IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. 91 OF 2017

BETWEEN:

	HENRICHO SWABY	**Plaintiff**
AND		
	ATTORNEY GENERAL	**1st Respondent**
AND		
	CHIEF IMMIGRATION OFFICER	**2nd Respondent**
AND		
	GOVERNOR OF THE CAYMAN ISLANDS	**3rd Respondent**

Appearances: Mr. James Kennedy of KSG Attorneys- At -Law for the Plaintiff

Ms. Rachael Hoare of the Attorney General's Chambers for the Respondents

Before: Hon. Justice Richard Williams

Heard: 4 December 2017

Draft Judgment circulated: 12 December 2017

Date of Judgment: 13 December 2017

HEADNOTE

Deportation - judicial review – Bill of Rights – Notice under GCR Order 24, rule 10(1) for production for inspection of written legal advice – legal professional privilege

JUDGMENT

Application

1. This application is brought by the Applicant's Summons dated 24 October 2017 in which only the following order[1] is now sought:

   (i) for the Respondents to produce for inspection within seven days of the service of this order legal opinion referenced in the affidavit of Wesley Howell dated 4 September 2017 as contained within the Cabinet Paper 2361/17 as Appendix D.

2. The application comes within Judicial Review Proceedings commenced by the Applicant's Notice of Originating Motion filed on 9 June 2017 and superseded by the Amended Notice of Originating Motion filed on 25 July 2017. The resolution of the matter, as pleaded, will include the issue of proportionality under the Cayman Islands Constitution Order 2009. Leave to apply for Judicial Review was granted by Hall J. on 1 June 2017. On 18 July 2017 Hall J. made a number of directions to trial which were set out in a Consent Order.

3. The Applicant contends that the decision of the Governor to deport him was unlawful and *ultra vires*. The grounds for that contention are set out at paragraphs 1 to 5 of the Amended Notice of Originating Motion. One of the grounds is that the Respondents failed to take into consideration relevant factors when reaching

[1] The Court was informed at the hearing that the order in paragraph 2 of the Summons is not sought at this hearing.

the decision to exercise discretion to order deportation. At paragraph 4 the Applicant lists those relevant factors as being:

i. the nature and seriousness of the offence committed by the Applicant;
ii. the length of the Applicant's stay in the country from which he is going to be expelled;
iii. the age of the Applicant when he first became resident in the Cayman Islands;
iv. the time elapsed since the offence was committed as well as the applicant's conduct in that period;
v. the future threat that the Applicant poses to public order;
vi. the nationalities of the various persons concerned;
vii. the Applicant's family situation; and
viii. the Applicant's ties to the country of deportation.

4. A further ground is that the Respondents failed to adopt fair procedural safeguards in breach of s.19 of the Bill of Rights (Part 1 of Schedule 2 to the Cayman Islands Constitution Order 2009) ("BOR") and specifically that:

> *"The Respondent's decision is unlawful, ultra vires, or otherwise unreasonable in that it has failed adequately, or at all, consider the relevant circumstances of the applicant, including but not limited to, the risk of re-offending, risk of harm posed and effects of rehabilitation when considering whether or not the applicant should be deported."*

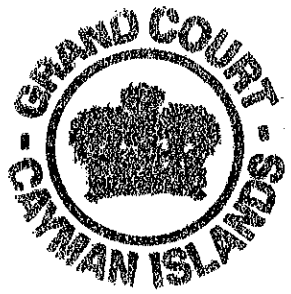
5. The Applicant summarises as follows the test, as set out by the House of Lords in ***R., ex parte Razgar v Secretary of State for the Home Department,*** Appeal

Judgment [2004] UKHL 27, [2004] 2 AC 368, [2004] 3 WLR 58, [2004] 3 All ER 821, ILDC 104 (UK 2004), to be followed at the final hearing of the Originating Notice when deciding whether the decision to remove was proportionate in the light of the facts and whether a fair balance was struck between the Applicant's right to respect for private and family life under s. 9 BOR and the immigration policy of the Cayman Islands:

> *(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?*
> *(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8[2]?*
> *(3) If so, is such interference in accordance with the law?*
> *(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?*
> *(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"*

6. On 4 September 2017 the Respondents filed an affidavit sworn on 4 September 2017 by Mr. Wesley Howell, Chief Officer of the Ministry of Human Resources, Immigration and Community Affairs. The affidavit appears to be the only evidence of the Respondents in the present proceedings and therefore reliance will be placed upon it by them at the trial of the action. At paragraph 3 of the affidavit

[2] Section 9 BOR.



Mr. Howell indicated that the decision to deport was informed by Cabinet Paper CP2361/17 prepared by the Department of Immigration and presented by his Ministry in which the making of a deportation order was recommended.

7. Amongst the appendices to the Cabinet Paper was a legal opinion in the form of a Memorandum entitled: **"Henrico Swaby: potential human rights implications of deportation"** dated 9 February 2017 from the Attorney General's Chambers following the Ministry's request for advice "*as to whether any deportation action would place the Cayman Islands in breach of any of its obligations*[3]" under the BOR. At paragraph 7 of his affidavit, Mr. Howell indicates that the Cabinet Paper was circulated for consideration and received approval from a quorum of Minsters on 28 April 2017. Mr. Howell added that the Paper's approval was confirmed at the 17 May 2017 Cabinet meeting when there was no formal discussion of the matter.

8. The Applicant highlights that the 20 paragraph affidavit directly references and/or relies upon and/or selectively quotes from the legal opinion in paragraphs 4e; 6; 9; 11; 12-14; 16-19 and 20.

9. By notice given under GCR O.24, r.10(1) the Applicant requires the production of both the Cabinet Paper and the legal advice for inspection. On 26 September 2017

[3] Paragraph 3 of the Legal Opinion.

the Respondents advised the Applicant that the production of the legal advice was opposed on the grounds that it was subject to legal professional privilege. On 12 October 2017 the Respondents produced the Cabinet paper.

The General Issues

10. It is agreed that the advice would ordinarily be regarded as being covered by legal professional privilege. It is also agreed that the general rule is that legal advice is excluded from discoverable documents due to the principle of legal professional privilege. The issue for resolution is whether the Respondents have waived that privilege due to the references made by Mr. Howell in his affidavit and/or, by their disclosing extracts of the advice in the Cabinet Paper.

Relevant Procedural Rules

11. Under the heading "*Inspection of documents referred to in pleadings and affidavits*" GCR O.24, r.10 states as follows:

> *"(1) Any party to a cause or matter shall be entitled at any time to serve a notice on any other party in whose pleadings or affidavits reference is made to any document requiring him to produce that document for the inspection of the party giving the notice and to permit him to take copies thereof. (2) The party on whom a notice is served under paragraph (1) must, within 4 days after service of the notice, serve on the party giving the notice a notice stating a time within 7 days after the service thereof at which the documents, or such of them as he does not object to produce, may be inspected*

at a place specified in the notice, and stating which (if any) of the documents he objects to produce and on what grounds."

12. Under the heading "*Order for production for inspection*" GCR O.24, r.11(1), which provides:

> *"If a party who is required by rule 9 to serve such a notice as is therein mentioned or who is served with a notice under rule 10(1) –*
>
> *(a) fails to serve a notice under rule 9 or, as the case may be, rule 10(2); or*
> *(b) objects to produce any document for inspection; or*
> *(c) offers inspection at a time or place such that, in the opinion of the Court it is unreasonable to offer inspection*
>
> *then or, as the case may be, there,*
>
> *then, subject to rule 14(1), the Court may, on the application of the party entitled to inspection, make an order for production of the documents in question for inspection at such time and place, and in such manner, as it thinks fit."*

13. Under the heading "*Production to be ordered only if necessary, etc.*" GCR O.24, r.14, to which r.11(1) is subject, provides:

> *"(1) No order for the production of any documents for inspection or to the Court or for the supply of a copy of any document shall be made under any of the foregoing rules unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.*
> *(2) Where on an application under this Order for the production of any document for inspection or to the Court or for the supply of a copy of any document privileged from such production or supply is*

claimed or objection is made to such production or supply on the ground that it contains confidential information or on any other ground, the Court may inspect the document for the purpose of deciding whether the claim or objection is valid."

Legal Professional Privilege

14. There is no dispute that the legal opinion is covered by legal professional privilege. Before I go on to deal with whether the Respondents have waived that privilege I remind myself about the importance placed on legal professional privilege. The author of **Passmore on Privilege, 2nd Edition (2006)** states at paragraph 1.001:

> *"In English law, legal professional privilege is a substantive common law and human right that protects the confidentiality of certain types of communication made between a professional legal adviser and his client or, where made in respect of legal proceedings, between the legal adviser or client and a third party, such as a witness in those proceedings."*

15. Lord Hoffmann in ***R (Morgan Grenfell) v Special Commissioners*** [2003] 1 AC noted that the European Court of Human Rights has held that legal professional privilege was protected as an aspect of the right to respect for private life and correspondence guaranteed by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It can be argued that s.9 BOR makes similar provision.

16. In my judgment dated 8 November 2013 in ***The Attorney General v Martin Bridger*** Cause No. 486 of 2011 I analysed the importance that had been placed on privilege as follows:

> *"91. The importance of legal professional privilege comes from the public interest, requiring full and frank confidential exchanges between a client and his attorney once legal advice is being sought. In the long-established rule in the common law was described by Lord Taylor of Gosforth CJ in* ***R v Derbyshire Magistrates' Court ex p. B*** *[1996] AC 487 at 507-508:*
>
> > *"The principle...is that a man must be able to consult his lawyer, in confidence, since otherwise he might hold back of the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests....It is not for the sake of the applicant alone that the privilege must be upheld, it is in the wider interests of all those hereafter you might otherwise be deterred from telling the whole truth to their solicitors."*
>
> *92. Lord Scott of Foscote, having reviewed the case law, went on to explain the policy reasons justifying the presence of legal professional privilege, and particularly legal advice privilege, in* ***Three Rivers District Council and Others v Governor and Company of the Bank of England (No 6)*** *[2005] 1 AC 610 at 649F para 34:*
>
> > *"None of these judicial dicta tie the justification for legal advice privilege to the conduct of litigation. They recognise that in the complex world in which we live there are a multitude of reasons why individuals, whether humble or powerful, or corporations, whether large or small, may need to seek the advice or assistance of lawyers in connection with their affairs; they recognise that the*

seeking and giving of this advice so that the clients may achieve an orderly arrangement of their affairs is strongly in the public interest; they recognise that in order for the advice to bring about that desirable result it is essential that the full and complete facts are placed before the lawyers who are to give it; and they recognise that unless the clients can be assured that what they tell their lawyers will not be disclosed by the lawyers without their (the clients') consent, there will be cases in which the requisite candour will be absent. It is obviously true that in very many cases clients would have no inhibitions in providing their lawyers with all the facts and information the lawyers might need whether or not there were the absolute assurance of non- disclosure that the present law privilege provides. But the dicta to which I have referred all have in common the idea that it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers' legal skills in the management of their (the clients') affairs, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busybodies or anyone else..."

93. Lord Scott earlier stated in ***Three Rivers District (No 6)*** *at 646D para 25:*

"...if a communication or document qualifies for legal professional privilege, the privilege is absolute. It cannot be overridden by some supposedly greater public interest. It can be waived by the person, the client, entitled to it and it can be overridden by statute, but it is otherwise absolute. There is no balancing exercise that has to be carried out.""

Issues that Arise where there is an Objection to the Production of a Document on the Ground of Legal Professional Privilege

17. The Applicant agrees with the Respondents' submission that the following legal issues arise when there is an objection raised to production on the ground of legal professional privilege:

> *"(i) Whether there has been a reference to a privileged document in pleadings or affidavits so as to engage GCR O.24, r.10(1);*
> *(ii) If so, whether the reference to the document is sufficient to waive privilege; and*
> *(iii) In any event, whether the Court should exercise its discretion under GCR O.24, r.14(1) to order the production of the document."*

18. The Applicant points out that the general duty of candour in judicial review proceedings places a particular burden on public authorities to place all the relevant facts and reasoning underlying the relevant decisions. The Applicant also contends that in judicial review proceedings, where a public authority relies upon a document as being significant for its decisions, it is ordinarily good practice to exhibit it as primary evidence, with a summary not necessarily being sufficient, and it is for the Judge to rule on the need for disclosure. In support of this contention reference is made to Lord Bingham's following remarks at paragraph 4 in ***Tweed v Parades Commission for Northern Ireland*** [2006] UKHL 53:

> *"Where a public authority relies on a document as significant to its decision, it is ordinarily good practice to exhibit it as the*

primary evidence. Any summary, however conscientiously and skilfully made, may distort. But where the authority's deponent chooses to summarise the effect of a document it should not be necessary for the applicant, seeking sight of the document, to suggest some inaccuracy or incompleteness in the summary, usually an impossible task without sight of the document."

As a consequence, it is suggested with some force by the Applicant that the restrictions placed on discovery in GCR O.24, r.14 are not to be so strictly applied in judicial review cases.

19. Before I move away from Lord Bingham's observations at paragraph 4 in ***Tweed***, I note that he also stated therein:

> *"It is enough that the document itself is the best evidence of what it says. There may, however, be reasons (arising, for example, from confidentiality, or the volume of the material in question) why the document should need not be exhibited. The judge to whom application for disclosure is made must then rule on whether, and to what extent, disclosure should be made."*

20. The first issue, which is at paragraph 12(i) herein, is sometimes referred to as "*mentioning*". There is no issue that the legal advice was mentioned in Mr. Howell's Affidavit. As Rix L.J. confirmed at paragraph 23 in ***Expandable Limited v Rubin*** [2008] 1 WLR 1099, when considering the meaning of *"mentioned"* there is no substantive difference between CPR 31.14 and the law

developed under the RSC O.24, r.10 where the words "*where reference is made*" appeared. This is not a case where a reference by inference is suggested; it is accepted that there has been a "*direct allusion*" to the legal opinion. With that in mind, submissions have been concentrated on the last two issues found at (ii) and (iii) of paragraph 12 above.

Reference to Privileged Documents in Pleadings and Waiver of Privilege

21. In England and Wales under the RSC, a reference to a privileged document in an affidavit did not generally amount to a waiver, provided that it could be shown that reliance is on the document and not on its contents. Similarly, it was held in the ***Expandable Limited*** case, where the CPR applied, that there is no automatic waiver of privilege just because a document was mentioned in a witness statement.

22. As there is no automatic waiver, the Court has to determine whether the mentioning of the legal advice in the affidavit means that privilege has been waived. When doing so the Court draws a distinction between reliance placed on a document and a reference to legal advice, because simply to refer to the fact that advice was given does not amount to a waiver of privilege in the advice. Elias J. in ***Brennan v Sunderland City Council*** [2009] ICR 479 (EAT, 16 December 2008) aptly summarised the issues at paragraph 64 when he stated:

"The first is the nature of what has been revealed; is it the substance, the gist, content or merely the effect of the advice? The second is the circumstances in which it is revealed; has it simply been referred to, used, deployed or relied upon in order to advance the parties' case?"

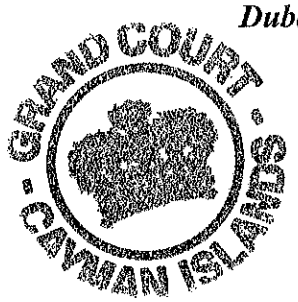
23. In ***Tate & Lyle International v Government Trading Corporation*** (CA, 19 October 1984) (1984) 81 L.S.G. 3341, CA[4] the deponent, the solicitor for the Appellant, stated that the information to which he deposed in a paragraph in his affidavit filed in interlocutory proceedings on the issue of Iranian law was derived from a lawyer with whom he had consulted in Iran. It was held by the Court of Appeal that this did not to amount to a waiver in relation to communication with the lawyers. Goff L.J. agreed with the Court below that the question was whether, having regard to the circumstances in which that paragraph in the affidavit was sworn and to what is there deposed to:

> *"constituted a disclosure of a document or communication which amounts to a waiver of privilege, or whether it is what has been called in the authorities a mere reference to a document or conversation which does not amount to a waiver of privilege."*

24. In ***Marubeni Corporation v Alafouzos*** Unreported, November 6, 1986, reference in an affidavit for leave to serve out of the jurisdiction that the Plaintiffs had obtained outside Japanese legal advice which categorically stated that a particular defence lacked merit was held not to amount to a waiver of privilege in respect of

[4] Reference to the case made to the parties by the Judge during the hearing.

the Japanese advice.[5] This decision was expressly followed by Slade L.J. in ***Dubai Bank v Galadari (No. 2)*** *[1990] 1 WLR 731, CA.* who found that:



> *"a mere opinion that on the balance of probabilities, a transaction referred to in a pleading or affidavit must have been effected by a document, does not give the court jurisdiction to make an order under R.S.C., Ord. 24, r. 10, unless the pleading or affidavit makes direct allusion to the document or class of documents in question."*

The two decisions were grounded on a finding that the plaintiffs did not rely on the contents of the privileged document, only on its existence. It is clear that the Court would have found differently if the plaintiffs had been relying, as the Respondents do in the matter before me, on some of the content.

25. In ***Derby v Weldon (No. 10)*** [1991] WLR 66[6] the deponent of an affidavit sworn for a hearing without notice referred to a privileged document to comply with his duties of full and frank disclosure. Vinelott J. helpfully reviewed the ***Marubeni Corporation*** and ***Tate and Lyle*** cases as follows:

> *"There are, of course, clearly contexts where a party who refers in interlocutory proceedings to the fact that he has obtained legal advice and who states the effect of that advice does not thereby waive privilege. In the common case of an application for summary judgment, the plaintiff will normally state that he has been advised that the defendant has no defence. He does not thereby waive privilege. In Marubeni Corporation v. Alafouzos*

[5] See ***paragraph 26 – 16*** **Phipson on Evidence -16th Edition.**
[6] Reference to the case made to the parties by the Judge during the hearing.

(unreported), 6 November 1986; Court of Appeal (Civil Division) Transcript No. 996 of 1986 in which judgment was given on 6 November, Lawton and Lloyd L.JJ. drew a distinction between a reference to the effect of such advice and the substance or content of it. In that case the plaintiffs sought leave to serve abroad and, in discharge of their duty to make full disclosure of all relevant facts, made reference to advice as to whether the defendants could raise a defence of illegality under the law of Japan. In Government Trading Corporation v. Tate & Lyle Industries Ltd., 19 October 1984; Court of Appeal (Civil Division) Transcript No. 376 of 1984 (a case referred to by Lloyd L.J.) advice of an Iranian lawyer had been referred to in an affidavit filed in opposition to an application for trial of a preliminary issue. It was held that privilege had not been waived. In both those cases what was material in the interlocutory proceedings was the fact that the plaintiff had been given advice to a particular effect and not the substance of the advice or the extent of the instructions given to the lawyer."

26. Vinelott J. went on to find that the situation was different in ***Derby*** as the privilege had been waived because reliance had been placed by the deponent who relied upon the contents of the privileged document for the purposes of the application.

27. In ***Dunlop Slazenger International Limited v Joe Bloggs Sports Limited*** [2003] EWCA Civ 901, CA[7] Waller L.J. having considered the above cases, referred to the authorities as being "*not altogether easy.*" Waller L.J. felt that there was no

[7] Case mentioned in ***Rubin v Expandable*** at page 1100.

need to detail all of the cases in his judgment, although he considered ***Derby*** and related it to the case before him, stating :

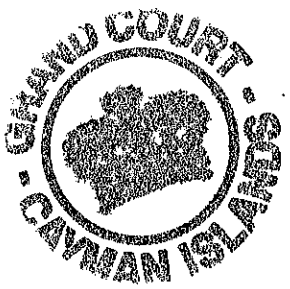
> *"The most formidable authority was the decision of Vinelott J in Derby v Weldon [1991] 2 All ER 908, [1991] 1 WLR 660. The most material passage runs from 767H to 668E. It comes to no more than this. If in interlocutory proceedings a party has waived privilege – in that case that was on a Mareva injunction application – then, that is a waiver for all purposes and the cherry picking principle applies. Whether that will always be right is a matter that I would reserve for future decisions. It is not necessary to say that that will always be right to dispose of this case. If there is to be an exception to that principle it would need to be framed in the following way. It would need to be argued that since it was only for the purpose of the interlocutory proceedings and in relation to an issue in those proceedings that the waiver had taken place the waiver was in some way limited. That was almost certainly not the position in Derby v Weldon since the conversations did relate to the merits of the case as a whole. In this case, again the waiver that was taking place was not taking place simply in relation to obtaining the order from Gibbs J. The waiver that was taking place was taking place by reference to statements that were to be put in as part of the evidence to go to the trial and relating to the merits at the trial."*

28. In the matter before me, Mr. Kennedy rightly points out that Mr. Howell's affidavit is the Respondent's only evidence and that it is filed for the purposes of reliance being placed upon it at the trial of the action and not for an interlocutory

application. This brings it more in line with the position in the ***Dunlop Slazenger*** case as highlighted by Waller L.J..

29. In ***Dunlop Slazenger*** Waller L.J. commented at paragraph 10.7:

> *"The key word here is 'deploying'. A mere reference to a privileged document in an affidavit does not of itself amount to a waiver of privilege, and this is so even if the document referred to is being relied on for some purpose, for reliance in itself is said not to be the test. Instead, the test is whether the contents of the document are being relied on, rather than its effect. The problem is acute in cases where the maker of an affidavit or witness statement has to give details of the source of his information and belief, in order to comply with the rules of admissibility of such affidavit or witness statement. Provided that the maker does not quote the contents, or summarise them, but simply refers to the document's effect, there is apparently no waiver of privilege. This benevolent view has not been extended to the case where the maker refers to the document in order to comply with the party's need to give full and frank disclosure, eg on a without notice (ex parte) application."*

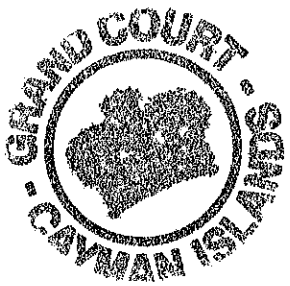


Waller L.J. highlighted that the authors had correctly identified that the authorities provided for a distinction between a reference to the existence/effect of the document and reliance on with deployment of the content.

30. Waller L.J. concluded that the matter under appeal should be characterised as being a deployment case as the content was referred to persuade the judge to

make the interlocutory order sought, as well as being an attempt to put in evidence for the purpose of the trial as it was material for the judge to consider at the trial. Mr. Kennedy rightly contends that in the present matter it is intended that the reference to parts of the privileged advice set out in the affidavit is intended material for the judge to consider at the trial.

31. Mr. Kennedy also adds that great reliance was placed upon the recommendation in the Cabinet Paper, especially in regard to human right issues, and therefore the Respondent should not be permitted to 'cherry pick' the disclosure given. When doing so he referred to Nicol J.'s comments at paragraph 12 in ***Commodities Research Unit International v King and Wood Mallesons LLP*** *[2016] EWHC 63 (QB)* when addressing the extent to which privilege was waived:



> *"A client could not 'cherry pick' i.e. be selective and waive privilege in relation to one part of a document (or series of documents on the same topic) while maintaining it in relation to other parts of the same document or same series. On the other hand, if there were severable parts of the document or if there were severable issues in the exchanges with legal advisers, privilege waived in relation to one of those parts or one of those issues, did not mean it was waived as well for the others"*

32. Mr. Kennedy highlighted the "*danger*" of permitting 'cherry-picking' in a proportionality case by referring to the following observations of Lord Carswell at paragraph 39 in ***Tweed v Parades Commission for Northern Ireland:***

"When one takes into account the proportionality factor, the need for disclosure is greater than in judicial review applications where it does not apply. The duty of candour has been fulfilled by adduction of summaries of the police report, authorised officers' reports and other documents, and the appellant's counsel did not suggest that there had been any deficiency in candour in putting that evidence before the court. He submitted, however, that it is not always possible to obtain the full flavour of the content of such documents from a summary, however carefully and faithfully compiled, and that there may be nuances of meaning or nuggets of information or expressions of opinion which do not fully emerge in a summary. I consider that there is force in this view and that in order to assess the difficult issues of proportionality in this case the court should have access as far as possible to the original documents from which the commission received information and advice."

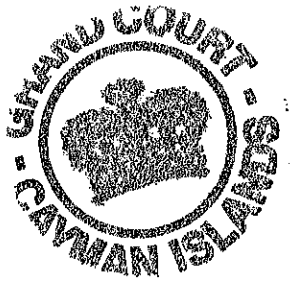
33. Waller L.J. at paragraph 11 in ***Dunlop Slazenger*** addressed the issue of 'cherry-picking' with reference to the case of and the text in ***Matthews & Malek***, where the authors referred at para 10.17 to the following dictum of Mustill J. (as he then was) in ***Nea Karteria Maritime Co Ltd v Atlantic & Great Lakes Steamship Corporation*** [1981] Com LR 138[8], which provides as follows:

"Where a person is deploying in court material which would otherwise be privileged, the opposite party and the court must have the opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the

[8] Case mentioned in ***Rubin v Expandable*** at page 1100.

material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood."

34. Waller L.J. added at paragraph 15:

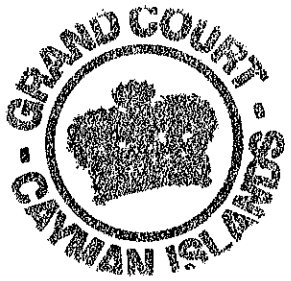


To answer the question whether waiver of part of a privileged communication waives the complete information, it is that dictum of Mustill J (as he then was) which applies. A party is not entitled to cherry pick, and a party to whom privileged information is provided is entitled to have the full contents of what has been supplied in order to see that cherry picking is not taking place. If this material (paras 13 and 14 of Miss Ahmed's statement) had been evidence given at a trial, there really would be no answer to the point that the full information should be provided in order to make certain that cherry picking is not taking place."

35. Ms. Hoare contended in her oral submissions that there has not been 'cherry-picking' and states that the Respondent is entitled to reserve its position until trial on the issue and should not be fettered by the legal advice. Although the relevant information in the matter before me was not deployed at an interlocutory hearing, at paragraph 16 in ***Dunlop Slazenger***, Waller L.J. shared some helpful observations about the approach when a party wished to be able to preserve its position, when he commented as follows on whether the full information should be provided:

"There are only two points here which might provide for a different answer. The first is that this information was deployed at

an interlocutory stage, and the second is that, insofar as it was being put in witness statements, they have not yet been deployed at a trial. In relation to both aspects, what in essence the submission would come to is that at this stage a party is entitled to preserve its position and wait to see what actually happens at the trial in order to see whether that deployment takes place and whether a waiver takes place at the trial. As it seems to me, there is clear authority for the proposition that, if deployment has taken place at an interlocutory stage and waiver of the privileged material has resulted, then the cherry picking principle applied."



36. The Respondents submit that the references to the legal advice found in the affidavit are insufficient to waive privilege in the document as a whole, as the reference is to its effect rather than to its contents. Although Mr. Howell shares information from the advice by directly quoting from the eight page twenty paragraph legal opinion, it is submitted that they are:

> "*uncontroversial statements of fact, included in the discharge of the Respondents' duty of candour to identify the facts relevant to the decision-making process under challenge, and solely for the purpose of reassuring the Applicant and the Court that there was before the Cabinet material relating to various of the factors that the Applicant complains were not taken into account. The quotations reveal nothing about the way in which the various factual considerations were weighed in the balance, which is the essence of the advice and the privileged part. In these particular circumstances, the Respondents respectfully invite the Court to*

conclude that any waiver of privilege effected by the quotations was limited to the material contained therein."

CONCLUSIONS

37. Although there are some extracts which go to effect and not the content of the advice, I note that a number of extracts appear in the section of the affidavit headed "*Response to the Applicant's complaint that the Cabinet failed to take certain matters into account.*" At paragraph 8 of his affidavit Mr. Howell sets out, what he has been advised to be, a number of factors which the Applicant complains in the Judicial Review proceedings were not taken into account by Cabinet when reaching the decision to deport. At paragraph 9 of his affidavit, Mr. Howell states that the factors were dealt with in detail in the Cabinet Paper and/or the legal opinion attached to the paper. In some of the paragraphs thereafter it is clear that part of the content of the advice was shared by him specifically to counter the complaint of the Applicant, as can be seen by the words "*in respect of the Applicant's complaint....*" that immediately precede a number of the quotations addressing the factors mentioned in paragraph 8 of the affidavit. It was obviously material content of the advice which the Respondents wished to deploy in order to support the version of events that they wish to put before the Court concerning factors taken into account by Cabinet.

38. Although parts of the affidavit contain quotations that accurately reflect and repeat the detail contained in some of the documentation already provided to the

Applicant, it is clear that it is the content of the advice that is being relied upon, not simply that advice was given and acted upon. For example, in paragraph 20 of the affidavit the extract from the advice goes beyond restating facts and gives an opinion on the weight to be placed on the Applicant's contentions about his family ties. The conclusions in the advice were also reached on some material not placed before Cabinet including the DCR Home Background Report. I note that that the affidavit makes clear that the Cabinet Paper (with its appendices including a full copy of the advice) was approved without any formal discussion, an illustration that the deportation decision was greatly influenced by the content especially on the issue of potential breaches of s.9 BOR.

39. Having had the opportunity to review the Legal Opinion I find that there is no merit in the submission made at paragraph 33 and 34 of the Applicant's Skeleton Argument. There is nothing in the opinion that could lead one to a conclusion, or even to a concern, that a decision to deport had already been made by the time that the legal opinion was requested by the Ministry. The opinion did not fetter Cabinet's discretion, although it is clear that great reliance was placed upon it by Cabinet.

40. When exercising my discretion concerning the disclosure of this legal opinion, I accept that it will be for the Court to assess the proportionality of Cabinet's decision to deport in the facts of the case. The quoting from the legal advice in

Mr. Howell's Affidavit and the paraphrasing its contents amounted to reliance on the contents of the advice to meet the Applicant's case. As such significant reliance was placed by Cabinet on the opinion attached to the Cabinet Paper and more importantly, as can be seen from the nature of the selective extracts from the advice in its only evidence, namely the affidavit of Mr. Howell, the Respondents are placing such great reliance on the actual advise which they seek to partially deploy to counter the Applicant's complaints, it would only be fair and just for the full advice to be made available.

41. Accordingly I order the Respondents to produce for inspection within seven days of the circulation of the sealed copy of this Judgment a copy of the Legal Opinion referenced in the affidavit of Wesley Howell dated 4 September 2017 as contained within the Cabinet Paper 2361/17 at Appendix D.

42. Unless I hear otherwise from the parties within 14 days of circulation of this sealed Judgment, I will reserve the costs of this application.

THE HON. MR. JUSTICE RICHARD WILLIAMS
JUDGE OF THE GRAND COURT

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