IN THE COURT OF APPEAL OF BELIZE, A.D. 2005

CIVIL APPEAL NO. 7 OF 2004

BETWEEN:

MINISTER OF FINANCE AND HOME AFFAIRS
ATTORNEY GENERAL
APPELLANTS

AND

BELIZE PRINTERS ASSOCIATION LTD.
BRC PRINTING LIMITED
RESPONDENTS

—

BEFORE:

The Hon. Mr. Justice Mottley	**-**	**President**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**
The Hon. Mr. Justice Morrison	**-**	**Justice of Appeal**

Mr. Elson Kaseke, Solicitor General and Ms. Minet Hafiz for the appellants
Ms. Lois Young-Barrow, SC for the respondents

—

13, 15 October 2004; 9 March 2005.

MOTTLEY P

1. On October 2004 this Court dismissed the appeal of Minister of Finance and Home Affairs and the Attorney General, with an order that the appellants pay to the respondents the costs of the appeal. We promised to put out reasons into writing for do doing.

2. On 15 July 2003 the Government of Belize issued a Press Release concerning the transfer of the assets of Government Printing Department to Print Belize Limited (PBL) for $2.4 million. The Release stated inter alia:

> Following on an earlier decision of Cabinet, the Ministry of Finance announced that the transition of the Government Printers from a public sector subsidized Department to a private enterprise commences on July 12, 2003.

The Release continued:

> After several months of developing private sector management systems at the Printer's Department, a private company Print Belize Ltd., led by long-serving Government Printer, Mr. Lawrence Nicholas will purchase the assets of the Government Printers. Other employees will be offered the opportunity to become shareholders of the new company.

The Release also contained reference to the financing of the purchase by the Development Finance Corporation (DFC):

> "Under an agreement between Print Belize Ltd. and the Government, the new company will provide printing services to the Government. The asset purchase is being financed through the DFC for approximately $2.4 million dollars."

3. On 30 April 2004, the respondents were granted leave by Barrow J (Ag) to apply for judicial review of the decisions of the Minister of Finance and Home Affairs, (a) to sell the assets of the Government Printing Department to a private company called Print Belize Limited, and (b) to enter into a printing services contract ("the contract") with Print Belize Limited without public tender whereby Print Belize Limited would perform the services of Government Printer for a price of approximately $2.5 million annually. The respondents challenged the decision on the following grounds: (i) Unlawfulness (ii) Unfairness (iii) Procedure impropriety (iv) Disproportionate exercise of power and (v) Irrationality.

4. At the hearing for directions for the conduct of the judicial review, the respondents sought orders for the disclosure (a) of an inventory of the assets of the Government Printing Department sold by the Minister of Finance and Home Affairs to Print Belize Limited and (b) of the contract between the respondent and the Government.

5. On 10 May 2004 Barrow J (Ag) ruled that the contract was subject to disclosure and ordered its production for his inspection. The judge however suspended the operation of his Order to enable the appellants to appeal against the ruling should they so desire.

6. The appellants filed five grounds of appeal:

    (i) The judge erred in law and wrongly exercised his discretion in ordering the production of the Contract

because the Contract *evidences* the formulation *and* implementation of Government economic policy at the Cabinet level;

(ii) The judge failed to appreciate that the formulation and implementation of policy are inextricably linked and one runs into the other since policy cannot be formulated in abstract or similarly implemented in abstract;

(iii) After correctly and expressly finding that the contract fell into a class of documents protected by public interest immunity because it evidences the formulation of Government policy decided at the Cabinet level in a matter of major economic importance to Belize, the judge erred in law and misdirected by holding that the respondents, by seeking disclosure of the contract, are not asking for invasion of the confidentiality that is a necessary attendant of the formulation of Government policy.

(iv) After identifying the three grounds on which the respondents are challenging the award of the Contract, namely (a) violation of standards of fairness, and (b) violation of the law on how Government awards contracts, and (c) procedural impropriety, the

judge misdirected himself in law by ordering the production of the contract to *enable* the respondents "to question the accuracy of the claim by the Government that the contract falls into the public interest immunity class";

(v) The Judge succumbed to the urge to "take a peep" at the printing services contract to satisfy himself that the contract is "purely confirmatory of which the Financial Secretary has *disclosed*".

7. In his judgment Barrow J (Ag) held:

> *"In this case there is no attempt by the applicants to obtain disclosure of cabinet papers, ministerial communications, civil servants' memoranda or the like. The applicants are not seeking to invade the confidentiality that the law recognizes is a necessary attendant to the formulation of Government policy. I do not see, from what the Financial Secretary says, anything that places the contract into the category of documents that should be withheld from production. I apprehend that there is a distinction to be drawn between the formulation of policy, on the one hand, and the application or implementation of that policy, on the other hand. Evidence of the former, I think, would be protected from disclosure; evidence of the latter, I think, would not be protected. As a general proposition, it*

would seem to me, the contract would fall into the latter category. I would echo Lord Reid: it seems to me most improbable that any harm would be caused to government by the disclosure of the contract. This view, however, derives purely from general reasoning and is not a finding of fact. To decide whether the contract falls within a protected class and, perhaps more fundamentally, whether the contract should be withheld to protect the public interest, I would need to see the contract. Because I have found the contract to be material and, indeed, critical to the printers' claim for relief, and guided by the approach taken in ***Conway v Rimmer*** *it follows from what I have said that I (or the judge before whom this matter continues) should privately inspect the contract to see if it contains evidence of the formulation of policy. That inspection is the only way to determine the accuracy of the Government's claim that the contract falls within the protected class of documents and/or ought to be withheld from production, I am conscious that great weight is to be given by the courts to the certificate of the minister that it is in the public interest that disclosure should be refused; see* ***Air Canada*** *at 408 G-H. But this factor does not detract from the proposition that it is for the court to determined whether the withholding of the document is really necessary for the*

functioning of government; see ***Conway v Rimmer*** *at 952 G. If it appears from the inspection that the contract falls within the protected class the judge, from that inspection, would have been enabled to determine whether it contains evidence of the formulation of policy and to such a degree that the public interest in withholding the contract from production outweighs the public interest in the administration of justice that this document, which is virtually the very object of the challenge, should be disclosed."*

8. In essence Barrow J (Ag) rejected the appellants claim for class privilege in respect to the contract. He, however, ordered that the contract be produced to him or to the judge before whom the trial will be taking place.

9. The Solicitor General submitted that the contract, being a contract which is both Government economic policy and which evidences the formulation of policy at the Cabinet level", was entitled to public interest immunity. He further submitted that the production of the contract for printing services would definitely fan or create ill-informed criticism because it will be divorced from the documents which related to the policy aspect of the decision as this is subject to class privilege. He contended that the contract was formulated within the broader economic policy framework of the Government and this had several objectives. The documents which evidenced

the formulation of policy should not be produced because these are subject to a claim of class privilege. It was one of several documents all of which sought to attain the objects of the economic policy.

10. The factual matrix on which this submission is based is to be found in the affidavit of the Financial Secretary where he stated inter alia:

> "The contract itself reflects Government's economic policy in this matter, and is the culmination of the views of the Cabinet Ministers and senior public officers to protect the public interest of Belize with the aim of ultimately controlling public expenditure in Belize by introducing an economic policy package of divesting Government of its responsibilities in areas which are essentially "non-governmental" in nature, I therefore object to the productions of the printing services contract and any other contract or document in this matter on the basis of public interest immunity."

11. In support of this submission the Solicitor General relied on **Conway v Rimmer [1968] AC 910** where Lord Reid said at p 952:

> *"I do not doubt that there are certain classes of documents which ought not to be disclosed whatever their contents many be. Virtually everyone agrees that Cabinet minutes and the like ought not to be disclosed until such time as they are only of historical interest. But I*

do not think that many people would give as the reason that premature disclosure would prevent candour in the Cabinet. To my mind the most important reason is that such disclosure would create or fan ill-informed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind. And that must, in my view, also apply to all documents concerned with *policy making within departments including, it may be, minutes and the like by quite junior officials and correspondence with outside bodies. Further it may be that deliberations about a particular case require protection as much as deliberations about policy. I do not think that it is possible to limit such documents by any definition. But there seems to me to be a wide difference between such documents and routine reports. 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's case, whether the withholding of a document because it belongs to a particular class is really 'necessary for the proper functioning of the public service'."*

12. He contended that Lord Reid had accepted that it is not only documents concerned with making policy, but also documents concerned with deliberation about a particular case. His Lordship had also accepted that no exhaustive classifications of documents entitled to public interest immunity could be made.

13. The Solicitor General forcibly argues that the contract, being a Government document executed at a "high" level was entitled to public interest immunity. For this proposition he relied on observation by Lord Pearce and Lord Hudson in **Conway's**:

> *"It is in the case of documents for which protection is claimed on the ground of their class, irrespective of their contents, on what may be called the "candour" ground that the principal difficulty arises, for it is not to be disputed that there are classes of documents which from their very character ought to be withheld from production if protection is properly claimed on grounds of state. I have in mind those enumerated by Salomon L.J. in re Grosvenor Hotel, London (No. 2) such as Cabinet minutes, dispatches from ambassadors abroad and minutes of discussions between heads of departments. The expression "class", however, covers not only such documents which pass at a high level and which require absolute protection, but also those communication not readily distinguishable from those passing in the ordinary course of*

business conducted by commercial organizations and carrying only a qualified privilege."

In agreeing with this observation Lord Pearce said:

"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 ordered of Cabinet correspondence, letters or reports on appointments to office of importance and the like."

14. In **Burmah Oil Co. v Bank of England [1980] A.C. 1090 at P 1111** Lord Wilberforce had this to say with regards to class claim:

"The claim to "public interest immunity" in respect of these documents is clearly what has come under a rough but accepted categorization to be known as a "class" claim not a "contents" claim; the distinction between them being that with a class claim it is immaterial whether the disclosure of the particular contents of particular documents would be injurious to the public interest – the point being that it is the maintenance of the immunity of the class from disclosure in litigation that is important; whereas in a contents claim the protection is claim for particular contents in a particular document. A claim remains a class even though something may be known about the contracts; it remains a class even if parts of documents are revealed and parts disclosed."

15. As stated earlier, Barrow J (Ag) in his judgment concluded at para. 42 that:

> *"In this case there is no attempt by the applicant to obtain disclosure of cabinet papers, ministerial communications, civil service memorandum of the like. The applicants are not seeking to invade the confidentially that the law recognizes is a necessary formulation of the government of policy. I do not see from what the Financial Secretary says anything that places the contract into the category of documents that should be withheld from production."*

16. The learned judge made a distinction between the formulation of policy and the application or implementation of that policy. He was correct in holding that while evidence relating to the formulation of policy was privileged, evidence which related to the implementation of that policy was not protected. He held that as a general proposition the contract as it was not covered by a class claim.

17. In deciding whether the contract falls within the class of document which are protected by privilege from disclosure it is necessary to apply the test laid down by Lord Reid in Conway's case. The judge accepted that the proper test to be applied is to ask, in the language of Lord Simon in Duncan's case, whether the withholding of a document because it belongs to a particular class is really "necessary for the proper functioning of the public service".

18. For my part, I find it difficult to imagine in what way the disclosure of the contract between the Government and the Print is necessary for the proper functioning of the public service. The contract would appear to be an ordinary commercial contract. It is clear from the judgment of Lord Reid that “Cabinet minutes and the like “ought not to be disclosed”. The respondents are not seeking to apply for the disclosure of any deliberation relating the formulation the Government’s policy to sell the assets of the Print Department or the reason why the Government entered into the contract with PBL to provide the printing services.

19. The Solicitor General submitted that the policy decision to sell the assets of the Print Department to PBL and the contract are all part and parcel of one transaction and cannot be separated from each other. He contended that the contract could not have been made without a policy decision to sell. It was, he said, one indiscernible series of actions and if separated it would not be possible to understand them. Disclosing he contended it would cause “create or fan ill-informed or captious public or political criticism”. He did not think that there could be any distinction between the formation of government policy and the implementation of that policy. He rejected any idea that, while the document relating to the formation of the policy to sell the assets of the Print Department would be privileged from disclosure, the contract for the transfer should be

considered the implementation of that policy and therefore would be subject to discovery. He submitted that the contract could be considered as merely "nuts and bolts" of the policy.

20. In support of this submission, the Solicitor General relied on **Burmah Oil Co. Ltd. v Governor and Company of The Bank of England and Another [1980] A.C. 1090** where Lord Wilberforce at P. 1112 has this to say:

> *"I now deal with the two main arguments used by the appellants. The first is to seek to make a distinction between a decision to allow the bank to buy the B.P. stock and a decision as to price: the first, it is said, may be "policy", the second is something less than policy. I have to reject this distinction. The whole course of negotiation of which, as I shall explain, we know a great deal, shows that these two matters were indissolubly linked as part of one decision. It is indeed inconceivable that any responsible minister or civil servant would regard the only matter of policy to be decided to be the purchase of the stock in principle and would leave over the matter of price as one merely of "nuts and bolts"."*

He contended that in the circumstances "the negotiation of printing services contract at Cabinet and Ministerial level and its execution were indissolubly linked as a policy issue".

21. There was no evidence to suggest that the decision to sell the assets of the Printing Department was indissolubly linked with the contract to provide the print service. The Press Release stated:

> *Following on an earlier decision of Cabinet, the Ministry of Finance announced that the transition of the Government Printers from a public sector subsidized Department to a private enterprise commences on July 12, 2003.*
>
> *After several months of developing private sector management systems at the Printer's Department, a private company Print Belize Ltd., led by long-serving Government Printer, Mr. Lawrence Nicholas will purchase the assets of the Government Printers. Other employees will be offered the opportunity to become shareholders of the new company.*
>
> *Under an agreement between Print Belize Ltd. and the Government, the new company will provide printing services to the Government. The asset purchase is being financed through the DFC for approximately $2.4 million dollars.*

However in his affidavit the Financial Secretary states:

> *After the sale of the Government Printing Department assets to Print Belize Ltd. by DFC, the Government entered into a printing services agreement with Print Belize Limited which recognized that the Government Printing needs cost approximately $2.5 million annually,*

and which required Print Belize Limited to charge 10% mark-up on Government printing business.

In the circumstances it does not suggest that the decision to sell the assets and the decision to enter into the contract for printing services are "indissolubly linked".

22. Discovery is sought of the printing services contract. Discovery is not sought of the documents which lead to the formation of the policy to sell the assets of the printing press. Nor is discovery sought of the documents used by the Government to arrive at the selling price of the assets. What is sought is the contract to be carried out by PBL. In my view, the learned trial judge was right in making the distinction between policy formulation and policy implementation.

23. A further submission by the Solicitor General was that, by ordering disclosure of the contract for printing services the respondents were seeking to invade the inner workings of Government by having produced an isolated contract formulated in the context of wider government economic policy, and which when produced the public would not have all the background information to explain fully how it is the way it is. He contended that what the respondents were seeking to be disclosed was "a necessary attendant to the formulation of government policy". The contract, he contended, was the process by the Cabinet decision was reached. He adopted

that what was said by Lord Fraser of Tullybelton in **Air Canada v Secretary of State for Trade [1983] 2 AC 394 at 432**:

> *"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 matters, but they approach that level in that they may disclose the reasons for Cabinet decisions and the process by which the decisions were reached."*

24. Lord Scarman in **Burmah Oil** case appears to express some doubt about secrecy insofar as it relates to the inner workings of Government. He states at p 1144:

> *"But is the secrecy of the "inner working of the government machine" so valid 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?"*

25. For my part, I reject this submission of the Solicitor General. I would expect that the contract between the Government and Print Belize Limited for the performance of printing services would be an

arms length commercial contract. It is difficult to envisage in what way the contract would contain the reasons for Cabinet decision to sell the assets of the Print Department or the process whereby Cabinet reached that decision. Having disposed of the assets of the Print Department. The contract, in my view, is the implementation of the government policy to engage PBL to provide printing services. It is not conceivable how a commercial contract could be expected to reflect the process by which Cabinet arrived at its policy. Good governance and open government requires that implementation of government policy should be subject to the scrutiny of an ever inquisitive public. Clearly the judge, in asking for the contract to be produced to a judge so that the judge may inspect it to ascertain whether its contents are in fact subject to privilege, was acting in the interest of justice.

26. Complaint was made of the conclusion by Barrow J (Ag) that:

> *"Because I have found the contract to be material and, indeed critical to the printers claim for relief …should privately inspect the contract to see if it contains evidence of the formulation of policy."*

It was alleged that the judge fell into error by failing to appreciate the issues before him in he substantive judicial review proceedings. It is said that he erred when he determined that it was necessary to have the printing services contract produced to a judge in order to fairly dispose of the issue between the parties. Complaint is also

made that he applied the wrong principles in ordering production of the contract. It is submitted that the judge unconsciously wanted to take a peep at the printing service contract to see whether it was "purely confirmatory of what the Financial Secretary had said.

27. The Solicitor General submitted that the general principle was that an order for discovery of a document will be made when it is established that the document was necessary for the disposal fairly of the issues between the parties. It was his contention that the judge ought to have identified the issue which were to be determined is the substantive judicial review. The judge had granted leave to apply for Judicial Review of the decision of the Minister of Finance and Home Affairs to enter into contracts with Print Belize Limited for the supply of printing services of the Government and to sell to Print Belize Limited the publicly owned printing assets which constituted the Government Printery at a price of $2.4 million.

28. In the Originating Notice of Motion the Respondent sought relief on eight grounds. They alleged that the appellant acted unlawfully by failing to invite tenders for the provision of printing services to the Government in breach of the Financial Order 1965. They further alleged that "the decision to contract for the provision of printing service to the Government of Belize by a contract which places a cost on the Government of $2.5 million dollars and a requirement of

Print Belize Limited to charge 10% mark up on Government printing business" was disproportionate to any power the Government may have had to make the contract. They also alleged that the decision of the Minister of Finance to sell the assets of the Printing Department including the land and building where the Department was situate "for a price that was clearly below its true market value and without first inviting offers for its purchase this was irrational.

29. In **Burmah Oil** case Lord Edmund-Davies recognized that "the court has no power to order disclosure unless it is "of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs." Lord Edmund-Davies again revisited this theme in the **Air Canada** case where he said at p 441:

> *"It is common sense that the litigant seeking an order for discovery is interested, not in abstract justice, but in gaining support for the case he is presenting, and the sole task of the Court is to decide whether he should get it. Applying that test, any document which, it is reasonable to suppose, contains information which may enable the party applying for discovery either to advance his own case or to damage that of his adversary, if it is a document which may fairly lead him to a train of inquiry which may have either of those consequences, must be disclosed."*

30. There can be no doubt that having regard to the grounds upon which the Judicial Review is sought that the contract for the printing services will be central to the issues raised. In order to decide whether the decision to award the contract for the provision of printing services was disproportionate to any power which the Minister has, it would be necessary, in my view, to examine the entire contract to ascertain its true effect. The contract in my view is both relevant and material.

_____

MOTTLEY P.

CAREY JA

1. There was before Barrow J (Ag) an application for leave to apply for judicial review, which, in the event he granted, but allied to this process was an application by the Belize Printers Association Ltd. and BRC Printing Ltd for discovery of certain documents, viz., (a) the contract with Print Belize Ltd for the supply of printing services to the government and (b) an inventory of the assets sold to the Print Belize Ltd.

2. The Belize Printers Association Ltd. And Belize Printing Co. Ltd were seeking judicial review of the decisions of the Minister of Finance and Home Affairs – (a) to sell the assets of the Government Printing Department to a private company, Print Belize Ltd and (b) to enter into a printing services contract with the same company without public tender whereby Print Belize Ltd. would perform the services of Government Printer for a price of approximately 2.5 million annually. The grounds alleged were unlawfulness, procedural impropriety, unreasonableness and proportionality.

3. The judge refused discovery of the inventory of assets but ordered production of the contract. These orders respectively aggrieved the party adversely affected and prompted these appeals now before us. The Attorney General was dissatisfied with the order for discovery of the printing services contract (CA 7/04); the Belize

Printers Association Ltd and BRC Printing Ltd, for their part, were unhappy with the order which refused discovery of an inventory of the government assets sold to Print Belize (CA 8/04) Ltd.

4. Both appeals were separately argued before us and in the result, we set aside the order refusing discovery of the inventory of assets and confirmed the order for inspection in relation to the contract. The President promised to give reasons for those decisions and I now set out my reasons for concurring in the result.

5. The short question which calls for determination in this appeal is whether the contract entered into between the government and Print Belize Ltd for provision of printing services to government should be produced notwithstanding the Attorney General's claim that it should not, on the ground of public interest immunity. Put in other words, is the claim of the Attorney General well founded? It is to be borne in mind that the learned judge did not grant the order in terms, he directed that the document be produced for his inspection. He said this - "Because I have found the contract to be material and indeed critical to the printer's claim for relief, and guided by the approach taken in *Conway v. Rimmer*, it follows from what I have said that I (or the Judge before whom this matter continuous) should privately inspect the contract to see if it contains evidence of the formulation of policy. That inspection is the only way to determine the accuracy of the Government's claim that the

contract falls within the protected class of documents and/or ought to be withheld for production".

6. The learned Solicitor General challenged the exercise of the discretion of Barrow J (Ag) in making the order he did, on the basis that the contract evidences the formulation and implementation of government economic policy at the cabinet level. He was critical of the judge's reasoning in arriving at his decision. First, he submitted in his skeleton arguments, that the judge failed to appreciate that formulation and implementation of policy are inextricably linked. Policy, he said cannot be formulated in abstract or implemented in abstract. Secondly, having correctly found that the printing services contract fell into a class of documents protected by public interest immunity because it evidences the formulation of government policy decided at Cabinet level in a matter of major economic importance to Belize, he misdirected himself by holding that the respondents in this appeal, by seeking disclosure were not asking for invasion of the confidentiality that is a necessary attendant of the formulation of government policy.

7. It is now settled since *Conway v. Rimmer [1968] AC 910* that the certificate of the Minister, while entitled to the greatest weight was not conclusive. The following extracts demonstrate this fact. Lord Upjohn at p. 992 stated as follows:

"…there is sufficient authority to support the view held by all your Lordships that the claim of privilege by the Crown, while entitled to the greatest weight, is only a claim and the decision whether the court should accede to the claim lies within the discretion of the judge; and it is real discretion."

At p.971 Lord Morris said:-

"…In my view, it should now be made clear that whenever an objection is made to the production of a relevant document it is for the court to decide whether or not to uphold the objection."

At p.952 Lord Reid expressed himself thus:-

> ***"…I would therefore propose that the House ought now to decide that courts have and are entitled to exercise a power and a 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."

8. The law as stated by Lord Simon LC in *Duncan v. Cammell, Laird & Co. Ltd [1942] AC 624* has been overruled. It is very necessary to make this clear as the learned Solicitor General went very close to arguing for the conclusivity of the certificate of the Financial Secretary in saying that ***"…never before in this country have government papers ….formulated at the Cabinet level been ordered to be disclosed over the policy objections of the Government"***.

9. It was at the heart of the Solicitor General's submissions that the contract for services fell into a class of documents protected by public interest immunity. The public interest to be protected was identified by the Financial Secretary in these terms (p.76)

"4. …The decision to enter into a contract for printing services was similarly made as a Cabinet policy in the public interest to contain Government's recurrent expenditure, and overall it significantly reduced Government's operating costs. The contract reflects Government's economic policy in this matter, and is the Cabinet Ministers and Senior Public Offers' to protect the public interest of Belize by introducing an economic policy package of divesting Government of responsibilities in

areas which are essentially "non-governmental" in nature. I therefore object to the production of the printing services contract on the basis of public interest immunity".

A few comments should be made with respect to para 4 of the certificate which is its pith and substance. This paragraph consists of a series of assertions, for example, it states: "The contract reflects Government's economic policy in this matter and is the culmination of the views of the Cabinet Ministers and Senior Public Officers to protect the public interest of Belize by introducing an economic policy package of divesting Government of responsibilities in areas which are essentially, 'non-governmental' in nature. "The economic policy identified is to contain expenditure by divestment. I pause to observe that it is not easy to appreciate how a purely legal document is capable of achieving what is claimed for it in the paragraph. What is of crucial importance is that the certificate does not demonstrate in any shape or form the Financial Secretary's opinion why the production of the document would be injurious to the public interest. *Burmah Oil Co. Ltd. v. Bank of England (supra)* on which the Solicitor General strongly relies, does not support his thesis that the document being executed at a high level, and is the culmination of the views of the Cabinet, is sufficient to give the certificate viability. See the comments of

Lord Wilberforce at p.1109 A-D. In my respectful opinion, the certificate was inadequate for the purpose of claiming public interest immunity.

Mr. Kaseke urged that because the printing services contract was at one and the same time reflective of economic policy and was evidence of the implementation of that policy, it is entitled to public interest immunity. As I understood the learned Solicitor General, the contract belonged to a class, and accordingly the contract as well as all other documents which reflected government policy, were protected. For support, he cited *Conway v. Rimmer [1968] A.C. 910* and in particular the following observations of Lord Reid, at p.952:-

> ***"…I do not doubt that there are certain classes of documents which ought not to be disclosed whatever their contents may be. Virtually everyone agrees that Cabinet Minutes and the like ought not to be disclosed until such time as they are only of historical interest. But I do not think that many people would give as the reason that premature disclosure would prevent candour in the Cabinet. To my mind the most important reason is that such disclosure would create or fan ill-informed or captious public or political criticism. The business of government is difficult enough as it is, and***

no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticize without adequate knowledge of the background and perhaps with some axe to grind. And that must in my view, also apply to all documents concerned with policy making within departments including, it may be, minutes and the like by quite junior officials and correspondence with outside bodies. Further it may be that deliberations about a particular case require protection as much as deliberations about policy. I do not think that it is possible to limit such documents by any definition…..

…but I think that the proper test to be applied is to ask in the language of Lord Simon in Duncan's case, whether the withholding of a document because it belongs to a particular class is really "necessary for the proper functioning of the Public Service".

10. I put forward no heretical view when I suggest that the claim for public interest immunity rests on the rationale that the inner workings of government should not be exposed to public gaze. Cabinet meetings are not on television. Ministers take an oath of secrecy. The privilege or immunity thus covers the deliberations of the Cabinet, of Ministers and their advisers. At this level of

governance, policy making is the principal item on the menu. It is not doubted that at some time the policy decided or the decision made will be exposed to public gaze for assessment or criticism of the country. The documents which, it is understandable, would be withheld would relate to and concern the working out of policy or in decision making. For this reason I do not accept that the services contract – a contract between a government agency and a private entity – falls within the class of documents that ought not to be disclosed. It is of little moment that the contract was decided at the highest level. This contract was in the hands of Print Belize Ltd – for all practical purposes a member of the public. It was in the public domain and exposed before any claim was made.

11. Although the Solicitor General contended that the services contract was a government document, he gave no reason why it should be so categorized. In my view, it could as readily be called a Print Belize Ltd document. I do not think that learned counsel would argue that the very same document would be subject to a similar claim in the event that an action on the contract was launched by one of the parties to it. I wish to emphasize that I accept unreservedly that if a document properly falls within the "class" claim, then it matters not whether disclosure of the contents are against the public interest.

12. In the course of his submissions Mr. Kaseke was critical of the dichotomy which the judge found to exist in relation to documents dealing with implementation of policy on the one hand, and those concerned with the formation of policy on the other. The judge's opinion was that the former were not entitled to class public interest immunity while the latter would be. He based this contention on the observation of Lord Reid in *Conway v. Rimmer (supra)*:-

> ***"…Further it may be that deliberations about a particular case require protection as much as deliberations about policy…"***

13. The short answer to this argument must rest on a clear understanding of the reason why protection is being given to some documents. That reason as Lord Reid suggest is to prevent the "inner workings of the government machine" being exposed to prevent uninformed criticism by those possibly with an axe to grind. I am of opinion that the contract of services, between the government and a private company does not constitute deliberations about a case nor does it represent the inner workings of the government machine. The cabinet had decided on privatization of certain assets of government as part of an economic plan to reduce expenditure. That was no secret, it had been announced by government in a press release. Privatization involves sales, in other terms, contracts. Generically, contracts are

not an unusual fare in courts of justice, the more so when the breach constitutes the genesis of the action launched by one of the parties.

14. With all respect to the very forceful arguments of Mr. Kaseke, I am unable to accept that the services contract was a document executed at a “high level” nor a document which passed at a “high level” in the formulation of economic policy for the reason I have put forward.

15. In the result, I would conclude that the contract for services was not protected by public service immunity. But the judge in the final analysis, had not definitively arrived at that conclusion although his reasoning clearly pointed in that direction. He said: “…it seems to me most improbable that any harm would be caused to government by the disclosure of the contract. This view, however, derives purely from general reasoning and is not a finding of fact. To decide whether the contract falls within a protected class and perhaps more fundamentally, whether the contract should be withheld to protect the public interest, I would need to see the contract”. In the circumstances, the judge ordered that the contract be produced to the court for its inspection and suspended the order pending an appeal by either of the parties, seeing that neither side had obtained what it sought as to the appellants, a finding that the

claim for public interest immunity was valid and an order refusing discovery, while, in respect of the printers, an order for discovery.

16. The Solicitor General in this regard treated this result as the tantamount to an order for discovery of the contract of services between the government and Belize Print Ltd. I suspect for this reason he was impelled to challenge whether the judge was competent to consider or evaluate the issues raised in the certificate. It should be noted that a judge is entitled to call for inspection of a document for which public interest immunity is claimed where the judge "feels any doubt about the reason for its indecision as a class document" per Lord Upjohn in *Conway v. Rimmer (supra)* at p 995. Lord Fraser of Tullybelton in *Air Canada v. Secretary of State for Trade [1983] 2 A.C. 394* at p 434 said:-

> ***"…Inspection is with a view to the possibility of ordering production, and in my opinion, inspection ought not to be ordered unless the court is persuaded that inspection is likely to satisfy it that it ought to take the further step of ordering production. Lord Reid in Conway v. Rimmer (supra) at p.953 said that if the judge "decides that on balance the document probably ought to be produced. I think that it would generally be best that he should see them before ordering production and if he thinks that the***

minister's reasons are not clearly expressed he will have to see the documents before ordering production…"

17. In the instant case Barrow J (Ag) gave solid reasons for ordering inspection by himself which reasons are in complete accord with dicta from the authorities to which I have alluded. It is true that having regard to the views I have expressed in relation to the document in question, inspection would not have arisen for consideration. I would have held that the document did not belong to the "class" identified by the learned Solicitor General as requiring protection from the vulgar gaze. It seems to me that the judge exercised a discretion in requiring inspection by himself. For the reasons I have given above, I do not think it has been shown that he exercised it on any wrong principle.

18. There remains one other matter with which I must deal. The application for discovery was an interlocutory process arising out of the applicant's motion for judicial review. It was as well point out that among the other remedies sought was:

> "(b) a Declaration that the agreements or contracts with Print Belize Ltd. are void and/or of no effect.
>
> (c) an Order of Certiorari to remove into this honourable court and quash the contracts with Print Belize Ltd."

Having regard to the remedies sought it seems to me altogether inconceivable that a claim for public interest immunity could outweigh the administration of justice. I do not suppose it could be argued with any chance of success that the contract, would not be considered directly relevant. The question may well be asked what "inner workings of the government machine" can be contained in a commercial contract between a government agency and a private entity and so vital as to prevail over the imperative demands of justice. See the observations of Lord Scarman in *Burmah Oil Co. Ltd v Bank of England (supra) at p1144*. As he so eloquently and pithily asked: "what is so important about secret government that it must be protected even at the price of injustice in our courts?"

19. As I understood the contention of the Solicitor General, the production of the services contract is irrelevant to dispose of an issue which he particularized as – whether the government was required to enter into the printing services contract only after going to tender. He argued that the trial judge erred in law because he focussed on relief, that is, the ordering of production.

20. I do not accept this approach. The judge ordered production for reasons which are supported in law and not because he focussed on relief. The printer' claim for relief included a declaration regarding the contract and an order to quash the contract. The contract was contained in a written document. If the written

document is to be quashed as sought, then the document is the principal exhibit in the case. It accords more with rationality and logic to include it. Mr. Kaseke accepts that it is both relevant and material. Indeed that is why it is the subject of the claim to public interest immunity. It is of course the fact that the contract is the progeny of government policy but that is hardly a reason for shielding it from public gaze. It is precisely because of this reluctance to disclose that will fan speculation and allegations of lack of transparency in government. Lord Keith of Kinkel in *Burmah Oil co. Ltd. v Bank of England (supra)* said in this regard – "…There can be discerned in modern times a trend towards more open governmental methods than were prevalent in the past…". This was said in 1980 – twenty-four years later, I would think that we can even more so vouch for this trend.

21. I am of the opinion that in light of the analysis I have endeavoured to detail, that we should not interfere with the order of Barrow J (Ag.). I accordingly agreed with the other members of the panel that the appeal be dismissed.

_____

CAREY JA

MORRISON JA

Introduction

1. On 13 October 2004 this Court heard arguments from counsel in Civil Appeals Nos. 7 and 8 of 2004. The appeals were not strictly speaking heard together, as counsel advised the Court that it might be more convenient for the parties to be heard separately in respect of each appeal. They both, however, have their genesis in a single matter, that is Action No. 198 of 2004, an application for judicial review, in respect of which Barrow J (Ag) gave leave on 30 April 2004 to Belize Printers Association Ltd. ("Belize Printers") to apply for judicial review of a decision by the Government of Belize to sell the assets of the Government Printing Department ("the Printing Department") to Print Belize Ltd. ("Print Belize") and to enter into a contract with that company for it to provide printing services to the Government thereafter ("the printing services contract"). Nothing now turns for the purposes of these appeals on that grant of leave, save to the extent that it can illuminate the nature of the matters in dispute between the parties.

2. These appeals concern the manner in which Barrow J (Ag) dealt with an application by Belize Printers for discovery in the action by the Minister of Finance and Home Affairs ("the Minister") further to the grant of leave, of certain documents, the discovery of which Belize Printers claimed to be necessary for the disposal fairly of the

application for judicial review. These documents were (a) the printing services contract and (b) an inventory of the assets sold to Print Belize. In a ruling dated 10 May 2004, the learned judge ordered discovery in respect of (a), that is, the printing services contract with Print Belize, but refused the order sought in respect of (b), that is, the inventory of the assets sold to Print Belize. Civil Appeal No. 7 of 2004 is the Minister's Appeal from the Order of Barrow J (Ag) made at (a) above, while Civil Appeal No. 8 of 2004 is Belize Printers' Appeal from the judge's Order refusing discovery at (b) above.

The nature of the dispute

3. I am mindful that, despite its having already attracted a significant amount of judicial attention in the Court below and in this Court, this litigation is still at a relatively preliminary or opening stage, concerned as we are now with whether or not an order for discovery of documents ought to have been made. I am therefore content to set out for the purposes of this judgment, and to adopt gratefully, the following outline of the shape of the dispute from the decision of Barrow J (Ag) granting leave and given on April 30, 2004:

> "The challenge that the Applicants wish to make is to the respective decisions of the Minister of Finance and Home Affairs, of the Government of Belize and of the Cabinet of

Belize dated 15th July 2003. According to the Applicants, by a press statement of that date the Ministry of Finance announced that, following a Cabinet decision, a private company, Print Belize Limited, would be purchasing the assets of the Government Printers for $2.4 million. The Applicants also say that the Minister further announced that an agreement had been made for Print Belize to provide printing services to the Government.

The Applicants wish to challenge the lawfulness of the decision to sell and the subsequent sale of public assets without public disclosure and without the approval of the House of Representatives. The sale of a capital asset, in the view of the Applicants, must be disclosed in a budget for the approval of the legislature. Even if the sale was lawful, the Applicants wish to urge, the price at which the assets were sold was so much lower than the market value as to make the decision to sell at that price disproportionate to any power the Cabinet may have had to sell. The Applicants would also urge irrationality.

Contracts for works and services with the Government are governed by a law which mandates that tenders shall be invited for contracts over $10,000.00, the Applicants also wish to argue. The contract given to Print Belize Ltd. to

provide printing services to Government would be for a price of around $2.5 million, according to the Applicants. Therefore, the Applicants would urge, this contract is in breach of the relevant law.

The Applicants are respectively an association of six printing businesses and an individual printing business. They complain that they are prejudiced by the favour shown to Print Belize Ltd because it had received a contract, to the exclusion of everyone else, that guarantees it a source of income derived from public funds." (paragraphs 4 – 7).

4. It is against this background that Belize Printers sought the order for discovery referred to at paragraph 2 above.

5. In a subsequent development, the Financial Secretary swore an affidavit on behalf of the Minister dated 5 May 2004, in which he stated that Government had transferred its property interests in the Printing Department to the Development Finance Corporation ("the DFC") on 15 July 2003 (the same day as the press release referred to by Barrow J (Ag), which had announced that "under an agreement between Print Belize and the Government, the new company will provide printing services to the government. The asset purchase is being financed through the DFC for approximately $2.4 million"). The Financial Secretary's affidavit went on to indicate that "The transfer of the Government Printing

Department's assets to DFC was done with a view to their ultimate disposal by DFC."

The Judge's Ruling on the discovery application

6. At the hearing before Barrow J (Ag) the Minister objected to the production of the printing services contract on the ground of public interest immunity, maintaining that it fell within a class of documents which evidenced the formulation of government policy decided at the highest level (i.e. Cabinet) in a matter of major economic importance to Belize (the control and reduction of Government's recurrent expenditure) and was accordingly entitled to immunity from production. The learned judge had no difficulty in holding that the contract ought to be produced:

> "The contract is more than relevant, however; the contract is the very object of this case. It is the execution of the decision that is being challenged. This is not simply a situation where a party is seeking production of a document so that it may advance or attack the case for the other side. The contract is undoubtedly material and would require to be produced for that purpose. Beyond the issue of materiality in the usual way, however, that is a case where the printers ask for production of the contract that they ask the court to set aside. The printers are saying the contract is bad because it violates the law on how Government should award contracts, it violates standards of fairness and it was

procedurally improper to enter into such a contract. It would be extraordinary, in my view, for a court to set aside a contract that it has not seen.

I really do not see how the court can properly or safely proceed without having the contract before it." (paragraphs 35 and 36 of Ruling dated 10 May 2004).

7. The learned judge did not, however, order production of the contract without limitation, but ordered its production to the Court for inspection and determination of whether the claim to public interest immunity was well founded.

8. Primarily because of the Financial Secretary's "revelation" referred to at paragraph 5 above, however, the learned judge regarded the inventory of assets sought as falling into a different category for the purposes of the application for discovery. As a result of the interposition of the DFC in the transaction, to which the Financial Secretary had deposed, Barrow J (Ag) held "as a matter of fact that it was DFC which sold the assets to the company and in doing so acted in its own right and on its own behalf and not as the agent of Government" (paragraph 25). Barrow J (Ag) treated DFC for these purposes as having "a completely separate legal personality from the Government" (paragraph 27) and therefore approached the matter on the footing of traditional company law doctrine of

separate legal personality (indeed, the learned judge specifically cited Salomon v Salomon Co. Ltd. [1897] AC 22 in this regard).

9. In the result, the judge refused the application for the production of an inventory of the assets sold to Print Belize in the following terms:

> "I therefore conclude on this point that it is not open to the court to lift the corporate veil so as to treat the sale of assets by DFC to the company as a sale by Government.
>
> Where does that leave the application for production of an inventory of the assets sold to the company? I have already noted that the printers thought that it was the Government that had sold the assets. I gave the printers leave to move for judicial review of the alleged decision by Government to sell to the company and the alleged contract by which this decision was effected. The printers have now been shown to have been wrong. There was no such decision and no such contract. I must not be taken as deciding the point because I have not heard counsel thereon but it does seem to me that the printers will have to abandon the challenge to the sale. The printers did not ask for leave and were not granted leave to move for judicial review of the decision to transfer the assets to DFC. The inventory of assets is therefore not relevant or material to any issue in this case that is now a live issue. I therefore refuse the application for

the production of an inventory of the assets sold to the company." (paragraphs 32 and 33).

The Minister's appeal

10. The Minister appealed against the Order for production of the printing services contract on the following grounds:

1. The Learned Trial Judge erred in law and wrongly exercised his discretion in ordering the production of the Printing Services Contract because the Printing Services Contract evidences the formulation and implementation of Government economic policy at the Cabinet level.

2. The Learned Trial Judge failed to appreciate that the formulation and implementation of policy are inextricably linked and one runs into the other since policy cannot be formulated in abstract or similarly implemented in abstract.

3. After correctly and expressly finding at Para. 7 that documents which evidence the formulation of Government policy decided at the Cabinet level in a matter of major economic importance to Belize were exempt from production on the basis of public interest immunity, that Learned Trial Judge erred in law and misdirected himself by holding at Para. 12 that the Respondents, by seeking the disclosure of the Printing Services Contract, are not asking for invasion of the confidentiality that is a necessary attendant of the formulation of Government policy.

4. After identifying at Para. 5 the three grounds on which the Respondents are challenging the award of the Printing Services Contract, namely (a) violation of the law on how Government awards contracts, (b) violation of standards of fairness, and (c) procedural impropriety, the Learned Trial Judge misdirected himself in law by ordering the production of the Printing Services Contract to enable (at Para. 10) the Respondents "to question the accuracy of the claim by the Government that the contract falls into the [public immunity] class".

5. The Learned trial Judge succumbed to the urge to "take a peep" at the Printing Services contract to satisfy himself that the contract "is purely confirmatory of what the Financial Secretary has disclosed"."

11. The learned Solicitor General, who appeared for the Minister, submitted that the printing services contract was a document which was entitled to public interest immunity, "being a contract which is both Government economic policy and which evidences the formulation of policy at Government level". It was further submitted that the contract was "concerned" with government economic policy, or, put another way, it "is government economic policy concretized." The contract, the Solicitor General contended, was not necessary for the disposal fairly of the issues between the parties and the learned trial judge was accordingly wrong in ordering its production.

12. The learned Solicitor General relied in particular on the landmark decision of the House of Lords in **Conway v Rimmer [1968] AC 910**, but also referred the Court to and relied on **Burmah Oil Co. v Bank of England [1980] AC 1090**, **Air Canada v Secretary of State for Trade [1983] 2 AC 394** and **R v Secretary of State for Foreign Affairs, Ex parte World Development Movement [1994] 4 LRC 178**.

13. Ms Lois Young Barrow SC, who appeared for Belize Printers, submitted on the other hand, that Barrow J (Ag) had correctly found the contract to be relevant and material and that its production was

necessary to enable the Court to dispose of the issues before it fairly. With regard to the claim of public interest immunity, Ms Young Barrow submitted that the learned judge was correct in ruling that there was nothing in the material placed before him that suggested that any harm would be caused to Government by the disclosure of the contract. Indeed, she submitted further, Barrow J (Ag) in fact "chose to move cautiously" in ordering that, instead of being disclosed outright, the contract was to be disclosed to the Court in the first instance. This she described as an approach that was "overly generous to the Appellants since they had not succeeded in making a valid claim for public interest immunity". She also relied on **Conway v Rimmer**, the **Air Canada** case and the **World Development Movement** case.

The applicable law

14. In the **Air Canada** case, Lord Edmund-Davies said as follows (at page 441):

> "My Lords, I proceed to state the obvious. Under our Supreme Court Practice, discovery of documents between parties to an action with pleadings (as in the present case) is restricted to documents "relating to matters in question in the action" (R.S.C., Ord. 24, r. 1 (1)), and no order for their inspection by the other party or to the court may be made "unless the court is of opinion that the other is necessary either for disposing fairly of the cause or matter or for saving costs" (r. 13 (1)). It is common sense that the litigant seeking an order for discovery is interested, not in abstract justice, but in gaining support for the case he is presenting, and the sole task of the court is to decide whether he should get it. Applying that test, any document which, it is reasonable to suppose, contains information which may

> enable the party applying for discovery either to advance his own case or to damage that of his adversary, if it is a document which may fairly lead him to a train of inquiry which may have either of those two consequences, must be disclosed: see Compagnie Financière et Commerciale du Pacifique v. Peruvian Guano Co. (1882) 11 Q.B.D. 55, 63, per Brett L.J. So it was that in Glasgow Corporation v. Central Land Board, 1956 S.C. (H.L.) 1, 18, Lord Radcliffe spoke of the need that "a litigant who has a case to maintain should not be deprived of the means of its proper presentation by anything less than a weighty public reason" and concluded, at p. 20, "Nor … do I feel any clear conviction that the production of the documents sought for is in any real sense *essential to the appellants' case."* (emphasis added.) It follows that, at every stage of interlocutory proceedings for discovery, the test to be applied is: will the material sought be such as is likely to advance the seeker's case, either affirmatively or indirectly by weakening the case of his opponent? To take but one more example out of many, such was again the test applied by the Court of Appeal in Woodworth v. Conroy [1976] Q.B. 884".

15. It is common ground between the parties that this is an accurate statement of the modern law of discovery. It is also common ground that what Lord Radcliffe once described as a "weighty public reason" (referred to in the dictum of Lord Edmund-Davies set out in the preceding paragraph) may operate to curtail the operation of the correlative right to and duty of disclosure. It is in this sense that there can be in this branch of the law a tension between competing public interest requirements. As Lord Reid observed in **Conway v Rimmer** (at page 940):

> "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" (and see, to similar effect, Lord Morris at pages 955 – 956, where he speaks of the "balance of desirabilities".)

16. It is, finally, common ground between the parties that where, as here, there is a claim that certain documents attract public interest immunity, the appropriate test is that propounded by Lord Reid, in **Conway v Rimmer** (at page 952):

> "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.
>
> I do not doubt that there are certain classes of documents which ought not to be disclosed whatever their content may be. Virtually everyone agrees that Cabinet minutes and the like ought not to be disclosed until such time as they are only of historical interest. But I do not think that many people would give as the reason that premature disclosure would prevent candour in the Cabinet. To my mind the most important reason is that such disclosure would create or fan

> ill-informed or captious public or political criticism. The business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind. And that must, in my view, also apply to all documents concerned with policy making within departments including, it may be, minutes and the like by quite junior officials and correspondence with outside bodies. Further it may be that deliberations about a particular case require protection as much as deliberations about policy. I do not think that is possible to limit such documents by any definition. But there seems to me to be a wide difference between such documents and routine reports. 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's case, whether the withholding of a document because it belongs to a particular class is really "necessary of the proper functioning of the public service"."

The result

17. Applying these principles to the instant case, I have found the approach of Barrow J (Ag) to be, as counsel for Belize Printers put it, "unassailable". I am therefore of the view that he was amply justified in principle and by authority in arriving at the conclusion set out at paragraph 42 of his judgment:

> "In this case there is no attempt by the applicants to obtain disclosure of cabinet papers, ministerial communication, civil servants' memoranda or the like. The applicants are not seeking to invade the confidentiality that the law recognizes is a necessary attendant to the formulation of Government policy. I do not see, from what the Financial Secretary says,

> anything that places the contract into the category of documents that should be withheld from production. I apprehend that there is a distinction to be drawn between the formulation of policy, on the one hand, and the application or implementation of that policy, on the other hand. Evidence of the former, I think, would be protected from disclosure; evidence of the latter I think, would not be protected. As a general proposition, it would seem to me, the contract would fall into the latter category. I would echo Lord Reid: it seems to me most improbable that any harm would be caused to government by the disclosure of the contract. This view, however, derives purely from general reasoning and is not a finding of fact. To decide whether the contract falls within a protected class and, perhaps more fundamentally, whether the contract should be withheld to protect the public interest, I would need to see the contract".

18. Although I am not without some sympathy for Ms Young Barrow SC's complaint that in ordering that the contract be produced in the first place for the Court's private inspection he may have been "overly generous" to the Minister, the fact is that that approach is also firmly anchored in authority (see, in particular Lord Reid in **Conway v Rimmer** at page 953), as indeed is the learned judge's suspension of his order "for the contract to be produced for private

inspection by the judge to enable both sides to take an interlocutory appeal to this order".

19. It is for these reasons that I agreed with the Order made on 15 October 2004 dismissing this appeal and ordering production within fourteen days of the printing services contract for the inspection of the judge of the Supreme Court to whom the matter might ultimately be assigned.

Costs

20. The respondents are entitled to the costs of this appeal, to be agreed or taxed.

_____

MORRISON JA