

27/1/12

1 **THE GRAND COURT OF THE CAYMAN ISLANDS**
2 **HOLDEN AT GEORGE TOWN, GRAND CAYMAN**

3 **CAUSE NO. 486 OF 2011**

4
5 **BETWEEN:**

6
7 **THE ATTORNEY GENERAL**

8 **PLAINTIFF**

9 **- AND -**

10
11 **MARTIN BRIDGER**

12 **DEFENDANT**

13 **- AND -**

14
15 **STUART KERNOHAN**

16 **PROPOSED SECOND DEFENDANT**

17
18
19
20 **Appearances:** Mr. Douglas Schofield for the Plaintiff
21 Mr. Anthony Akiwumi for the First Defendant
22 Mr. Shaun McCann for the Proposed Second Defendant

23
24 **Before:** Hon. Justice Williams

25
26 **Heard:** 14th December 2011

27
28 **Delivered:** 27th January 2012



29
30
31 **RULING**

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33
34 1. This matter came before me on the application of Stuart Kernohan dated 11th
35 November 2011 for leave to intervene and to be joined as the Second Defendant,
36 in injunction proceedings commenced on 28th October 2011 by the Attorney
37 General. Mr. Kernohan submits that he has a very significant interest in the
38 outcome of the proceedings and that he will be affected by any order therein
39 made. If successful on the Application Mr. Kernohan seeks, pursuant to paragraph

1 2 of his Summons, specific details in relation to the documents the Attorney
2 General claims are subject to legal privilege.

3

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

10

11 3. The Attorney General submits that the said documents are subject to legal
12 privilege. The Attorney General contends that Mr. Kernohan has no locus standi
13 to participate in the hearing and therefore opposes the application for joinder. It is
14 contended that the issue for me to determine will be whether Mr. Bridger should
15 be allowed to disclose to Mr. Kernohan in the separate Kernohan proceedings
16 documents which are contended to be legally privileged and over which privilege
17 has not been waived. It is submitted that if Mr. Kernohan, being the actual person
18 who is not entitled to know anything about any privileged documents, is present
19 when the question of privilege is being argued that it will “obstruct and hamper”
20 the argument.

21

22 4. Mr. Bridger submits that, “all things being equal,” Mr. Kernohan should have the
23 opportunity to inspect the documents. He appears to take a neutral position on the

1 application for leave to intervene. At paragraph 36 of Mr. Bridger's Amended
2 Defence he stated:

3 *"...The First Defendant further avers that all decisions on the*
4 *issuance of the Notice of Investigation were taken in good faith*
5 *and after careful and conscientious consideration and*
6 *deliberation. The first Defendant acted at all times with the benefit*
7 *of appropriate legal advice. For the avoidance of doubt privilege*
8 *in respect of this legal advice has not been waived."*

9 However, it is clear that Mr. Bridger is now of the view that if the Attorney
10 General succeeds in his application concerning the documents then that will have
11 "far reaching consequences" on his ability to successfully defend the misfeasance
12 of office claims brought by Mr. Kernohan against him and the Second Defendant.
13 At this stage, on the papers before me, I have no particularised written
14 submissions or evidence from Mr. Bridger to counter the contention that the
15 documents are privileged or why any privilege has been waived. These will need
16 to be filed and served well in advance of the hearing of the Originating Motion.

17
18 **Background**

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20 5. Mr. Kernohan was appointed as Commissioner of the Royal Cayman Islands
21 Police Force pursuant to a written contract commencing on 15th October 2005. It
22 was a fixed term renewable contract due to expire on 14th October 2009. On 18th
23 November 2008 Mr. Kernohan was summarily dismissed from the Police Force.

1 6. In his Amended Writ of Summons re-issued on 17th June 2011 and Amended
2 Statement of Claim re dated 17th June 2011 in Case No. 255 of 2009 Mr.
3 Kernohan makes a claim for wrongful dismissal contending that the termination
4 of his contract of employment was unlawful. This is denied by the Attorney
5 General, as Second Defendant, in his Amended Defence re-dated 28th July 2011.
6 Mr. Kernohan claims that Mr. Bridger is liable to him for damages for the tort of
7 misfeasance in public office. This is denied by Mr. Bridger, as First Defendant, in
8 his Amended Defence re-dated 1st August 2011. Mr. Kernohan also alleges that
9 the Government of the Cayman Islands (represented by the Attorney General) is
10 vicariously liable for misfeasance in public office and this is also denied in the
11 said Amended Defence filed by the Attorney General.

12
13 7. On 28th May 2011 Sir Alan Moses, (AJ) made various orders including
14 comprehensive directions in the Kernohan proceedings. The parties were ordered
15 to exchange disclosure lists by 7th October 2011 with inspection of documents to
16 follow within seven days thereafter. Exchange did not take place until around 17th
17 October 2011.

18
19 8. The Attorney General claimed legal professional privilege over documents
20 detailed as follows in Part 2 of Schedule 1 of his list dated 17th October 2011.

21 “1) Confidential correspondence, instructions, opinions, memoranda,
22 notes and other communications and documents passing between
23 the First Defendant, the Strategic Oversight Group, the Governor
24 and/or others concerned with Operation Tempura; and their legal

1 advisers; including, Mr. Andre' Mon Desir, independent special
2 counsel to Operation Tempura, Mr. Marin Polaine, successor to
3 Mr. Mon Desir, Ms. Arvinder Sambei, a colleague of Mr. Polaine,
4 the Second Defendant, and other members of the Cayman Islands
5 Attorney General's Chambers and/or the Cayman Islands
6 Government Legal Department; for the purposes of giving or
7 obtaining legal advice, which are subject to legal professional
8 privilege, and copies, notes, extracts, summaries and discussion
9 thereof and other references thereto.

10 2) Confidential correspondence, instructions, opinions, memoranda,
11 notes, drafts of pleadings, affidavits and statements, and other
12 privileged documents passing between and/or in the possession,
13 custody or power of the Second Defendant and other members of
14 the Cayman Islands Attorney General's Chambers and/or the
15 Cayman Islands Government Legal Department and/or counsel
16 made in contemplation and/or during the conduct of these
17 proceedings for the purpose of information, evidence and advice in
18 connection therewith, which are privileged, and copies, notes,
19 extracts and summaries thereof and other references thereto.

20 3) Confidential correspondence, instructions, opinions, memoranda,
21 notes and other communications and documents passing between
22 the parties or former parties to this action or their attorneys or
23 counsel for the dominant purpose of informing each other of the
24 facts, or the issues, or advice received, or of obtaining legal advice
25 in respect of contemplated or pending litigation, which are subject
26 to common interest privilege.”
27

28 9. Mr. Bridger served his List of Documents around 19th October 2011, in which
29 Schedule 1 Part 1 detailed all the documents that he would make available for
30 inspection by the other parties. It is suggested that Mr. Bridger retained copies of

1 these documents comprising legal advice that was presented in relation to the
2 investigation, some of which were given to him at a time when both he and the
3 Attorney General were jointly represented by Members of the Attorney's
4 Chambers. The Attorney General, upon reviewing the list of documents
5 mentioned in the Schedule, formed the view that a number of them were subject
6 to legal professional privilege and that Mr. Bridger had made a deliberate decision
7 to disclose them to all parties. It is claimed that the documents contain legal
8 advice from the Attorney General and his Chambers, Mr. Andre Mon Desir (who
9 was appointed by the Governor to act as independent special counsel to the
10 investigation from November 2007 up to 17th May 2008) and Mr. Martin Polaine,
11 who took over when his Company was appointed to do so by the Ministry of
12 Internal and External Affairs. The expenses incurred in the investigation,
13 including for the services of the special counsel, were paid for from that
14 Ministry's budget.

- 15
- 16 10. Various exchanges took place between the Attorney General and Mr. Akiwumi,
17 which eventually resulted in the current sensible holding position, namely an
18 undertaking from Mr. Bridger not to permit inspection of the documents until
19 determination of the Court of the Notice of Motion. The matter cannot proceed
20 until the Attorney General's Notice of Originating Motion has been determined
21 by the Court.

22

1 **Factual Background – Operation Tempura**

2
3 11. The background of this matter is set out in some detail in the previous decision of
4 the Chief Justice in the matter of *Operation Tempura* [2008] CILR 111, and *R v*
5 *Ebanks, ex parte Henderson* [2009] CILR 57 as well as the in the Ruling of Lord
6 Justice Moses made on 28th May 2011 in the Kernohan proceedings. I am not
7 required for the purpose of this ruling to go into the same detail herein.

8
9 12. It is alleged by Mr. Kernohan that at a meeting held on 27th August 2007
10 involving amongst others himself, the former Governor of the Cayman Islands
11 and Mr. Larry Covington Her Majesty’s police representative for the Caribbean
12 and other nearby territories a discussion was held concerning the investigation of
13 allegations that Anthony Ennis, Deputy Commissioner of Police, had passed
14 confidential information concerning police affairs to Desmond Seales, the Editor
15 of the Cayman Net News newspaper.

16
17 13. It is said that at the meeting it was agreed that these allegations would be
18 investigated by an independent team comprised of overseas police officers. Mr.
19 Kernohan alleges that, during the meeting, the Governor with the consent and
20 approval of the Attorney General and Mr. Covington authorised and instructed
21 him to procure Mr. John Evans and Mr. Lyndon Martin to obtain copies of
22 relevant documents from the office of Cayman Net News, where they both
23 worked. The Attorney General denies that the Governor has ever made a decision
24 in relation to the investigation into the Deputy Commissioner.

- 1 14. On 3rd September 2007 Evans unsuccessfully searched the office of the proprietor
2 for a box file which he thought contained the documents.
3
- 4 15. Mr. Kernohan contends that at a meeting held on 29th August 2007 between
5 himself, the Governor and the Attorney General it was agreed that he would stand
6 down as officer with oversight of the operation and that the Governor would take
7 his place. Mr. Kernohan's position is that it was agreed that Chief Superintendent
8 Jones would assume that role and report direct to the Governor.
9
- 10 16. In September 2007 Chief Superintendent Bridger, as he was then, arrived and
11 headed the team of investigators made up of officers from the Metropolitan
12 Police. The police operation became known as Operation Tempura. He was sworn
13 in as a special constable by Mr. Kernohan on 17th September 2007.
14
- 15 17. On 22nd February 2008 Mr. Mon Desir unsuccessfully applied to the Chief Justice
16 for a search warrant against Mr. Kernohan on the basis that he had procured Mr.
17 Evans to commit a burglary at the offices of the newspaper. He was again
18 unsuccessful in applications made on 13th and 20th March 2008. The Chief Justice
19 found in a detailed ruling delivered on 4th April 2008 that there were no
20 reasonable grounds for issuing a search warrant on the basis of suspecting Mr.
21 Kernohan of misconduct contrary to statute.
22
- 23 18. By a letter written by the Governor dated 27th March 2007 Mr. Kernohan was
24 placed on "required leave." The letter stated:

1 *“...after discussion with the Attorney General, it has been decided*
2 *to place you on Required Leave in the public interest for an initial*
3 *period of one month commencing immediately. This is to facilitate*
4 *the enquiry into the events of the 3rd September 2007 and matters*
5 *related thereof.”*

6 The “required leave” was to be kept under review on “an ongoing basis” and Mr.
7 Kernohan was to be kept informed. The Governor stressed in the letter that the
8 “required leave” was not a disciplinary action, but that the breaking of the
9 expressed conditions of the “required leave” could result in disciplinary
10 proceedings.

11
12 19. On 15th May 2008 Mr. Kernohan was given notice, under a complaint from then
13 Chief Superintendent Bridger, that he was under investigation for misconduct in
14 public office contrary to common law. The allegation being that he:

15 *“...failed to carry out a proportioned investigation by not*
16 *undertaking reasonable lines of enquiry in relation to allegations*
17 *made by Mr. Lyndon Martin against Deputy Commissioner of*
18 *Police Anthony Ennis and Mr. Desmond Seales the editor in Chief*
19 *of Cayman Net News which culminated in an unlawful act, namely*
20 *– the unlawful entry into and search by John Evans of the office of*
21 *Mr. Desmond Seales.”*

22 This allegation was exactly the same basis for the first failed application for a
23 search warrant.

1 20. On 18th November 2008 Mr. Kernohan was dismissed as Commissioner of Police.
2 The letter of dismissal did not contain any reference or did not purport to be on
3 the grounds of the surrounding events being investigated in Operation Tempura.
4 The dismissal was because; (i) he did not return to the Cayman Islands following
5 a number of requests and then orders for him to do so by the Governor and (ii) it
6 was alleged he had made unsupported spurious allegations of potential
7 impropriety against members of the Government.

8
9 21. On 30th November 2009 Mr. Kernohan was informed that any suggestion that he
10 had committed a criminal offence had been withdrawn.

11
12 **The Law**

13
14 22. Although not clearly stated in the pleadings Mr. Kernohan’s application to
15 intervene is made pursuant to Order 15, r6 (2) (b) of the Grand Court Rules 2000,
16 which provides:

17 *“(2) Subject to the provisions of this rule, at any stage of the*
18 *proceedings in any cause or matter the Court may on such*
19 *terms as it thinks just and either of its own motion or on*
20 *application –*

21
22 *(b) Order any of the following persons to be added as a*
23 *party, namely-*

24
25 *(i) any person who ought to have been joined as a*
26 *party or whose presence before the Court is*

1 and adjudicated upon. A significant object of the rule is to prevent multiplicity of
2 proceedings.

3
4 25. Adopting the approach in *Lord Ashburton v Pape* [1913] 2 Ch. 469, a case
5 involving the equitable jurisdiction to grant injunctions to protect breach of
6 confidence once a privileged document has been disclosed, the Attorney
7 General's application for an injunction has been made in separate proceedings.
8 The purpose of these separate proceedings is to determine whether the documents
9 referred to in Mr. Bridger's disclosure list and which Mr. Bridger seeks to provide
10 to Mr. Kernohan are protected by legal privilege, and if they are, has privilege
11 been waived. Where legal professional privilege is not waived or abrogated it is
12 paramount and absolute and not subject to the balancing exercise of weighing
13 competing public interests against one another. As is oft quoted Lord Taylor said
14 in *R v Derby Magistrates Court Ex Parte B* [1996] 1 AC 487 at 507:

15 *"The principle which runs through all cases... is that a man must*
16 *be able to consult his lawyer in confidence, since otherwise he*
17 *might hold back half the truth. The client must be sure that what he*
18 *tells his lawyers in confidence will never be revealed without his*
19 *consent. Legal professional privilege is thus much more than an*
20 *ordinary rule of evidence, limited in its application to the facts of a*
21 *particular case. It is a fundamental condition on which the*
22 *administration of justice as a whole rests. ...Nobody doubts that*
23 *legal professional privilege could be modified, or even abrogated*

1 *by statute, subject to the objection that legal professional privilege*
2 *is a fundamental human right protected by the European*
3 *Convention for the Protection of Human Rights and Fundamental*
4 *freedoms...but whatever inroads may have been made by*
5 *Parliament in other areas, legal professional privilege is a field*
6 *which Parliament has so far left untouched.”*
7

8 26. The Attorney General’s application is for an injunction to prevent Mr. Bridger
9 disclosing the disputed documents to Mr. Kernohan or anyone else. The
10 documents in question are not “in evidence” and if the Court is satisfied that they
11 are covered by privilege Sir Nicholas Brown-Wilkinson, Vice Chancellor stated
12 in *English American Insurance Company Limited v Herbert Smith* [1998] Fleet
13 Street Reports 232 at page 236 that there would be an entitlement to “*an*
14 *injunction restraining the other side from making use of them, including the use in*
15 *the proceedings that are pending.*”
16

17 27. Any disputed question concerning privilege needs to be decided by putting
18 evidence relevant to that disputed question before the Court. The Attorney
19 General, as the party asserting privilege, will rely upon evidence to prove the
20 relevant facts. It will be for Mr. Bridger to have the Court take into account any
21 facts which tend to suggest that there never was a privilege, or to contend that, if
22 ever there was privilege, there are facts which mean that it has been lost. He will

1 need to file affidavit evidence that prove those facts. The issue is between the two
2 of them.

3
4 28. This is not the type of case where a party upon whom a list has been served
5 wishes to challenge the claim of privilege that has been made and who then, to
6 ensure the issue is actually determined by the Court, must serve a notice of
7 motion seeking that the documents in question be produced for inspection. This is
8 because the Court is already due to carry out that very exercise, namely to
9 determine the same issue after inspecting the documents in question, considering
10 the affidavit evidence and hearing full submissions made on behalf of Mr. Bridger
11 and the Attorney General in the separate proceedings. It is patently clear from Mr.
12 Akiwumi's submissions before me that at the injunction hearing, for which he
13 indicates an intention to instruct leading counsel, any application for such an
14 order will be forcefully opposed, as the documents in question are contended to be
15 of fundamental importance to his client's Defence. Therefore, all the parties
16 necessary for the Court to determine the question arising will be present before
17 the Court. Mr. Kernohan's presence would not be necessary to ensure that the
18 issue of privilege is effectually and completely determined.

19
20 29. If the hearing of the injunction involves only the Attorney General and Mr.
21 Bridger, then the parties will be able to make their respective submissions
22 referring the Court directly to the content of the documents in question which they
23 and the Court will have before them. However, if Mr. Kernohan is joined, then the

1 hearing will become most disjointed and laborious, resulting in unnecessary
2 complication as he and his representatives will not be able to remain in Court
3 whilst such detail is discussed.
4

5 30. I am not satisfied that the case raised by Mr. Kernohan's affidavit sworn on 16th
6 November 2011 and the submissions of Mr. McCann that it would be just and
7 convenient to determine the issue of privilege of the documents in question
8 between Mr. Kernohan as proposed intervener as well as the current parties to the
9 application.
10

11 31. Accordingly, the application of Stuart Kernohan dated 11th November 2011 for
12 leave to intervene and be joined as the Second Defendant in injunction
13 proceedings commenced on 28th October 2011 by the Attorney General is
14 dismissed.
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19 Williams J.
20 Judge of the Grand Court
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