



**IN THE GRAND COURT OF THE CAYMAN ISLANDS**

**CAUSE NO. GC 20 OF 2021**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW  
AND IN THE MATTER OF GCR O.53**

**BETWEEN:**

**(1) MAPLES CORPORATE SERVICES LIMITED  
(2) MAPLESFS LIMITED**

Plaintiffs

**AND**

**CAYMAN ISLANDS MONETARY AUTHORITY**

Defendant

**IN CHAMBERS**

**Appearances:** Mr Hector Robinson QC (Mourant Ozannes (Cayman) LLP) and Ms Jodie Woodward (Cayman Islands Monetary Authority) for the Defendant (the “Authority”/ “CIMA”)

**Before:** The Hon. Justice Kawaley

**Date of Decision:** 28 October 2022

**Draft Reasons  
Circulated:** 8 November, 2022

**Reasons Delivered:** 22 November 2022



## HEADNOTE

*Judicial review-public interest immunity privilege application by Defendant in respect of documents admitted to be relevant- Order 24 rule 19*

## REASONS FOR RULING ON DEFENDANT’S PUBLIC INTEREST IMMUNITY PRIVILEGE APPLICATION

### Introductory

1. Under paragraph 1 of this Court’s Order herein dated August 30, 2022, the Defendant was ordered to produce certain documents referred to in its List of Documents in the event that it failed to make a “Public Interest Immunity Application”. By an Ex Parte Summons dated 30 September 2022, the Defendant sought the following Order:

*“1. That Exhibits 8, 9, 10, 30, 36, 37, 38 and 48 referred to at paragraph 1 of the Order dated 30 August 2022 shall not be disclosed in these proceedings on public interest immunity grounds.”*

2. That Summons was heard on 28 October 2022 and at the conclusion of the ex parte hearing I reserved costs but made an Order in the following substantive terms:

*“1. The Defendant shall not be required to produce to the Plaintiffs or otherwise disclose in these proceedings Exhibits 8, 9, 10, 30, 36, 37, 38 and 48 referred to at paragraph 1 of the Order dated 30 August 2022.*

*2. That the First Affidavit of Angelina Partridge (unfiled) shall not be disclosed in these proceedings on public interest immunity grounds.”*

3. These are the reasons for that decision.



### **The factual basis for the privilege claim**

4. The application was supported in broad, disclosable terms by the First Affidavit of Cindy Scotland dated 3 October 2022, the deponent being the Authority's Managing Director. The deponent firstly explained that of the 11 documents referred to in the 30 August 2022 Order, three had been disclosed but public interest immunity ("PII") privilege was maintained in respect of the eight documents referred to in paragraph 1 of the Ex Parte Summons. She then deposed:

*"7. In relation to the PII Exhibits, I can confirm that these documents contain sensitive information relating to the business of the Authority and their disclosure would seriously damage the effectiveness of the Authority to regulate the financial services industry if these documents were made available to the Plaintiffs, their legal representatives or otherwise publicly disclosed..."*

*8. The internal workings of the Authority are sensitive information relating to the Authority covered by s.50 (1) of the MAA. It is important that that information does not enter the public domain that could affect the efficiency of the Authority's onsite inspections ...Should such documents be disclosed into the public domain, it is possible that this will enable licensed entities to evade compliance with the laws and regulations of the Cayman Islands and prevent discovery by the Authority. Further, it may also jeopardise other regulators or law enforcement agencies both domestically and in the international sphere. The sensitive nature of the material is confidential and if disclosed the public interest would be injured as it would prevent the Authority from properly being able to carry out its statutory functions..."*

5. These broad averments were supported with greater particularity by reference to the specific documents in the First Affidavit of Angelina Partridge which I reviewed in camera



with the assistance of Leading Counsel for the Authority. I ultimately directed that this Affidavit need not be filed.

## Legal findings

### The Court's jurisdiction

6. It was essentially common ground at the directions hearing that this Court's jurisdiction to determine whether public interest immunity privilege corresponded to that enjoyed by the High Court of England and Wales<sup>1</sup>. GCR Order 24 rule 19 provides:

***“Disclosure which would be injurious to public interest: saving (O.24, r.19)***

*19. The foregoing provisions of this Order shall be without prejudice to any rule of law which authorises or requires the withholding of any document or information on the ground that the disclosure of it would be injurious to the public interest.*

7. I assumed that the Authority was not an emanation of the Crown entitled to formally rely upon section 19 of the Crown Proceedings Act (1997 Revision), but that to the extent that the Grand Court Rules were silent as to the procedure for public interest immunity in particular, the English practice (under, *inter alia*, CPR 31.19 and/or Supreme Court Practice 1999 paragraph 24/5.35) in relation to public interest immunity privilege would apply by virtue of section 11 as read with section 18 (2) of the Grand Court Act (2015 Revision) and GCR Order 24 rule 19.
8. Further and in any event, in a case involving public interest immunity asserted by the Crown, the general provisions relating to privilege found in GCR Order 24 rule 14 were regarded as applying to public interest immunity claims: *Douglas –v-The Governor of the*

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<sup>1</sup> The Plaintiffs' Skeleton Argument for that hearing addressed the public interest immunity issue in Section III.



*Cayman Islands and The Director of Prisons*, Cause No. 155 of 2017, Judgment dated October 19, 2020 (unreported, Marlene Carter J (Actg.)) at paragraph 6.

### **The application of public interest immunity privilege to the Authority**

9. Various English law texts were cited in the Authority’s written submissions which made it clear that the proposition that public interest immunity privilege applied to financial services regulatory bodies is no longer controversial. Helpful concise explanations of the reasons why this is so may be found in ‘*Disclosure*’, 5<sup>th</sup> edition at 12-29-12-30, ‘*Documentary Evidence*’, 14<sup>th</sup> edition, at 22.19 and ‘*Phipson on Evidence*’ Twentieth edition at 25.19. It was impossible to conceive any valid basis for contending that the same principles should not apply as a matter of Cayman Islands law. On the contrary, the fact that the financial services industry is a major pillar of the local economy in my judgment materially elevated the public policy imperative for the law to support (as far as possible) the integrity of the operations of a national financial regulatory body such as the Authority. It was in any event, common ground in this case that the Authority could assert public interest immunity privilege, just as it was 27 years ago in *Kaufman-v- Credit Lyonnais Bank* [1995] CLC 300 at 313 E-F where Arden J (as she then was) held:

*“Normally public interest immunity is conferred only on a government department but exceptionally the immunity may be conferred on others: see, for example, D v NSPCCLR [1978] AC 171 where the House of Lords held that public interest immunity extended to the names of those who gave information to the NSPCC, a body authorised under Act of Parliament to bring proceedings for the protection of children.*

*In this instance the SFA is also enabled under the 1986 Act to license and to monitor persons carrying on the business of giving investment advice on securities. It has therefore a statutory supervisory role, and the fact that it is not an arm of*



*the government does not prevent it from making a claim to public interest immunity. Both parties have proceeded on the basis that the SFA is operating in the public interest when it receives information from member firms rather than simply operating contractual rights against them. As the later point has not been argued I propose to proceed on the basis that public interest immunity can be asserted by the SFA. In MGN Pension Trustees Ltd v Invesco Asset Management Ltd (unreported, 14 October 1993) Evans-Lombe J held that IMRO could claim public interest immunity.”*

10. I accordingly had little difficulty in accepting the conceded proposition that the Authority possessed legal standing to assert its public interest immunity claim on the basis that this category of privilege may be invoked by financial regulatory bodies as indicated above. It is clear from, in particular, section 50 of the Monetary Authority Act (2020 Revision) that information received by the Authority from, *inter alia*, regulated entities or foreign authorities is *prima facie* confidential. The same applies to information received in relation to the enforcement of the Proceeds of Crime Act (2020 Revision) (“POCA”) and the Anti-Money Laundering Regulations (2020 Revision). For instance, section 139 of the POCA creates the offence of “*tipping-off*” which is committed by, *inter alia*, disclosing information which would prejudice an investigation. Under section 6(1) of the Monetary Authority Act (2020 Revision), functions conferred on the Authority include the following:

“(b) *regulatory functions, namely —*

*(i) to regulate and supervise financial services business carried on in or from within the Islands in accordance with this Law and the regulatory laws;*

*(ii) to monitor compliance with the anti-money laundering regulations;*  
*and*



*(iii) to perform any other regulatory or supervisory duties that may be imposed on the Authority by any other law;*

*(c) co-operative functions, namely, to provide assistance to overseas regulatory authorities in accordance with this Law...”*

### **Substantive and procedural governing principles**

11. In oral argument, Mr Robinson KC referred to a selection of instructive judicial pronouncements on the substantive and procedural approach to public interest immunity privilege applications. Firstly, in terms of vintage, in *Conway-v-Rimmer* [1968] A.C. 910 at 952 A-B, Lord Reid opined as follows:

*“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.”*



12. In *Air Canada-v-Secretary of State for Trade* [1983] 2 A.C. 394 at 435 E-G, Lord Fraser observed:

*“My Lords, I do not think it would be possible to state a test in a form which could be applied in all cases. Circumstances vary greatly. The weight of the public interest against disclosure will vary according to the nature of the particular documents in question; for example, it will in general be stronger where the documents are Cabinet papers than when they are at a lower level. The weight of the public interest in favour of disclosure will vary even more widely, because it depends upon the probable evidential value to the party seeking disclosure of the particular documents, in almost infinitely variable circumstances of individual cases. The most that can usefully be said is that, in order to persuade the court even to inspect documents for which public interest immunity is claimed, the party seeking disclosure ought at least to satisfy the court that the documents are very likely to contain material which would give substantial support to his contention on an issue which arises in the case, and that without them he might be ‘deprived of the means of... proper presentation’ of his case see *Glasgow Corporation v. Central Land Board* 1956 S.C. (H.L.) 1 per Lord Radcliffe at p. 18. It will be plain that that formulation has been mainly derived from the speech of my noble and learned friend Lord Edmund-Davies in *Burmah Oil* at p.1129 and from the opinion of McNeill J. in *Williams v. Home Office* [1981] 1 All E.R. 1151, 1154 A. It assumes, of course, that the party seeking disclosure has already shown in his pleadings that he has a cause of action, and that he has some material to support it. Otherwise he would merely be ‘fishing’.”*

13. The two quoted passages support the proposition that claims to public interest immunity privilege must be assessed by the courts on a case-by-case basis balancing the competing interests of the public authority and the fair hearing rights of the citizen litigant. A third passage makes a more general point only indirectly relevant to the present application, namely that a judicial review applicant has no automatic fair hearing right to receive all

information which informed a public authority's decision. In *Edwards-v-Environment Agency* [2007] Env. L. R. 9 at paragraph 91, Auld LJ (Rix and Maurice Kay LJ concurring) stated:

*“91. Focusing more closely on the issue thrown up by this case, namely whether fairness in decision-making subject to public consultation requires internal workings of a decision-maker also to be disclosed as part of the consultation, the answer given by the House of Lords in *Bushell & Anor v Secretary of State for the Environment* [1981] AC 75 and in a number of other authorities since, is generally not. In *Bushell*, Lord Diplock, with the agreement of the majority, expressed the principle in the context of a minister's decision-making role on his department's motorway proposal, in which the minister took into account governmental policy as to the method of assessing future traffic growth, unavailable or unpublicised at the material time. He said, at 95E-96A and 102E/F.*

*‘... What is fair procedure is to be judged ... in the light of the practical realities as to the way in which administrative decisions involving forming judgments based on technical considerations are reached. ... Discretion in making administrative decisions is conferred upon a minister not as an individual but as the holder of an office in which he will have available to him in arriving at his decision the collective knowledge, experience and expertise of all those who served the Crown in the department of which, for the time being, he is the political head. The collective knowledge, technical as well as factual, of the civil servants in the department and their collective expertise is to be treated as the minister's own knowledge, his own expertise. ... This is an integral part of the decision-making process itself; it is not to be equiparated with the minister receiving evidence, expert opinion or advice from sources outside the department after the local inquiry has been closed.*

...



*... Once he has reached his decision he must be prepared to disclose his reasons for it ... but he is, in my view, under no obligation to disclose to objectors and give them an opportunity of commenting on advice, expert or otherwise, which he receives from his department in the course of making up his mind. If he thinks that to do so will be helpful to him in reaching the right decision in the public interest he may, of course, do so; but if he does not think it will be helpful – and this is for him to decide – failure to do so cannot in my view be treated as a denial of natural justice to the objectors.’ ” [Emphasis added]*

14. Finally, a passage was cited which elucidated the way in which a public authority should in practice approach a public interest immunity claim. The report of *Al Rawi and others-v-Security Service and others* [2012] A.C. 531 reproduces both the Court of Appeal and Supreme Court judgments, and counsel referred to the following passage in the judgment of Lord Neuberger MR (as he then was) in the Court of Appeal:

*“24. First, the relevant Minister (or his lawyers) must decide whether the documentary material in question is relevant to the proceedings in question – i.e. that the material should, in the absence of PII considerations, be disclosed in the normal way. Secondly, the Minister must consider whether there is a real risk that it would harm the national interest if the material was placed in the public domain. The third step is for the Minister to balance the public interests for and against disclosure. If the decision is, that the balance comes down against disclosure, then the Minister states, in a PII certificate, that it is in the public interest that the material be withheld.*

*25. As decided in Conway [1968] AC 910 and explained in Wiley [1995] 1 AC 274, it is then for the court to weigh, as Lord Simon of Glaisdale put it, ‘the public interest which demands that the evidence be withheld ... against the public interest in the administration of justice that courts should have the fullest possible access to all relevant material’, and if ‘the former public interest is held to outweigh the*



*latter, the evidence cannot in any circumstances be admitted’ – R v Lewes Justices ex p Secretary of State for the Home Department [1973] AC 388, 407. On the other hand, if the court concludes that the latter public interest prevails, then the document must be disclosed, unless the Government concedes the issue to which it relates – see per Lord Hoffmann in Secretary of State for the Home Department v MB [2007] UKHL 46, [2008] 1 AC 440, paragraph 51. As Lord Woolf said in Wiley [1995] AC 274, 306H-307B, even where material cannot be disclosed, it may be possible, and therefore appropriate, to summarise the relevant effect of the material, to produce relevant extracts, or even to produce the material ‘on a restricted basis.’ ”*

15. Two further judicial statements upon which the Plaintiffs relied in their Skeleton Argument for the 10 August 2022 directions hearing, which they invited the Court to consider in the course of determining the ex parte application, are worthy of mention. Firstly, reliance was placed on an observation made by Lord Mance in *Al Rawi and others-v-Security Service and others* [2012] A.C. 531 which confirms the principles contended for by the Defendant:

*“100. A conventional PII exercise at common law involves comparing the public interest in the administration of justice secured by availability of the material with the public interest identified by the certificate and court favouring its suppression; and in striking a balance between these two competing interests: see Lord Reid’s speech in Conway v Rimmer [1968] AC 910, pp 940 and 951-952, quoted by Lord Clarke in paras 142-143.”*

16. Secondly, the Plaintiffs’ counsel helpfully commended to the Court the following more recent distillation of relevant factors to be taken into account when conducting this balancing exercise. In *Hoareau-v-Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 3825 (Admin), Singh LJ opined:



“20. Factors relevant to the balancing exercise include:

(a) the seriousness of the claim in which disclosure is sought;

(b) whether the Government is itself a party or alleged to have acted unconscionably;

(c) the significance and relevance of the evidence to the case;

(d) the importance of the public interest claimed;

(e) the nature and degree of risk that disclosure presents; and

(f) the nature of the litigation (see *Al Rawi* at [102] and *AHK & Others v Secretary of State for the Home Department* [2012] EWHC 117 (Admin) at [34] in the judgment of Ouseley J.”

17. Finally, brief mention should be made of a local case relied upon by the Defendant’s counsel. The Cayman Islands Court of Appeal has made it clear that the Court in carrying out this balancing exercise is not entitled to uncritically accept the evidence relied upon by the public authority and may in the face of an official claim (in an appropriate case) conclude that “*withholding of the documents is not necessary for the proper functioning of the public [authority]*”: *Whittaker-v-Watler* [1996] CILR 378.

## **Findings: the merits of the Defendant’s PII application**

### **Merits of the application**

18. The Authority’s Managing Director certified on oath that disclosure of the relevant information “*would cause a real risk of serious harm to an important public interest, namely the Authority being able to properly carry out its statutory duties as stated within section 6 of the MAA*”. Each document was addressed in more detail by another officer of the Authority. Nonetheless, I scrutinized the documents critically mindful of the fact that the Court’s central function is to balance the competing litigation rights of the citizen litigant with the public interest in non-disclosure. The present application was made against the background of the controversial documents being disclosed by the Authority as relevant (yet privileged), before a belated attempt was made to withdraw the relevance admission.



19. The allegedly privileged documents fell into the following two categories as described in the Defendant's Skeleton Argument:

- (a) *“working papers of analysts for the onsite inspection process”*; and
- (b) *“discrepancy list[s], including internal comments, relating to the Authority's findings”*.

20. At first blush, it appeared to me that the documents all contained some material which was clearly relevant and not privileged and that a few of the asserted grounds of privilege were overstated or artificial. Mr Robinson KC greatly assisted me in forming a more textured understanding of the character of the documents and the basis of the privilege claims. I was ultimately satisfied that:

- (a) the Authority created certain documents relating to the inspection process which were designed for service on the regulated entities and other documents which were designed exclusively for internal use;
- (b) the documents designed for service on regulated entities contained no privileged information;
- (c) the documents designed for internal use contained a combination of confidential internal information some of which fell within a potential privilege claim in addition to non-privileged information relevant to the present proceedings but which had been disclosed to the Plaintiffs through the service of other documents expressly designed for service on the subjects of an inspection process;
- (d) the information in relation to which privilege was claimed was not to any or any material extent relevant to the Plaintiffs' claims in the present proceedings. There was no 'smoking gun'. The public interest in protecting the information from



disclosure accordingly far outweighed the almost non-existent interest in disclosure;

- (e) the administrative approach of the Authority in preparing its regulatory inspection documentation was entirely rational and consistent with the fulfilment of its statutory functions in an efficient manner. There was an entirely straightforward explanation as to why in its List of Documents the Defendant had claimed privilege in relation to documents which could not fairly be described as irrelevant; and
- (f) although technically each of the documents in relation to which privilege was claimed was not entirely privileged and was potentially liable to be disclosed in redacted form, imposing such a requirement was practically unnecessary and would achieve no procedural benefit for the Plaintiffs while being manifestly wasteful in terms of costs.

21. In summary, I granted the Authority’s public interest immunity application and declined to require production of redacted versions of documents which contained relevant non-privileged information on case management grounds since the non-privileged information had already been disclosed to the Plaintiffs in another documentary form. As I observed in my 24 August 2022 Ruling in this matter:

*“25... The Court should be astute to ensure that the discovery sought is genuinely needed to assist the Court to adjudicate the case before the Court, having regard to the need for a nuanced application of the Overriding Objective in the public law arena in which the requirements of expedition are an obvious public policy concern. How this case management power should be exercised depends on the circumstances of each case...”*

## **Conclusion**

22. For these reasons on 28 October 2022, I granted the Defendant's public interest immunity application, reserving costs.



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**THE HONOURABLE MR JUSTICE IAN RC KAWALEY**  
**JUDGE OF THE GRAND COURT**