IN THE CAYMAN ISLANDS COURT OF APPEAL

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 149 OF 1994
C.I.C.A. NO. 1 OF 1996

BEFORE: THE RT. HON. MR. JUSTICE EDWARD ZACCA, P.C.
PRESIDENT

HON. MR. JUSTICE J. S. KERR, JUDGE OF APPEAL

HON. MR. JUSTICE GERALD COLLETT,
JUDGE OF APPEAL

BETWEEN	WALLING WHITTAKER	Defendant/ Appellant
AND	LADNER WATLER	Plaintiff/ Respondent

Appearances

Miss Lisa Agard Crown Counsel for the appellant
Mr. P. Lamontagne, Q.C. & Mr. Graham Hampson
of Quin & Hampson of Quin & Hampson

AUGUST 13th AND DECEMBER 6th 1996

ZACCA, PRESIDENT

The respondent, Ladner Watler, a police officer on secondment as a

Marine Conservation Enforcement Officer, brought an action for defamation against the appellant who was the Director of Environment and as such was one of the respondent's Superior Officers.

The action for defamation was based on the contents of a memorandum alleged to have been sent by the appellant to the Principal Secretary, Personnel of the Cayman Islands Government. Copies were distributed to other officers within the Public Service.

On a summons for order for direction, the Court ordered both parties to file and serve a list of documents and also ordered that there be inspection of such documents.

Objection was taken to the production of documents and any oral evidence as to its contents. This was done in a Certificate of the Chief Secretary of the Cayman Islands Government dated 31st January, 1995. It is necessary to set out the contents of the Certificate:

"CERTIFICATE OF THE CHIEF SECRETARY
OF THE CAYMAN ISLANDS

1. I have considered documents numbered 17, 18, and 19 in Schedule Part 1 (a) of the Plaintiff's List of Documents filed on the 25th August 1994 and documents numbered 30, 31, 32, 33, 34,35, 36, 37 and 38 in Schedule 1 Part 2 of the Defendant's List of Documents filed on the 19th August 1994

and object to their production on the ground that it would be injurious to the public interest to produce them.

2. The documents referred to in paragraph 1 above belong to a class of documents which in the public interest it is necessary for the proper functioning of the public service to withhold from production as they relate to the assessment of the performance of duties of a public officer in a Government Department.

3. In my capacity as Administrative Head of the Civil Service I am concerned to maintain the confidentiality of personnel matters within the Service. It certainly is in the public interest that the Service is staffed with competent and productive employees and it would certainly impair the proper and efficient functioning of the Service if frank and honest assessments could not be made of the performance of a public officer's functions by his Head of Department.

4. I understand that oral evidence may be given in these proceedings. If oral evidence were sought to be given of the contents of any of the documents to the production of which I have in this certificate objected, I would wish to object to such evidence on the same grounds as those hereinbefore set out in relation to the documents in question."

The respondent filed a summons dated 20th March, 1995 requesting the Court to order production and inspection of documents as set out in the Schedule 1, Part 2 of the appellant's list of documents.

After hearing submissions on behalf of the appellant and the respondent, the learned Chief Justice made an Order for production and inspection of the documents which the appellant sought in his summons dated March 22, 1995.

It is from this Order that the appellant now appeals to this Court. The grounds of appeal as filed are as follows:

1. The learned Chief Justice was wrong in law in holding that the public interest reflects the requirements of the administration justice substantially outweighed the public interest in the withholding of such documents from production to ensure the proper functioning of the civil service.

2. In weighing the competing public interests the Learned Chief Justice failed to attach any or sufficient weight to the Certificate and further Certificate of the Chief Secretary in that he failed to consider the issue of confidentiality of personal matters within the civil service as set out in

the said certificate and further certificate.

3. The learned Chief Justice erred in concluding that Government officers were in no different position to other persons who record opinions in accordance with a duty to employers in that all Government officer are bound buy General Orders, and while they may not have the force of Law, Government officers are nonetheless under a compulsion to act in accordance with them.

4. Generally the decision of the Learned Chief Justice was wrong and ought to be set aside.

In her submissions, Miss Agard, for the appellant submitted that the learned Chief Justice placed undue reliance on the case of ***Conway v Rimmer*** [1968] 1 All E.R. 874. She argued that the documents were communications between various heads of Departments with respect to the appellant's continued position as a Marine Conservation Enforcement Officer. That these communications were of a confidential nature the heads of Departments could not properly exercise their functions if such documents were to be produced and inspected.

Whilst agreeing that there was some similarity between the instant case and the case of **Conway v Rimmer,** Miss Agard argued that high level

communications between of heads of Departments would be protected even if they were routine. The Director of Environment, she submitted, was a high level officer.

She took issue with the learned Chief Justice in this analysis of the cases and stated the if the Chief Justice had properly analyzed the cases and properly performed the balancing act between the public interest and the interest of justice, he ought to have concluded that the public interest far outweighed the interest of justice.

It was conceded that this was a class claim and that the withholding of the documents would be the death knell of the respondent's case. It is clear that without the production of the documents, the respondent would not be able to proceed with his action and he would be deprived of having his case considered by the Courts.

Mr. LaMontagne for the respondent supported the judgment of the Chief Justice and argued that the balancing act was properly executed and that the Chief Justice was correct in holding that the documents were to be

produced and inspected. He submitted that the appellant's claim was one which was wholly candour-based.

Miss Agard relied heavily on the case of **Air Canada v Secretary of State for Trade** [1983] A.C. 394 and **Rogers v Home Secretary and Gaming Board** [1973]A.C 388. She also referred to **Conway v Rimmer; Haselblad v Orbinson** [1985] 1 J.B. 475; **Continental Insurance Corporation [U.K] Ltd v Pine Top Insurance Ltd.** [1986] 1 Lloyd's Reports 8. The Court was also referred to the General Orders of the Cayman Islands Public Service.

Mr. LaMontagne, like the learned trial Judge, relied heavily on **Conway v Rimmer; Burmah Oil Company Ltd. v Bank of England** [1979] 3 All E.R. 700; **Poliva v Prime Minister and Kingdom of Tonga** [1988] L.R.C. [Const.] 949; **R v Chief Constable of West Midlands Police, ex parte Wiley** [1994] 3 All E.R. 420 and **Taylor v Anderton et al** [1995] 2 All E.R. 420.

One of the issues in the **Air Canada** case was the question of whether the Court should inspect the documents. Objection was taken to the

production of certain documents concerned with the formulation of Government Policy in the United Kingdom. The House of Lords held that the documents were unlikely to be of assistance to the plaintiff's case and refused to order inspection. The Law Lords, however, considered the cases of **Conway v Rimmer** and **Burmah Oil Company Ltd. v Bank of England.** The documents were divided into Categories 'A', 'B', 'C'. Category 'A' contained documents of high level ministerial papers relating to the formulation of Government policy and those in category 'B' consisted of inter departmental communications between senior Civil Servants relating to the formulation of policy described in Category 'A'.

Lord Fraser of Tullytbelton said at page 432:

> "I do not think that even Cabinet minutes are completely immune from disclosure in a case where, for example, the issue in a litigation involves serious misconduct by a Cabinet Minister. Such cases have occurred in Australia (see Sankey v Whimlam (1978) 21 A.L.R. 505) and the United States (see United States v s (1974) 418 U.S. 683) but fortunately not in the United Kingdom: see also the New Zealand case of Environmental Defence Society Inc. v South Pacific Aluminum Ltd. (No. 2 [1981] 1 N.Z.L.R. 153. But while Cabinet documents do not have complete immunity, they are entitled to a high degree of protection against disclosure. In the present case

> the documents in category 'A' do not enjoy quite the status of Cabinet minutes, but they approach that level in that they may disclose the reasons for Cabinet decisions and the process by which the decisions were reached."

Lord Fraser indicated that the onus was on the plaintiff as the parties seeking disclosure, to show why the documents ought to be produced for inspection.

Lord Wilberforce at p. 437 said:

> "The documents now in issue, in fact, can claim to bear a higher degree of confidentiality than those involved in Burmah; they relate directly to the making of decisions as to government policy in a sensitive area, viz., the economic and financial policy of the government, particularly in relation to nationalized industries, by ministers and civil servants prior to consideration in Cabinet, and familiar contentions are put forward as to the need to protect them against disclosure in the interest of the confidentiality of the inner working of government and of the free and candied expression of views. It is relevant to add that it is shown that there are in existence Cabinet papers bearing on these same matters. These are not asked for, but their existence underlines the high level status and confidentiality of those whose production is sought. It is not, at this stage, disputed that the documents in question fall within the class for which protection is claimed, nor that the claim for protection is put on what is accepted to be the highest grade."

Lord Edmund Davies at p. 442 stated:

> "The principles governing discovery in such special cases as the present were exhaustively considered by your Lordship's House in Burmah Oil Co. Ltd. v. Governor and Company of the Bank of England [1980] A.C. 1090, and I shall not restate them. Suffice it to say that provided that certain conditions have been satisfied, the stage may be reached when the court will be obliged to conduct "balancing" exercise, consisting in weighing (a) the public interest in the due administration of justice against (b) the public interest established by the claim for immunity. And it is for the party seeking discovery to establish clearly that the scale falls decisively in favour of (a) if he is to succeed in his quest. If he fails, even material clearly "necessary ... for disposing fairly of the cause of matter" must be withheld."

Lord Scarman at p. 444 said:

> "Faced with a properly formulated certificate claiming public interest immunity, the court must first examine the grounds put forward. If it is a "class" objection and the documents (as in Conway v. Rimmer [1968] A.C. 910) are routine in character, the court may inspect so as to ascertain the strength of the public interest in immunity and the needs of justice before deciding whether to order production. If it is a contents claim, e.g. a specific national security matter, the court will ordinarily accept the judgment of the minister. But if it is a class claim in which the objection on the face of the certificate is a strong one -as in this case where the documents are minutes and memoranda passing at a high level between ministers and their advisers and concerned with the formulation of policy-the court will pay great regard to the minister's view (or that of the senior official who has signed the certificates)."

Lord Templeman at p. 448 said:

> "The airlines now wish to go further. They wish to inspect privileged documents which relate to the evolution of the policy which was accepted by the government and set forth in the White Paper. The airlines seek to discover the views expressed by individual ministers and civil servants when they were evolving and agreeing the policy which was ultimately expressed in the White Paper and which was implemented in relation to the B.A.A. It may be that in the evolution of policy a minister or civil servant changed his mind or opposed the adoption of the policy or put forward views similar to those subsequently urged by the B.A.A. or the airlines in opposition to increased charges. But the disclosure of privileged documents relating to evolution of government policy is not necessary to enable the airlines to prove the extent to which that policy after it had been expressly adopted by the Government became responsible for the conduct of the Secretary of State and the actions of the B.A.A."

In the case of **Rogers v Home Secretary and Gaming Board** an a application was made to the Gaming Board for Certificates of Consent relating to Bingo Clubs. The application was refused. The Gaming Board acted on a letter written by the Assistant Chief Constable of the County. Proceedings for criminal libel in respect of the letter were commenced. The Home Secretary applied for an Order to set aside two witness summonses directed to the Chief Constable and the Secretary of the Board

to give evidence and produce certain documents including the letter. An Order setting aside the summonses was made.

Lord Reid at p. 400 said:

> "Claims for "class privilege" were fully considered by this House in Conway v. Rimmer [1968] A.C. 910. It was made clear that there is a heavy burden of proof on any authority which makes such a claim. But the possibility of establishing such a claim was not ruled out. I venture to quote what I said in that case, at p. 952:
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> > "There may be special reasons for withholding some kinds of routine documents, but I think that the proper test to be applied is to ask, in the language of Lord Simon in *Duncan v. Cammell Laird & Co. Ltd. [1942] A.C.* 624, 642, whether the withholding of a document because it belongs to a particular class is really 'necessary for the proper functioning of the public service.' "
>
> I do not think that "the public service" should be construed narrowly. Here the question is whether the withholding of this class of documents is really necessary to enable the board adequately to perform its statutory duties. If it is, then we are enabling the will of Parliament to be carried out. There are very unusual features about this case. The board require the fullest information they can get in order to identify and exclude persons of dubious character and reputation from the privilege of obtaining a licence to conduct a gaming establishment. There is no obligation on anyone to give any information to the board. No

> doubt many law-abiding citizens would tell what they know even if there was some risk of their identity being known, although many perfectly honourable people do not want to be thought to mixed up in such affairs. But it is obvious that the best source of information about dubious characters must often be persons of dubious character themselves. It has long been recognised that the identity of police informers must be in the public interest be kept secret and the same considerations must apply to those who volunteer information to the board. Indeed, it is in evidence that many refuse to speak unless assured of absolute secrecy.
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> The letter called for in this case came from the police. I feel sure that they would not be deterred from giving full information by any fear of consequences to themselves if there were any disclosure. But much of the information which they can give must come from sources which must be protected and they would rightly take this into account. Even if information were given without naming the source, the very nature of the information might, if it were communicated to the person concerned, at least give him a very shrewd idea from whom it had come."

Again at p. 413, Lord Salmon said:

> "In my view, any document or information that comes to the board from whatever source and by whatever means should be immune from discovery. It is only thus that the board will obtain all the material it requires in order to carry out its task efficiently. Unless this immunity exists many persons, reputable or disreputable, would be discourage from communicating all they know to the board. They might well be in fear not only of libel actions or prosecutions for libel but also for their safety and maybe their lives."

> I cannot, however, agree with the view expressed in the Divisional Court that, but for the immunity for which the Attorney-General contended, the police might refuse to give any information to the board. To my mind, this is unthinkable. It smacks of the old fallacy that any official in the government service would be inhibited from writing frankly and possibly at all unless he could be sure that nothing which he wrote could ever be exposed to the light of day. I am certain that even without the immunity the police would do their duty undeterred by fear of actions or even prosecution for libel."
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> I must refer shortly to the argument that *Conway v. Rimmer* [1968] A.C. 910 is an authority for the proposition that production of the letter of September 15, 1969, can be compelled by subpoena. *Conway v. Rimmer* dealt with an entirely different class of document from that with which we are here concerned and, in my view, is irrelevant to this appeal."

At page 414 :

> "For the reasons I have explained in this speech there is clearly all the difference in the world between the question whether the public interest requires that mundane communications between all persons in the government service should be immune from discovery and the question whether the public interest requires that communications received by the Gaming Board should be immune from discovery.".

Miss Agard for the appellant submitted that the facts in ***Rogers v the Home Secretary and Gaming Board*** comes closest to the facts in the instant

appeal. With respect, I am unable to agree with this view. There the case was of criminal libel, the documents were said to be inadmissible on the basis of the statute which regulated the affairs of the Gaming Board. It was also necessary to protect public informers.

In the ***Air Canada*** case, the documents were said to be high level documents concerning the formulation of government policy.

In my view, these cases do not support the contention advanced for by the appellant.

It is now necessary to consider the cases of ***Conway v Rimmer*** and ***Burmah Oil Company Ltd. v. Bank of England.***

In ***Conway v Rimmer*** [1968] 1 ALL E.R. 874, the court was asked to consider whether a probationary report on a police constable should be produced. The appellant in that case was a probationer police constable. Another probationer police constable found a electric torch in the appellant's locker which he claimed to be his. The matter was investigated and the appellant subsequently charged and later acquitted. The appellant

was dismissed from the force. In a action by the appellant for malicious prosecution, the Home Secretary claimed crown privilege for classes of documents which include the probationary reports relating to the appellant and the report leading to his prosecution.

An order for the disclosure of the reports was made

Lord Reid at p. 880 said:

> "It is universally recognised that here there are two kinds of public interest which may clash. There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done. There are many cases where the nature of the injury which would or might be done to the nation or the public service is of so grave a character that no other interest, public or private, can be allowed to prevail over it. With regard to such cases it would be proper to say, as LORD SIMON did, that to order production of the document in question would put the interest of the state in jeopardy; but there are many other cases where the possible injury to the public service is much less and there one would think that it would be proper to balance the public interests involved. I do not believe that LORD SIMON really meant that the smallest probability of injury to the public service must always outweigh the gravest frustration of the administration of justice.".

Lord Morris at p. 891 said :

> "It has been clearly laid down that the mere fact that a document is private or is confidential does not necessarily produce the result that its production can be withheld. In many decided cases, however, there have been references to a suggestion that if there were knowledge that certain documents (e.g. reports) might in some circumstances be seen by eyes for which they were never intended the result would be that in the making of similar documents in the future candour would be lacking. Here is a suggestion of doubtful validity. Would the knowledge that there were remote chance of possible enforced production really affect candour? If there was knowledge that it was conceivably possible that some person might himself see a report which was written about him, it might well be that candour on the part of the writer of the report would be encouraged rather than frustrated. The law is ample in its protection of those who are honest in recording options which they are under a duty to express. Whatever may be the strength or the weakness of the suggestion to which I have referred it seems to me that a court is as well and probably better qualified than any other body to give such significance to it as the circumstances of a particular case may warrant.".

Lord Pearce at p. 910 said :

> "In my view it is essential to leave the vague generalities of wide classes and get down to realities in weighing the respective injuries to the public of a denial of justice on the one side and, on the other, a revelation of governmental documents which were never intended to be made public and which might be inhibited by an unlikely possibility of disclosure. Obviously production would never be ordered of fairly wide classes of

> documents at a high level. To take an extreme case, production would never be order of cabinet correspondence, letters or reports on appointments to office of importance and the like; But why should the same yardstick apply to trivial documents and correspondence with or within a ministry?"

Lord Upjohn at p. 914 said:

> "My lords, feeling as I do unfettered by any necessity for strictly textual adherence to LORD SIMON'S words, I think that the principle to be applied can be very shortly stated. On the one side there is the public interest to be protected; on the other side of the scales is the interest of the subject who legitimately wants production of some documents which he believes will support his own or defeat his adversary's case. Both are matters of public interest, for it is also in the public interest that justice should be done between litigating parties by production of all documents which are relevant and for which privilege cannot be claimed under the ordinary rules. They must be weighed in the balance one against the other.
>
> Your lordships have reviewed the earlier authorities which are many and are not easy to reconcile and I shall not discuss them again, but it seems to be that there is sufficient authority to support the view held by all of your lordships that the claim of privilege by the Crown, while entitled to the greatest weight, is only a claim, and the decisions whether the court should accede to the claim lies within the discretion of the judge: and it is a real discretion."

The case of ***Burmah Oil Company Ltd. v. Bank of England*** [1979] 3 All E.R. 700 concerned an action brought by Burmah against the Bank seeking

to set aside the sale of stock on the grounds that the sale was unconscionable, inequitable and unreasonable and was in breach of Bank's duty of fair dealing and was at an undervalue.

At issue was the production of certain documents to which the Crown objected. The Certificate given by the Chief Secretary of the Treasury divided the documents into three categories. Category "A" consisted of memoranda of meetings attended by Ministers and Category "B" memoranda of meetings at which government officials but not Ministers, were present. The Certificate claimed privilege for the documents in these categories on the ground that they fell within the class of documents relating to formulation of government policy on important economic matters. Burmah asked for production of ten documents all of which fell within categories "A" and "B".

Having inspected the documents, the House of Lords was of the opinion that the documents did not in fact contain material necessary for fairly disposing of the case and the objection to production was upheld.

Lord Wilberforce at page 704 said :

> "It is apparent that these identified matters of policy were of the highest national and political importance and that they called for formulation of policy at the highest governmental levels, including the Cabinet, involving directly several Ministers in the Treasury, the Department of Energy and the Paymaster-General, and in the first two mentioned departments, handled by the Permanent Under Secretary of State."

At p. 708:

> "It may well be arguable whether, when one is faced with a claim for immunity from production on 'public interest' grounds, and when the relevant public interest is shown to be of a high, or the highest level of importance, that fact is of itself conclusive, and nothing which relates to the interest in the administration of justice can prevail against it. As Lord Pearce said in *Conway v Rimmer* 'obviously production would never be ordered of fairly wide classes of documents at a high level' (and see *Rogers v Secretary of State for the Home Department* per Lord Salmon). In the words of May J in *Barty-King v Ministry of Defence* (which was concerned with internal thinking and policy at a high civil service level) it is not even necessary to bring out the scales. Counsel for the Attorney-General did not contend for any such rigorous proposition, re that a high level public interest can never, in any circumstances, be outweighed. In this I think that he was in line with the middle of the road position taken by Lord Reid in *Conway v Rimmer* and also with the median views of members of the High Court of Australia in *Sankey v Whitlam;* see particularly the judgment of Gibbs ACJ. I am therefore quite prepared to deal with this case on the basis that the courts may, in a suitable case, decide that a high level governmental public

> interest must give way to the interests of the administration of justice."

Lord Edmund-Davies at page 719 said:

> "And so, as I see it, the position is reached that, on the one hand, Burmah seek disclosure of ten documents which may well contain material 'necessary... for disposing fairly of the cause or matter or for saving costs', while, on the other hand, the Attorney-General by his intervention asserts that the withholding of these ten documents (two in category A and eight in category B) is necessary for the proper functioning of the public service'. In these circumstances, the balancing exercise with which the courts of this country have become increasingly familiar since *Conway v Rimmer* is called for, and if Burmah are to succeed the scales must come down decisively in their favour."

At page 720:

> "Yet, when all this is said and done and even accepting that the withheld documents are likely to contain material supportive of the allegation of unconscionability, this House is at present completely in the dark as to the cogency of such material. For example, does it clearly and substantially support the allegation, or only to an insignificant degree?
>
> Unless its evidentiary value is clear and cogent, the balancing exercise may well lead to the conclusion that the public interest would best be served by upholding the Chief Secretary's objection to disclosure. On the other hand if the material provides strong and striking support of Burmah's claim, the Court may conclude that when this is set against such prejudice to the public interest as is likely to arise where any

> disclosure made in late 1979 regarding even high-policy commercial negotiations conducted in January 1975 the interests of justice demands that disclosure (complete or partial) should be ordered. A judge conducting the balancing exercise needs to know, in the words of Lord Pearce in *Conway v Rimmer:*
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> > '... whether the documents in question are of much or little weight in the litigation, whether their absence will result in a complete or partial denial of justice to one or other of the parties or perhaps to both and what is the importance of the particular litigation to the parties and the public. All these are matters which should be considered if the court is to decide where the public interest lies.'

Lord Keith at p. 724 states :

> "Over a considerable period it was maintained, not without success, that the prospect of the disclosure in litigation of correspondence or other communications within government departments would inhibit a desirable degree of candour in the making of such documents, with results detrimental to the proper functioning of the public service. As mentioned by Lord Reid in *Conway v Rimmer* the fashion for this was set by Lord Lyndhurst LC through the reasons possibly oblique, which he gave for refusing production of communications between the directors of the East India Company and the Board of Control in *Smith v East India Co.* This contention must now be treated as having little weight, if any. In *Conway v Rimmer* Lord Morris of Borth-y-Gest referred to it as being of doubtful validity. Lord Hudson thought it impossible at the present day to justify the doctrine in its widest term. Lord Pearce considered that a general blanket production of

> wide class led to a complete lack of common sense. Lord Upjohn expressed himself as finding it difficult to justify the doctrine 'when those in other walks of life which give rise to equally important matters of confidence in relation to security and personal matters as in the public service can claim no such privilege.' The notion that any competent and conscientious public servant would be inhibited at all in the candour of his writings by consideration of the off-chance that they might have to be produced in a litigation is in my opinion grotesque. To represent that the possibility of it might significantly impair the public service is even more so. Nowadays the state in multifarious manifestations impinges closely on the lives and activities of individual citizens. Where this has involved a citizen in litigation with the state or one of its agencies, the candour argument is an utterly insubstantial ground for denying him access to relevant documents. I would add that the candour doctrine stands in a different category from that aspect of public interest which in appropriate circumstances may require that the sources and nature of information confidentially tendered should be withheld from disclosure. *Rogers v Secretary of State for the Home Department and D v National Society for the Prevention of Cruelty to Children* are cases in points of that matter."

Lord Scarman at p 733 said :

> "I do not therefore accept that there are any classes of documents which, however harmless their contents and however strong their requirement of justice, may never be disclosed until they are only of historical interest. In this respect I think there may well be a difference between a 'class' objection and a 'contents' objection, though the residue power to inspect and to order disclosure must remain in both instances. A Cabinet minute it is said must be withheld from production.

Documents relating to the formulation of policy of at a high level are also to be withheld. But is the secrecy of the 'inner workings of the government machine' so vital a public interest that it must prevail over even the most imperative demands of justice? If the contents of a document concern the national safety, affect diplomatic relations or relate to some state secret of high importance I can understand an affirmative answer. But if they do not (and it is not claimed in this case that they do), what is so important about secret government that it must be protected even at the price of injustice in our courts?

The reasons given for protecting the secrecy of government at the level of policy-making are two. The first is the need for candour in the advice offered to Ministers; the second is that disclosure 'would create or fan ill-informed or captious public of political criticism'. Lord Reid in *Conway v Rimmer* thought the second 'the most important reason'. Indeed, he was inclined to discount the candour argument.

I think both reasons are factors legitimately to be put into the balance which has to be struck between the public interest in the proper functioning of the public service (i.e. the executive arm of government) and the public interest in the administration of justice. Sometimes the public service reasons will be decisive of the issue; but they should never prevent the court from weighing them against the injury which would be suffered in the administration of justice if the document was not to be disclosed. And the likely injury to the cause of justice must also be assessed and weighed. Its weight will vary according to the nature of the proceedings in which disclosure is

> sought, the relevance of the documents and the degree of likelihood that the document will be of importance in the litigation. In striking the balance the court may also, if it thinks it necessary, itself inspect the documents."

This Court was also referred to the General Orders of the Public Service. It provides, amongst other things, for annual performance and evaluation report of public officers. As the learned Chief Justice pointed out in his reasons for the decision, it is the candour argument on which the Chief Secretary relies. The duties under the General Orders do not resolve the issue before the Court.

The Learned Chief Justice, having analyzed the cases and the arguments had to balance the competing interest of the preventing harm to the public service by disclosure and preventing frustration of the administration of justice by withholding disclosure.

In holding that the documents were of great importance to the plaintiff's action, he was of the view that the plaintiff should not be driven from the judgment seat.

The defence as filed, relies on qualified privilege and justification. Production of the document will not be prejudicial to the appellant's case at trial.

The learned Chief Justice was not in error in giving great weight to the case of ***Conway v Rimmer.*** The principle enunciated in that case, clearly, was of relevance to the respondent's application for production.

In exercising this discretion to order production and inspection of the documents, the learned Chief Justice stated:

"I have concluded that the aspect of the public interest which reflects the requirements of the administration of justice substantially outweighs the aspect which is against disclosure and which was set out in the Chief Secretary's Certificate."

Having considered the cases cited to this Court and having regard to the submissions of counsel, I have come to the conclusion that the learned Chief Justice was correct in holding that the documents should be produced and inspected. The documents in this appeal do not relate to high policy nor can they be regarded as high level documents. In my view the withholding of the documents is not necessary for the proper functioning of the Public Service.

The balancing act was properly carried out and the discretion of the trial Judge was properly exercised.

For these reasons, I would dismiss the appeal with costs to the respondent to be agreed or taxed.

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PRESIDENT

I concur.

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JUDGE OF APPEAL

I concur.

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JUDGE OF APPEAL