

**IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION**

2009: No. 435

BETWEEN:

HER MAJESTY'S ATTORNEY GENERAL

Plaintiff

-and-

BERMUDA PRESS HOLDINGS LIMITED

First Defendant

-and-

ROYAL GAZETTE LIMITED

Second Defendant

-and-

WILLIAM J. ZUILL

Third Defendant

RULING

Date of Hearing: 17 December 2009

Date of Ruling: 18 December 2009

Barrie Mackay and Huw Shephard, Attorney-General's Chambers, for the Plaintiff

Jeffrey Elkinson and Ben Adamson, Conyers Dill & Pearman, for the Defendants

Introduction

- 1 When I granted the injunction sought by the Attorney-General on the evening of 15 December, I relied on the passage cited by Mr. Mackay from the Crossman Diaries case (Attorney-General –v- Jonathan Cape et al [1976] QB 752), and particularly the passage from Lord Widgery’s judgment at page 770, setting out the factors to be considered. First is that the publication would be a breach of confidence, something that the defendants accept would be the case here. Second is that the public interest requires that the publication be restrained, and that is really the nub of the dispute in this case. For the Attorney-General, Mr. Mackay maintains that Cabinet decisions are secret, and that such secrecy is crucial in order to facilitate full and frank debate when matters come before Cabinet for discussion. For the defendants, it is emphasised that the document which has been leaked to the defendants is not a minute of Cabinet discussions, and does not indicate how particular members of Cabinet voted. It is a proposal document, and the defendants maintain that there is no reason why publication should prejudice the Government.
- 2 Both sides recognise therefore that a balancing exercise is necessary to consider whether the publication of the document should be restrained, weighing the issue of Cabinet secrecy on the one hand and freedom of the press on the other.

The Authorities

- 3 Having heard argument, I adjourned so as to be able to consider the authorities more carefully before reaching a decision. I started by reviewing Lord Widgery’s judgment in the Crossman Diaries case in its entirety, because that case was concerned with Cabinet secrecy, whereas the other principal case to which I was referred, the Spycatcher case (Attorney-General –v- Guardian Newspapers et al [1988] 3WLR 776), was concerned with breach of confidence affecting the interests of Government in somewhat different circumstances.

- 4 In the Crossman Diaries case, the argument for the Attorney-General accepted that while all Cabinet papers and discussions are prima facie confidential, disclosure should only be restrained if the court could be satisfied that the public interest in concealment outweighed the interest in a right to free publication. The Attorney-General accepted that he would be in difficulty in maintaining an argument that Cabinet papers and discussion are all under the seal of secrecy at all times.
- 5 Lord Widgery gave examples of the different levels of secrecy applicable to different Cabinet decisions, in the following terms:

“Secrets relating to national security may require to be preserved indefinitely. Secrets relating to new taxation proposals may be of the highest importance until Budget day, but public knowledge thereafter. To leak a Cabinet decision a day or so before it is officially announced is an accepted exercise in public relations, but to identify the Ministers who voted one way or another is objectionable because it undermines the doctrine of joint responsibility.”

- 6 Lord Widgery then referred to the general principles which I have referred to at the outset, before going on to apply those principles to the case before the court. He came to this conclusion:

“In my judgment, the Attorney-General has made out his claim that the expression of individual opinions by Cabinet Ministers in the course of Cabinet discussion are matters of confidence, the publication of which can be restrained by the court when this is clearly necessary in the public interest.

The maintenance of the doctrine of joint responsibility within the Cabinet is in the public interest, and the application of that doctrine might be prejudiced by premature disclosure of the views of individual Ministers.”

So Lord Widgery clearly accepted that the doctrine of joint responsibility within Cabinet might be prejudiced by premature disclosure of the views of individual Ministers. He then dealt with the lapse of time which proved to be the critical factor in that case, and closed by rejecting arguments covering advice given by senior civil servants and observations made by Ministers in relation to such civil servants.

- 7 Although I was referred to the judgments from the House of Lords in the Spycatcher case, nothing in those judgments (in particular the judgments of Lords Keith and Goff) detracts from what was said by Lord Widgery in the Crossman Diaries case.
- 8 I was also referred to the decision of Ground CJ in the case of the Commissioner of Police and the Attorney-General –v- Bermuda Broadcasting Co. Ltd et al [2007] Bda LR 40, the Bermuda Housing Corporation case. As I understood counsel for the defendants, the important part of the learned Chief Justice’s judgment in that case so far as they were concerned was the fact that the newspaper concerned had itself done nothing wrong in acquiring documents which were no doubt improperly leaked, and the Chief Justice did not regard that aspect of matters as decisive when considering the balancing exercise which he had to undertake in that case. Mr. Mackay did suggest that there was some culpability on the part of the defendants in this case, insofar as they must have known that the document in question was confidential, and consequently had been leaked without authority. I would not accept that as a factor to which I should have regard in conducting the balancing exercise in this case.

Application to the Facts of this Case

- 9 The main argument for the defendants relates to the subject matter of the memorandum, which concerns a proposed commercial transaction. Counsel for the defendants also submits that the memorandum does not reveal voting patterns

or embarrass individual members of Cabinet; it is a presentation document for consideration by Cabinet.

- 10 In fact, the memorandum does make reference to the position of another member of Cabinet, so publication of the memorandum would involve the premature disclosure of the views of an individual Minister. However, I do not understand that factor to be conclusive.
- 11 It did seem to me that that might be the factor which would cause the balancing exercise to fall on the side of restraint. Without that reference to the view of an individual cabinet member, I would almost certainly have come to the view that publication should not be restrained.

Further Development

- 12 In the event, before the appointed time for the delivery of this ruling, I received a second affidavit sworn by the third defendant, which referred to the fact that VSB news had been carrying a story relating to Government's plan to purchase at least one city block in Hamilton, with a view to reducing Government's annual rental bill. The story also referred to the fact that Government's plan might have to be put on hold because of "budget strains".
- 13 It does seem to me that in these circumstances it is quite inappropriate to restrain publication of the memorandum. It is true that the VSB news story is inaccurate in one significant regard, which is in relation to the particular building which is owned by Sir John Swan which has been the subject of Government's interest. But as I have indicated, without the reference to the views of one Minister, I would not have restrained publication of the memorandum. In practical terms, the importance of what I had felt to be a potentially decisive factor in conducting the balancing exercise has now gone. It is in the public domain that budgetary considerations may put Government's plans on hold. And the underlying subject matter of the Cabinet memorandum now being, in broad terms, in the public

domain, I do not think that the court should restrain publication of the Cabinet memorandum which was the subject of the injunction which I granted on 15 December 2009. I do, therefore, set aside that ex parte injunction.

Costs

- 14 Given the circumstances in which I have ordered that the injunction be set aside, I would regard no order as to costs to be appropriate in this case, but will hear counsel on the issue should either side so wish.

Dated this day of December 2009.

Hon. Geoffrey R. Bell
Puisne Judge