.

50. The March letter also contained my direction that upon receipt of the Listing Form, the Listing Officer should endeavour to list the Summons as a matter of priority, but if the Listing Officer had not heard from the parties by or on 28th March 2013, she was to fix a date for the hearing of the Summons, whether or not that date was convenient to Counsel.

51. Following circulation of the draft judgment to Counsel pursuant to Practice Direction No. 1/2004 on 31 July 2013[11], the Court received a communication from Mr. Murphy, indicating that Mr. Akiwumi, who was out of the jurisdiction

[11] The parties being given 72 hours to review the judgment for typographical or factual errors.

until 5th August 2013, wished to list a 1½ hour hearing to enable him to make representations to the Court concerning the content of the draft judgment.



The Court, on 3rd August 2013, after considering Mr. Murphy's email, agreed to extend the time for Counsels' written comments on the draft, including on the matters raised by Mr. Murphy, until 8th August 2013.

53. Mr Schofield indicated on 3rd August 2013 that he was also out of the jurisdiction, and that he would be returning on 12th August 2013. However, Mr. Schofield in his email also took the opportunity to provide very brief written submissions concerning amendments to the draft judgment and as to why any further hearing in relation to the judgment would be inappropriate.

54. On 5th August 2013, the Court having considered both Counsels' emails and, having regard to the fact that the relevant attorneys had been/were out of the jurisdiction, extended the date for any written submissions to 19th August 2013. On 15th August 2013 Mr. Schofield sent an email reiterating the brief content of his email of 3rd August 2013 and in which he highlighted that he would need to see the written submissions submitted by Mr. Akiwumi.

55. On 16th August 2013 the Defendant's attorneys, filed with the Court by email a *"Note of the Judgment and Correspondence Following Publication of the Draft Judgment"* drafted by Mr. Murphy on 15th August 2013 in which he sets out his

recollection of what happened at the hearing and the manner in which he approached that hearing. From the letter, despite my clear indications at the hearing, it appears that Mr. Murphy formed the wrong impression that the chronology would not be dealt with in the judgment. As was stated to Counsel in the email from the Court on 5th August 2013:

> *"At the outset of the hearing on 12th of July 2013, the Court informed the parties that, due to the issues under consideration, the length of delay and inaccurate representations made concerning the reasons for delay, the Court was required to clarify and fully deal with the reasons for delay in the judgment. The Court referred to the letter of March 2013 and stated that the contents therein would be referred to in detail. Following that indication, no application for an adjournment was made, nor was any application to submit further submissions on the issues requested. (The parties should have been aware that the Court also had to fully address the issue of delay, not only because of the submissions being made by the Plaintiff concerning Rule 1.1 preamble GCR but with one eye on the case of Cobham v Frett (2001) 1 WLR 1775)."*

56. Mr.Murphy is right when he states in his Note that no reference was made by the Court during the hearing to the case of ***Cobham v Frett***. This is a very well known case which all Courts, and Counsel, would be expected to be aware of and have in mind when there is delay at the unfortunately high level found in the matter before me.

57. The Defendant's attorneys on 16th August 2013 also provided the Court with an eight page letter setting out their written submissions. The emailed written submissions importantly highlighted that a Summons and Listing Form from 13th November 2012 were annexed to the written submissions. In fact, these documents do not appear to have been transmitted with the email or hard copy which followed. The Defendant's attorneys also submitted *"a contemporaneous draft response to the letter from the Court."* The Defendant's attorneys, in the submissions informed, the Court that:

> *"It was decided that sending the letter would inflame a situation that detracted from the substantive application and may result in an application for the Learned Judge to recuse himself from the proceedings. Given that there had already been a considerable delay, it was decided to proceed with the application, rather than be distracted by satellite litigation that was irrelevant to the application."*

58. For the avoidance of doubt, the Court would have been content to, and would have expected to, receive appropriately drafted written comments from the Defendant's attorneys at the time if they had regarded the factual content and conclusions drawn in the March 2013 letter to be inaccurate. There would have been nothing improper in the Defendant's attorneys carrying out such an exercise.

59. It is evident from Mr. Akiwumi's email of 5th August 2013 that "*extensive advice*" was obtained by the Defendant's attorneys before a decision not to reply to the March letter was taken. Although not wishing to dwell on the issue, I am of

the view that the type of language and terms used in the contemporaneous letter were inappropriate to direct to a judicial officer, albeit through the Clerk of Courts. I am surprised to see that the current written submissions made by the Defendant's attorneys directly to the Judge are, on the whole, expressed in the same manner. Even if an attorney forcefully disagrees with the judgment or approach taken by a judicial officer the discourteous, and to a degree threatening, language used in the written submissions is improper and not what one would expect to be sent to a judicial officer from a member of the Bar. This is especially so when a Judge is at the judgment writing stage of the proceedings, as it may be perceived as placing undue pressure on the Judge. That having been said, in particular the issues surrounding and flowing from the November Summons filed by the Defendant's attorneys, the written submissions concerning factual matters and some of the observations made in the judgment merit careful and objective consideration, especially having regard to the guidance in ***R (Mohamed) v Foreign Secretary (No.2)*** [2011] QB 218.

60. On 19th August 2013 the Court received the final submission on the matter from the Plaintiff's attorneys. Therein, no issue was taken concerning the ***R (Mohamed)*** authority and an indication was given that no further submission beyond those already made in the earlier submissions need be made. Upon receipt of the same the Court made it clear to the parties that it did not expect to receive any additional written submissions from them and that it did not intend to list the matter for an oral hearing. The Court indicated that it would determine the issues

upon consideration of the written submissions and thereafter finalise and deliver this judgment. The Court informed the parties that the recent developments had and would cause inevitable delay to the delivery of this judgment, as well as to the judgment dealing with the substantive privilege application.

61. Having afforded both parties the opportunity to make submissions, I am satisfied that it appropriate to make certain factual amendments as well as remove certain comment from the judgment. The factual amendments are primarily made to clarify factual issues. I have deemed the removal of certain observations in the draft judgment to be appropriate, as they are not necessary to the judgment.

62. Some of the amendments have been made on the Court's own motion. Some amendments have been made on the invitation of the Defendant, and due to information contained in the recently received written submissions, especially concerning the November Summons 2012 which had been filed but was not on the Court File, the Court finds there to be exceptional circumstances to merit such an approach.

63. I wish to make it clear that the amendments made have not in any way changed my decision and the reasons for my decision reached in the draft circulated judgment.

The Law – Allowing New Affidavit Evidence After the Hearing But Before Judgment is Given

64. It is trite law that until an order is perfected the trial judge has jurisdiction to receive further evidence. Phipson on Evidence (17th Edition) Chapter 13 at 13-01, states that:

> *"[A] trial judge has a discretion to receive new evidence after the judgment has been given, but before an order has been drawn up."*

65. Both parties agree that the principles to be followed are those of Lord Denning L.J. in ***Ladd v Marshall*** [1954] 1 WLR 1489 at 1491. The principles are well-known, but nonetheless bear repetition as follows:

> *"It is very rare that application is made to this court for a new trial on the ground that a witness has told a lie. The principles to be applied are the same as those always applied with fresh evidence is sought to be introduced. To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."*

66. If new evidence is sought to be decided after judgment and before an order, the trial judge would be in a better position than the Court of Appeal to look at the evidence as a whole closer to the trial and to assess the impact of the new evidence on the result of the case. This may result in the expense and delay of an

appeal which might result in an order for retrial being avoided. The jurisdiction to permit further evidence after judgment is to be exercised having regard to the same kind of factors which are taken into account when such a discretion is being exercised concerning fresh evidence on appeal.

67. Mr. Murphy reminds the Court that in **Charlesworth v Relay Roads Ltd & Others** [2000] W.L.R. 230 the Court of Appeal indicated that the trial judge should have in mind the ***Ladd*** principles, but he may have more flexibility than the Court of Appeal when determining the issue of admission of new evidence. There may be exceptional cases where an application to admit further evidence would be granted even though all three parts of the ***Ladd*** criteria had not been met. Mr. Murphy reminded the Court of the following words of Neuberger J. in ***Charlesworth*:**

> *"...because it is inherently contrary to the public interest and unfair on the other side that an unsuccessful party should be able to raise new points or call fresh evidence after a full and final judgment has been given against him, it would generally require an exceptional case before the court was prepared to accede to an application where the applicant could not satisfy the three requirements in Ladd v Marshall [1954] 1 WLR 1489."*

68. From the Privy Council case ***Robert Sydney Acosta v Alfred Owen Longsworth, Aura Jones and Margaret Turton*** [1965] 1 WLR 107 it is clear that the judge has a discretion to allow a party to reopen its case, and admit further evidence after the close of the case, but prior to the judge delivering a reserved judgment.

69. As the application before me is one made before judgment has been given, Mr. Murphy also drew to the Court's attention the case of ***K v K (Abduction) (No 2)*** [2009] EWHC 3378. In that case an administrative error, which resulted in a judgment in Hague Convention proceedings being handed down in ignorance of an application to admit fresh evidence which went to the question of whether the children's removal from the jurisdiction had been consensual, was sufficient to amount to either strong reasons or exceptional circumstances for reconsidering the judgment, which had not yet been perfected.

70. Sir Stephen Sumner relied upon the case of ***Re M (Abduction: Non– Convention Country)*** [1995] 1 FLR 89 in which the Court of Appeal admitted further evidence from a mother in support of her case and from the father in answer to that evidence before dismissing the appeal. Waite L.J. therein stated at page 90 in relation to Hague Convention cases:

> *"Thirdly, it is of the essence of the jurisdiction to grant a peremptory return order that the judge should act urgently. That means that the court has no time to go into matters of detail. The case has to be viewed from the perspective of a quick appraisal of its essential features. Any risk of injustice suffered by the abducting parent as a result of limiting the scale of the survey in the interests of speed is minimised by the adoption in the Court of Appeal of policy which, while discouraging appeals that attempt to re-argue the merits, allows some relaxation of the rule in Ladd v Marshall [1954] 1 WLR 1489. That relaxation is applied to the extent necessary to enable this court to determine whether there are any matters not dealt with at first instance, which might have*

materially affected the judge's decision, had he been aware of them."

71. Sir Christopher Sumner then rehearsed the principles set out by Lord Denning in ***Ladd*** and their compatibility with the overriding objective set out in the English Civil Procedure Rules 1998 ("CPR"). He then went on to say at para 34 that:

> *"I am satisfied that the approach adopted by Waite L.J. is applicable to proceedings at first instance in appropriate cases. In those instances an application may be made to the trial judge, rather than to the Court of Appeal. The contrary has not been argued."*

72. In ***K v K*** Sir Christopher Sumner was satisfied that, if he had known about the application and the evidence, he would not have ignored them and would have delayed the handing down of his judgment. He would have withheld his judgment until he had heard from counsel. He considered what principles should govern the circumstances in which a court may admit further evidence after the hearing, but before judgment in Hague Convention cases which involve a summary jurisdiction. He found that the circumstances of the case amounted to either exceptional circumstances or strong reasons for him now to consider reconsidering his judgment if grounds existed to admit and consider the further evidence presented. He was satisfied that the circumstances met the criteria set out in ***Ladd*** and therefore he did not need to find that there were exceptional circumstances. However, he went further and said that if he was wrong in any of the conclusions he had reached he would, in the circumstances of this case, relax

the rule in ***Ladd*** to the extent of admitting the evidence in the interests of justice.

Sir Stephen Sumner concluded by stating:

> *"Where there is an application to reconsider or reverse a judgment in a Hague Convention case after judgment is given, it must satisfy the test of strong reasons. Some relaxation of the rule in Ladd v Marshall is permitted in respect of fresh evidence for the reasons and to the extent set out in Re M. If the application is made in respect of fresh evidence after the hearing, but before judgment, the difference is that there is no longer a need to find strong reasons Re M alone will govern the approach to be taken."*

73. The cases of ***K v K*** and ***Re M*** are referred to in Phipson on Evidence, First Supplement to the 17th Edition at 13-01. Mr. Murphy contends that, although the two cases deal with Hague Convention cases, they are applicable to all civil matters. Mr. Griffiths Q.C. contends that Sir Stephen Sumner took the approach that he did, relying upon the reasoning in ***Re M*** and the unique and urgent nature of these types of applications and the informal nature of some proceedings in the Family Division. I note with interest that neither party was able to produce any case in which the approach in ***K v K*** had been followed in a case which was not dealing with Hague Convention applications. I am not satisfied that the more relaxed approach to the principles in ***Ladd*** followed in ***K v K*** is applicable in civil cases, such as in the matter before me.

74. Mr. Griffiths Q.C. has indicated that, if the Court is considering the more flexible approach in ***Charlesworth***, other considerations as well as the principles in ***Ladd***

v Marshall may be relevant. He urged the Court, when exercising its discretion, to give effect to the overriding objective set out in the Preamble of the Grand Court Rules (Revised Edition) ("GCR"). He urges upon the Court the need to ensure parties assist the Court in its duty to case manage cases effectively for the parties involved in any specific case and for all other court users. Court time and resources are finite in nature and must be allocated fairly between all court users, not just those before the Court in a particular case.

75. The GCR Preamble 1.2(e) sets out the overriding objective similar to that found in the English CPR, namely that the Court deal with every case or matter "*in a just, expeditious and economical way.*" Therefore, in some instances, it may be appropriate to refer to CPR cases from England and Wales. The Court of Appeal stated at paragraph 11 of its decision in ***Royal Brompton Hospital NHS Trust v Hammond (No 8)*** [2001] CP Rep 90:

> *"It is an overriding objective of the CPR that cases should be dealt with expeditiously and fairly with an appropriate share of the court's resources being allotted to the case. To achieve that, the parties must place before the court the submissions that they wish to rely upon, and it would only be in an exceptional case, or for strong reasons that they should be allowed to reopen the arguments after the process of delivering the judgment has been initiated."*

76. I have regard to the following helpful principles set out in the Headnote in English Court of Appeal decision in the ***Mortgage Corporation v. Sandoes and Others*** [1997] PNLR 263:

(i) Time requirements of the Rules and of directions were rules to be observed and not merely targets.

(ii) However, the overriding principle is that justice should be done.

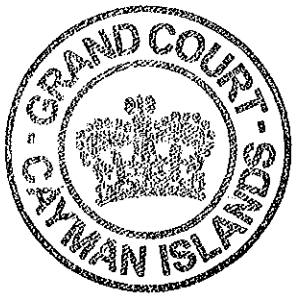
(iii) Litigants are entitled to have their cases resolved with reasonable expedition; delays can cause prejudice to one or other of the parties.

(iv) The vacation or adjournment of trials also prejudices other litigants and disruptive administration of justice…

(v) The Court will not look with favour on a party who seeks to obtain tactical advantage from a failure to comply with time limits...

(vi) In deciding whether or not to grant extensions of time, the Court will look at all the circumstances.

77. The parties agree that the test for the admission of the new evidence was that established in ***Ladd***. I too am satisfied that the three criteria set out in ***Ladd*** constitute the relevant consideration and firm guidance in deciding the exercise of my discretion whether to receive new affidavit evidence post hearing, but pre-judgment. I accept that some recent authorities support a more flexible approach and am satisfied that the application to adduce further affidavit evidence should also be decided in the context of the overriding objective set out in the preamble to the GCR.



The Defendant's Position

78. I would like to commend Mr. Murphy for his submissions and professional handling of his client's case at this hearing. I acknowledge that he only became involved recently and it seems he has been briefed only to deal with this hearing. I recognise this was an awkward task for him, as he did not have conduct when the matters raised in the chronology set out earlier herein occurred.

79. The Defendant's contention that he has made out a case for the admission of affidavit evidence is set out in Counsel's written submissions dated 29th November 2012. The Defendant has also submitted written submissions in relation to the content of the Affidavit of John Yates, and no matter what position I take in relation to the submission of the affidavit evidence, I will have regard to those when considering my judgment.

80. There were no substantial submissions made in support of the admission of the Blair affidavit in the written submissions and very limited oral submissions were made concerning the same by Mr. Murphy. The impression given was that the Blair affidavit is rather an afterthought.

81. It is interesting to note that the written submissions are headed:

> *"Written submissions in response to the service of the affidavit of John Yates an application for leave to adduce evidence in rebuttal."*

It is important to remind oneself that the Affidavit of Mr. Yates was filed by the Plaintiff only because the Court had reluctantly given leave late on in the privilege hearing for the Defendant to file further affidavits sworn by Mr. Yates and then by Mr. Bridger. Leave was given to the Plaintiff to file the affidavit from Mr. Yates to allay any prejudice that may have been caused by the late filing of the affidavit sworn by Mr. Yates' and the filing of Mr. Bridger's affidavit during the hearing. The Court did not intend there to be any further affidavits filed by either party thereafter.

82. The author of the written submissions prepared on behalf of the Defendant is wrong to characterise, at paragraph 13 vi) therein, the Court's leave to the parties to file brief written submissions in relation to the Plaintiff's affidavit[12] as the Court encouraging the issue to be properly addressed rather than dissuading the submission of new evidence from Mr. Bridger. The author is also wrong in his written submissions to characterise the Attorney General's evidence contained in the Yates affidavit as being a *"late"* submission of evidence. The Defendant seeks to rely on his misconceptions as part of his reasoning in support of a submission that leave should be given to adduce the additional affidavit evidence. The Yates affidavit is simply evidence that the Court specifically gave the Attorney General an opportunity to submit, as a direct consequence of granting leave during the hearing for the late submission of affidavit evidence by the Defendant. It was not filed late but was filed on time and pursuant to a Court direction.

[12] The Yates affidavit.

83. The Defendant submits that as a matter of natural justice, and in order to treat the parties equally, leave should be granted to submit the additional affidavits in rebuttal to the Yates affidavit. It is said that this is especially so as the Yates affidavit was a post-hearing submission of evidence by the Attorney General. It is submitted that it is in the interests of justice to allow Mr. Bridger to respond to disputed allegations in the affidavit. The Defendant is silent as to whether this argument could be adopted by the Plaintiff in relation to the affidavits which the Defendant now seeks leave to adduce. If the Defendant's approach is adopted one may question at what stage will the need to file affidavits in reply to the latest affidavit of the other party come to an end. In making such a submission and a failure to mention the Bridger and Yates affidavits filed during the hearing, it appears that the Defendant fails to recall why leave had been given for the latest affidavit to be filed by the Plaintiff[13].

84. The Defendant contends that the affidavits could not have been obtained before the trial because the evidence is in response to new evidence produced by the Attorney General. It is submitted that the evidence has an important influence on the case because it directly contradicts the new evidence. It is also contended that the evidence is prima facie credible because Mr. Bridger and Lord Blair are both highly decorated former police officers. The Defendant argues that this means that the ***Ladd v Marshall*** and ***Charlesworth*** tests have been met.

[13] The Yates affidavit.

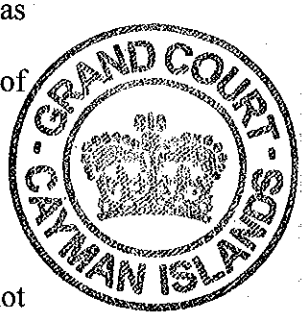
85. I have to consider whether the Defendant has made a case for the admission of the additional affidavit evidence. With this in mind, what is noticeably missing from the written and oral submissions made on behalf of the Defendant is a proper analysis of the content of the Bridger and Blair affidavits and applying that to the criteria in ***Ladd***. The submissions contain many general statements about the contents of the affidavits, including the Yates affidavit and the applicability of the relevant principles. One would have expected such an analysis of the Yates affidavit by the Defendant, as he needed to show that the evidence of Mr. Yates had changed an aspect of the case.

86. The Defendant's written document dated 29th November 2012 contains submissions on the affidavits filed by Mr. Bridger and Mr. Yates. Although the Defendant makes the general statement that the purpose of the proposed additional evidence is for rebuttal of the Yates affidavit filed by the Attorney General, it is clear from the content of the third Bridger affidavit that it is being used as a vehicle for putting his case, something he had ample opportunity to do prior to and at the September hearing.

The Plaintiff's Position

87. The written and oral submissions made on behalf of the Plaintiff, unlike those made on behalf of the Defendant, make a more detailed reference to the content of the relevant affidavit evidence. The Plaintiff submits that the Defendant should not be permitted to file further affidavit evidence at this stage of the proceedings

and adds that the further evidence which the Defendant seeks to introduce would not assist his case. Mr. Griffiths Q.C. submits that the Defendant has not only failed to satisfy the test set out in ***Ladd***, but has litigated in such a way that he has fallen foul of the overriding principle that good case management forms part of the justice in such cases.



88. The Plaintiff submits that there is nothing in the two affidavits which could not have been obtained and filed in accordance with the agreed timetable for evidence before the hearing commenced. I accept this submission. It is a breach of the first principle in ***Ladd*** for the Defendant to seek to use the affidavit as a means of putting his case forward after the case has closed. If the Defendant had acted diligently this information could have been put in an affidavit filed in compliance with the pre-trial directions or at the very least in his affidavit filed during the September hearing.

89. When considering the second test in ***Ladd*** the Plaintiff states that the affidavits are not truly ones that rebut the Yates affidavit. The Plaintiff highlights that the Yates affidavit draws a clear distinction between "*day to day operational matters*" and "*key strategic decisions in relation to Operation Tempura.*" The Plaintiff draws the Court's attention to the fact that the Yates affidavit confirms the terms of reference of the Strategic Oversight Group ("SOG") and confirms, in particular, Mr Yates' understanding:

> *"That the independent legal advice provided to Operation Tempura by Mr. Polaine's predecessor as Special Counsel, Mr.*

Andre Mon Desir, was provided by him as Special Counsel to the SOG of which Mr. Bridger was only one of the members."

90. The Plaintiff drew to the Court's attention that Mr. Yates, at paragraph 4 on page 6 of his affidavit, made it clear that:

> *"Although I thought that the Operation Tempura should have operational independence, this did not mean that I expected legal advice to be under the control of the Senior Investigating Officer, Mr. Bridger, and it was not my understanding that it was under his control."*

91. The Plaintiff also noted that Mr. Yates, at paragraphs 6 and 8 on page 7 of his affidavit, made the point that the ownership of the Operation Tempura files or papers lay with the Royal Cayman Islands Police Force ("RCIPS") and not with Mr. Bridger.

92. It is contended that the Blair affidavit says nothing of any relevance to the issues in question at all. Mr. Bridger in his third affidavit has ignored the distinction drawn by Mr. Yates between *"day-to-day operational matters"* and *"key strategic decisions in relation to Operation Tempura."* The Plaintiff rightly remarks that waiver of privilege in legal advice is not a "day-to-day operational matter" but "is an important strategic decision."

93. The Plaintiff with some force submits that Mr. Bridger makes no attempt in the third affidavit to address the specific question of legal advice and legal privilege.

It is submitted that, in the affidavit, Mr. Bridger does not put forward any evidence to rebut the points made in the Yates affidavit about these questions.

94. I accept the Plaintiff's characterisation of the third Bridger affidavit as being a very late rehearsal of the facts which the Defendant submits to show he had a degree of operational independence from the RCIPS. The Plaintiff points out that the affidavit does not address:

(i) the role of the SOG, its terms of reference and position in relation to the legal advice; and

(ii) the repeated statements by Mr. Mon Desir that he was "Special Counsel" to the Governor and the SOG.

The Plaintiff submits that the content of the affidavit does not refute the point made by Mr. Yates that Mr. Bridger was never entitled to waive privilege in relation to legal advice and that when he ceased to be the senior investigating officer he lost the freedom of action that he had in operational matters. The Plaintiff highlights that Mr. Bridger, at paragraph 21, appeared to concede that he was not autonomous, when he said:

> *"From November 2007, when I first sought legal advice on the entry, until October 2008, my direct reporting lines remained to Mr. Yates, HE the Governor and the SOG."*

The Plaintiff also reminded the Court that Mr. Bridger did not purport to waive privilege at any time during his tenure of that position.

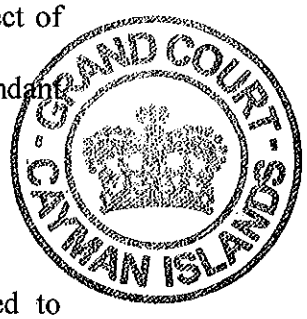
95. The Plaintiff contends that paragraph 15 in the November written submissions prepared on behalf of the Defendant concedes that Mr. Bridger's third affidavit does not refute the content in Mr. Yates's affidavit. Paragraph 15 of the submissions provides:

> *"...Mr Yates' latest affidavit does not undermine the central contention about the independence of the investigation."*

It is rightly submitted that the content of the Yates affidavit is focused on the issue before the Court about whether Mr. Bridger is entitled to deploy privileged documents without the consent of others, whereas the relevant Bridger affidavit is focused on a more general and irrelevant contention about the independence of his investigation in day-to-day operational terms.

96. The Plaintiff submits that the Defendant has failed to meet the criteria set out in ***Ladd.*** As already mentioned herein, there is great force in the Plaintiff's contention that the first condition in ***Ladd*** has not been met, because everything in the Bridger and Blair affidavits could have with reasonable diligence been obtained in time for filing before the hearing, in accordance with the agreed pre-hearing timetable for evidence. During the hearing I pointed out to Mr. Murphy that there was no evidence or informed submission made on behalf of the Defendant that the information put in the affidavit only came to his client's knowledge later, with the result that he did not have the opportunity to put it in an affidavit earlier and in compliance with agreed directions contained in the Court's order. Mr. Murphy stated that he did not concede the point but recognised that the

Court could draw such an inference. The Defendant has failed to show that he could not have submitted an affidavit with that information earlier with reasonable diligence or that the affidavit of Mr. Yates had changed an aspect of the case. The content of the Yates affidavit is not surprising and the Defendant should have rehearsed his case in his earlier affidavits.



97. When considering the ***Ladd*** principles, I accept that the affidavits failed to address the issues which are in question, and instead set out a general account of the facts which was not directed to the specific issue of legal privilege and who was entitled to waive it, which had been canvassed in Mr. Yates's affidavit. They do not in reality reply to the Yates affidavit and, as illustrated above, in parts actually confirm the content of that affidavit. Therefore, I am satisfied that the second test set out in ***Ladd*** is also not met, as it cannot be said that the evidence in the affidavits "*would probably have an important influence on the result of the case.*"

98. The third test in ***Ladd*** refers to the evidence being apparently credible, although not incontrovertible. It is submitted that the assertions made in the third Bridger affidavit that he was not acting as an Officer of the RCIP have been shown to be wrong by the evidence already filed. Also, Mr. Bridger's assertion that he was not at any time subject to the authority of Acting Commissioner of Police George is wrong since Mr. Bridger is on record as acknowledging that authority, as well as the authority of the later acting Commissioner of Police Smith. It is submitted that

the affidavit ignores the regular operation of the SOG and its terms of reference expressly covering legal advice which confirmed that legal advice was a matter for the SOG and not for Mr. Bridger as an individual, even before his retirement.

99. The Plaintiff rightly addresses the Defendant's submission that justice requires Mr. Bridger being given an opportunity to respond to the Yates affidavit which, as I have already mentioned, he has mischaracterised. The Plaintiff correctly states that there is no principle of natural justice that any party should have an unlimited ability to put in late evidence, or that one party rather than the other should have the last word on the matters of evidence. It is submitted, especially having regard to the overriding objective, that there should be an orderly exchange of evidence and that there should be an end to any timetable for evidence.

100. I accept the Plaintiff's submission that it is not just for the Defendant to put in evidence at this stage when it could have been put in an affidavit before the hearing, pursuant to the consent Court-ordered directions. I agree that it is not expeditious for the Defendant to seek to file affidavits at this late stage, especially as he has failed since September 2012 to take appropriate steps to bring this application in a proper form. Finally I accept the submission that it is not economical that evidence should be filed in this manner resulting in inevitable post-hearing additional costs. I say this having regard to the fact that any refusal to grant leave must not be made for the purpose of punishing the Defendant for the manner in which he has litigated his case. However, when considering what is

just and how to exercise its discretion, the Court is entitled, when considering the justice of the case, to have regard to its responsibility to promote good case management not only for the benefit of the parties in this case, but also for all other court users.

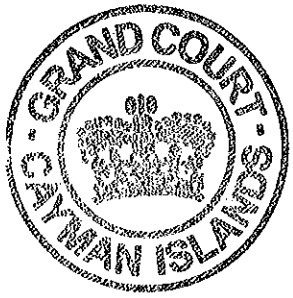
Conclusion

101. The Defendant has failed to meet the ***Ladd*** criteria. This is not a case which falls into the exceptional circumstances category envisaged in ***Charlesworth***. In fact when I consider whether in the interest of justice there are any exceptional circumstances, I note that the Defendant has pursued this application, as well not complying with orders in relation to the filing of affidavit evidence, in a manner that has hindered effective case management. The ***Ladd*** restrictions should be read in light of the overriding objective which has a bearing on the justice of the case. Accordingly, I dismiss the application to admit this evidence and I do not make an order giving leave to the Defendant to file the additional affidavit evidence sworn by the Defendant and Lord Blair. For the avoidance of doubt, I wish to reiterate that the decision I make is not to be regarded as being a punishment for this dilatory approach but is made having regard to the established principles and the justice of the case.

Costs

102. Upon reviewing the notes of Counsel's oral submissions contained in my notebook I see that Mr. Griffiths Q.C. submitted that, if the Plaintiff were

successful in defending the Summons, an order for costs should be made in his favour. In fact, Mr. Griffiths Q.C. also indicated that, due to the nature of the application, even if leave were given a costs order should be made against the Defendant. I see no note of Mr. Murphy's reply to the submissions made in relation to costs, and this may be because he did not seek to challenge the application in relation to costs. Ordinarily an order for costs in relation to such a summons, especially if it is dismissed, would be made against the party seeking to admit the additional evidence. I am presently minded to make an order for the Defendant to pay the costs of his application to adduce the affidavit evidence, to be taxed on the standard basis. However, in the absence of any written submissions made on behalf of the Defendant in my notebook, if the Defendant seeks to persuade me to make a different order in relation to costs, I will permit both parties to file written submissions on the issue of costs within seven days of the delivery of the approved version of this judgment.



Dated this 21st day of August 2013.

The Honourable Mr. Justice Richard Williams
JUDGE OF THE GRAND COURT