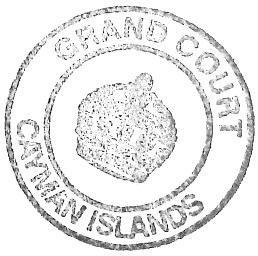
Chief Justice
20.10.95



IN THE GRAND COURT OF THE CAYMAN ISLANDS

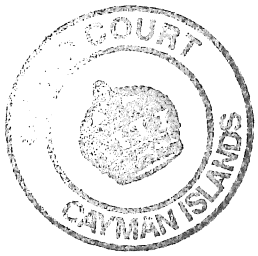
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. 149/94

BETWEEN:	LADNER WATLER	PLAINTIFF
AND:	WALLING WHITTAKER	DEFENDANT

For the plaintiff: Pierre Lamontagne Q.C.,
with him Mr. Graham Hampson
For the defendant: Ms. Lisa Agard

BEFORE HARRE C.J.



RULING

This application arose in an action for defamation based on the contents of a memorandum alleged to have been sent by the defendant to the Principal Secretary Personnel of the Cayman Islands Government with copies distributed to others within the public service.

The plaintiff was at the material time a Marine Conservation Enforcement Officer and the defendant was Director of Environment and as such one of the plaintiff's superior officers. Thus both parties were officers in the public service and the objection to the production of documents, and indeed to any oral evidence as to their contents, is set out in a certificate of the Chief Secretary dated 31st January 1995, the material part of which reads as follows -

> "The documents referred to .... 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.
>
> 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."

This application is of considerable importance to the plaintiff. If it fails it is unlikely that he will be able to maintain his action. That is an important consideration. In the words of Lord Pearce in Conway v. Rimmer (1968) 1 ALL .E.R. 874 at 911 -

> "... whether the documents in question are of much or little weight in litigation, whether their absence will result in a complete or partial denial of justice to one or either 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."

I was referred to a number of authorities by each side - Conway v. Rimmer (1968) 1 ALL. E. R. 874 (Police probationary report and a report leading to the prosecution of the probationer); Burmah Oil Co. Ltd v. Bank of England (1979) 3 ALL. E.R. 700 (documents relating to Government policy and information given in confidence to Government relating to the decision that the Bank of England should give

financial help to rescue a major oil company; R v. Chief Constable of the West Midlands Police, ex parte Wiley (1994) 3 ALL. E.R. 420 (Police complaints and the disciplinary files and statements taken in an investigation into complaints of police misconduct); Rogers v. The Home Secretary and Gaming Board for Great Britain (1973) A.C. 388 (police letter to gaming board in answer to request for information); Hasselblad (GB) Ltd v. Orbinson (1985) 1 Q.B. 475 (letter making allegations against plaintiffs sent to the Commission of the European Community); Bookbinder v. Tebitt (1992) 1 W.L.R. 217 (information given by informants relative to the performance of a statutory duty by the Audit Commission); and Pohiva v. Prime Minister and Kingdom of Tonga (Ministerial certificate claiming disclosure of plaintiff's personal files and relevant cabinet papers would be contrary to the public interest).

Of those on which the plaintiff relies I only propose to refer to Conway v. Rimmer in greater detail, both because the facts most closely resemble the present case and because the relevant principles are set out with abundant clarity in the extracts from the speeches of their Lordships which follow.

I turn first to the speech of Lord Reid. The following passage is to be found at page 880 F of the report which I have cited -

> "It is universally recognised that 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 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 in Duncan v. Cammell Laird "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."

The present case is obviously one in which such a balancing exercise should be carried out. The Chief Secretary has referred in his certificate to the documents which he declines to disclose being of a class which in the public interest should be withheld from production. The reason for this is given in the second of the two paragraphs from the Chief Secretary's memorandum which I have quoted.

In Conway v. Rimmer Lord Reid dealt with this approach in the following way. The references to a a Minister apply equally to the Chief Secretary in the Cayman Islands -

> "I find it difficult to see why it should be necessary to withhold whole classes of routine "communications with or within a public department" but quite unnecessary to withhold similar communications withor within a public corporation. There the safety of the public may well depend on the candour and completeness of reports made by subordinates, whose duty it is to draw attention to defects. So far as I know, however, no one has ever suggested that public safety has been endangered by the candour or completeness of such reports having been inhibited by the fact that they may have to be produced if the interests of the due administration of justice

> should ever require production at any time..."
>
> I would therefore propose that the House ought now to decide that courts have and are entitled to exercise a power and duty to hold a balance between the public interest, as expressed by a Minister, to withhold certain documents or other evidence, and the public interest in ensuring the proper administration of justice. That does not mean that a court would reject a Minister's view: full weight must be given to it in every case, and if the Minister's reasons are of a character which judicial experience is not competent to weigh then the minister's view must prevail; but experience has shown that reasons given for withholding whole classes of documents are often not of that character. For example a court is perfectly well able to assess the likelihood that, if the writer of a certain class of document knew that there was a chance that his report might be produced in legal proceedings, he would make a less full and candid report than he would otherwise have done....
>
> 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 .... whether the withholding of a document because it belongs to a particular class is really "necessary for the proper functioning of the public service."

The speech of Lord Morris also deals with the suggestion that if there were knowledge that documents such as reports might be seen by eyes for which they were never intended the result might be that in the making of similar documents in the future candour would be lacking. He said this -

> "Here is a suggestion of doubtful validity. Would the knowledge that there was a 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 opinions 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."

Before leaving Conway v. Rimmer I take the following succinct analysis of the course which a court should follow from the speech of Lord Pearce -

> "In my opinion the court should consider whether the document is relevant and important in a reasonable action, so that one may fairly say that the public interest in justice requires its disclosure. It must consider whether the disclosure will cause harm administratively, either because of the undesirability of publishing the particular class of documents (of which I have given examples above) or for any other valid reason. It must give due weight to any representation of the Minister which set out the undesirability of disclosure and explain the reasons. If these do not make the matter clear enough, the court should itself call for and inspect the documents before coming to a decision. If part of a document is innocuous but part is of such a nature that its disclosure would be undesirable, it should seal up the latter part and order discovery of the rest, provided that this will not give a distorted or misleading impression. In all these matters it must consider the public interest as a whole, giving due weight both to the administration of the executive and to the administration of justice."

The cases on which the Crown has relied differ substantially from the present dispute between two individuals.

In Rogers v. Home Secretary et al the issue was the protection which should be given to an Assistant Chief Constable who had given information to a statutory body, the Gaming Board, in response to a request which the Board had made. The special factors relating to the matter are described in the following passage from the speech of Lord Reid -

> "It has long been recognised that the identity of police informers must 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.
>
> 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."

In coming to a different conclusion on those particular facts, the principle which the court followed did not differ from that adopted in Conway v. Rimmer. It is to be found in the speech of Lord Pearson -

> "The court has to balance the detriment to the public interest on the administrative or executive side, which would result from the disclosure of the document or information, against the detriment to the public interest on the judicial side, which would result from non-disclosure of a document or information which is relevant to an issue in legal proceedings. Therefore the court, though

> naturally giving great weight to the opinion of the appropriate Minister conveyed through the Attorney-General or his representative, must have the final responsibility of deciding whether or not the document or information is to be disclosed."

Hasselblad v. Orbinson was an application of the balancing test between public and private interest by the Court of Appeal, in relation to the functions of the Commission of the European Communities under Article 89 of he EEC Treaty. Bookbinder v. Tebbit was another case involving a statutory body - the Audit Commission - in the exercise of its powers and the giving of testimony which might disclose the identity of informants whose consent was required before disclosure could be made. A further ground for the decision was that the evidence was not necessary for fairly disposing of the action, which is not the position in the present matter.

I was referred to Regulation 16 of the Public Service Commission Regulations 1985 which confers privilege on proceedings of the Commission and on its members. That is irrelevant in that no such proceedings are in issue here. I was also referred to the various duties imposed on Heads of Department and the Permanent Secretary (Personnel) under the General Orders of the Government. They expressly provide that they do not have the force of law and - to adopt again the observation of Lord Morris in Conway v. Rimmer "the law is ample in its protection of those who are honest in recording opinions which they are under a duty to express". I see no reason why Government officers should be in a different position to other persons who record opinions expressed in accordance with a duty to employers

in other sectors. There is no obvious distinction between Governmental and other organisations as far as the necessity for candour is concerned. It is the candour argument pure and simple on which the Chief Secretary has relied. Nevertheless, on looking at the description of the documents in the Chief Secretary's second certificate dated 17th March, I considered whether I should inspect them. On the face of the descriptions, they may contain matter relating to policy in relation to the environment of a confidential nature. But that is not the basis on which the objection has been put. It is a "class", not a "content" claim for immunity. I shall not inspect the documents. I think that I should add that in coming to that conclusion I have read and considered R v. Chief Constable of the West Midland ex parte Wiley in which their Lordships gave some consideration to the significance of the distinction between the two classes of claim in the context of the Police and Criminal Evidence Act 1984 in England.

The documents are of great importance to the plaintiff in this action. He should not be driven from the judgment seat. 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 is set out in the Chief Secretary's certificate.

Accordingly I make the order for production of documents for inspection which the plaintiff sought in his summons dated 20th March 1995.

Dated 20th October 1995

GRAND COURT CAYMAN ISLANDS

G.E. Harre
Chief Justice