IN THE GRAND COURT OF THE CAYMAN ISLANDS
IN THE MATTER OF THE FREEDOM OF INFORMATION LAW (2015 REVISION) ("THE FOI LAW")

AND IN THE MATTER OF A CERTIFICATION OF A REFERENCE TO THE COURT BY THE INFORMATION COMMISSIONER OF A FAILURE TO COMPLY WITH AN ORDER ISSUED PURSUANT TO SECTION 45 OF THE FOI LAW FOR THE DISCLOSURE FOR INSPECTION OF AN OFFICIAL RECORD.

CORAM: THE HONOURABLE CHIEF JUSTICE
THE 26TH DAY OF JANUARY 2017

DECISION AND REASONS

1. By letter of 6 December 2016, the Acting Information Commissioner (the "Commissioner")[1] certified to this court[2] the failure of the Office of the Premier to comply with the order of the Commissioner, issued in a letter addressed to the Cabinet Secretary within the Office of the Premier and dated 20 October 2016 ("**the Order").** The Order invoked section 45 of the FOI Law in the following terms[3]:

> *"Therefore, under my authority as Acting Information Commissioner of the Cayman Islands, pursuant to section 45 of the Freedom of Information Law (2015 Revision) I hereby order the production of the Ritch & Conolly Report dealing with immigration matters, ['**the Report**'] as soon as practicable and without further delay."*

2. The Order, the background to which will be explained in more detail below, relates to appeal No. 013/16 filed under section 42 of the FOI Law by members of the

[1] Mr. Cory Martinson, appointed by Her Excellency the Governor at the time to act as Commissioner in the absence Mr. Jan Leibaers who served at material times and still serves as the Acting Commissioner.
[2] Pursuant to section 48 of the FOI Law which provides: "Upon expiry of the forty-five day period for appeals referred to in section 47, the Commissioner may certify in writing to the court any failure to comply with a decision made under section 43 or 44, or an order under section 45, and the court may consider such failure under the rules relating to contempt of court."
[3] The Order was actually issued by Mr. Leibaers.

public[4] for disclosure of the Report, which appeal was accepted by the Commissioner on the 27 September 2016. The Report is the disputed record in that appeal. It was requested by the applicants pursuant to section 7 of the FOI Law[5] but access has been denied by the responsible public authority, the Office of the Premier. This was after the statutory processes of an initial decision on the application taken by that Office's Information Manager and an internal review by the Cabinet Secretary, both of whom had also denied access.

3. As the Order expressly acknowledges, the subject-matter of the Report is "immigration matters" and given the abiding public interest in such matters, the applications for disclosure of the Report would not have been surprising. Indeed, the rationalization of government policy on immigration matters has for many years been the subject of public scrutiny and debate. This has occurred amidst demands from the electorate for policies protective of Caymanian interests, juxtaposed against complaints of systemic delay, lack of transparency and procedural irregularities in the resolution of applications by non-Caymanians, especially those for permanent residence. Successive governments have been confronted by this sensitive and difficult problem but a final and generally acceptable resolution has proven to be illusive, as may be manifest from the near perennial amendments to the Immigration Law.

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[4] Mr. Brent Fuller and Mr. Bender Rodriguez, local journalists (hereinafter the "**applicants**").

[5] Section 6 subsections (1) and (2) provide: "(1)Subject to the provisions of this Law, every person shall have a right to obtain access to a record other than an exempt record.(2) The exemption of a record or part thereof from disclosure shall not apply after the record has been in existence for twenty years unless otherwise stated in this Law" Section 7 reads: "A person who wishes to obtain access to a record shall make an application to the public authority which holds that record". In this case, as explained above, that public authority is the Office of the Premier.

4. In particular, two complaints by applicants for permanent residence came to be of moment in relation to the present matter. These were applications which had been successfully taken on appeal to this Court against decisions of the Immigration Appeals Tribunal[6] and it was the publicly declared response of the Government to the criticisms in the judgment delivered on those appeals, among other considerations, that led to the commissioning of the Report[7]. The law firm of Ritch & Conolly were commissioned to provide the Report and, as will be more fully explained below, it is the position of the Premier as Minister for Home Affairs, Health and Culture (including immigration matters), that the Report constitutes privileged legal advice given by or on behalf of the Attorney General, it having been commissioned from Ritch & Conolly by the Attorney General on behalf of his Ministry. The Premier has certified that the Report is, therefore, exempt from disclosure under certain provisions of the FOI Law, and this is the central proposition to be examined below[8].

5. The aforementioned appeal of the applicants for disclosure having been filed under section 42 of the FOI Law, the Commissioner has the power to conduct a full investigation pursuant to section 45, which is expressed in these terms:

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[6] In the Matters of con-joined appeals in Hutchinson-Green v The IAT and Racz v The IAT 2015 (2) CILR 75

[7] See various reports in the media; eg: "Government: "Further work" needed on Immigration Law", by Brent Fuller, the Caymanian Compass Online, September 28, 2015; Immigration Report "soon come", Cayman News Service Online (CNS), 23, February 2016; "Cayman Booming but immigration issues unresolved, Premier says", by Brent Fuller ,Compass Online, October 19, 2016; "PR Applicant takes CIG [Cayman islands Government] to court over delay"; CNS, 06/12/2016;UK has expectations on PR [permanent residence] issue, says Governor"; CNS, 08/12/2016. These articles are Annex 1 to this ruling.

[8] A copy of the Premier's Ministerial Certification of Exemption is Annex 2 to this ruling.

> *"45 (1) In coming to a decision pursuant to sections 43 or 44[9], the Commissioner shall have the power to conduct a full investigation, including by issuing orders requiring the production of evidence and compelling witnesses to testify; in the exercise of this power he may call for and inspect an exempt record, so however, that, where he does so, he shall take such steps as are necessary or expedient to ensure that the record is inspected only by members of staff of the Commissioner acting in relation to that matter.*
>
> *(2) The Commissioner may, during an investigation pursuant to sub-section (1), examine any record to which this Law applies, and no such record may be withheld from the Commissioner on any grounds unless the Governor, under his hand, certifies that the examination of such record would not be in the public interest.*
>
> *(3) A certificate given by the Governor under subsection (2) shall not be subject to challenge in judicial or quasi-judicial proceedings of any kind."*[10]

6. By section 47, an applicant or a respondent public authority, is allowed 45 days within which to appeal to the Grand Court by way of judicial review against a decision or order made by the Commissioner under section 45(1)[11].

7. Save for that right of appeal and the qualification imposed upon it by the Governor's power under subsection 45(2) to certify an exemption in the public interest, the section 45 power is expressed in wide and seemingly unfettered terms. It enables the Commissioner, among other things, to require the production of a public record,

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[9] Which respectively prescribe the procedure and power for the taking of appeals. No decision could have been taken pursuant to these provisions until after the conclusion of the investigation which the Commissioner set in train under section 45,as manifest from by the Order.

[10] No certificate has been issued by the Governor in exercise of this power.

[11] Here the Office of the Premier did not exercise the right of appeal, choosing it seems instead, simply to stand behind the Premier's ministerial certification of exemption.

including even an exempt record, for examination in furtherance of his investigations. It is the power on which he relied in making the Order and in certifying under section 48 to this Court, the Premier's failure to comply, seeking enforcement of the Order.

8. The section 45(2) power is not however, one which can be construed and applied properly in isolation from other operative and relevant provisions of the FOI Law.

9. Before turning to those other provisions, I return to the factual context as more fully explained by the Commissioner's letter of reference to this Court of 6th December 2016:

> *"In trying to investigate this appeal, as further explained in the (Order) itself, the (Office of the Information Commissioner) tried for several weeks to obtain a copy of the Report in dispute, so that a full investigation may be undertaken in pursuance of a fair and impartial decision on the application of the exemptions claimed. However, we were eventually informed by the Cabinet Secretary that he was not willing to provide the record to us. This led the (Commissioner) to issue the (Order) on 20 October 2016."*

10. It is to be noted that the Commissioner's stated purpose in ordering the production of the Report was to undertake *"a full investigation... in pursuance of a fair and impartial decision on the application of the exemptions claimed."*

11. It must however also be recognized, that the Commissioner's ultimate purpose in calling for the Report, must be to decide whether or not the Report should be released to the applicants, in the event he determines that the exemptions claimed are inapplicable and decides the appeals in their favour. As the opening phrase of section 45 (1) explains, the powers of investigation and inspection are to be

exercised by the Commissioner "*In coming to a decision (on an appeal) pursuant to section 43 or 44*".

12. It must also be recognized in this context, that while the Commissioner's stated purpose is one of inspection in verification of the exemptions claimed, the Premier's certification may be seen as stating the obvious in this regard, especially coming against the background of the well-known circumstances described above, under which the Report was commissioned. Indeed, the factual context is such that there is no basis for a concern about and no suggestion of bad faith, on the part of the Premier's Office in the assertion of the claim to legal professional privilege.

13. And so, unless regarded as aimed at the ultimate fulfillment of his obligations under the FOI Law for the resolution of the appeals, the insistence by the Commissioner upon the production of the Report for his inspection may be seen as a rather strict invocation of his powers of investigation under the FOI Law, in this case.

14. In the typical case, an uncompromising investigative stance may well be a reasonable position for the Commissioner to take as the factual context of a claim for exemption may be unclear. As shown above, section 45 suggests that in the absence of a certificate from the Governor, it is the Commissioner who decides whether or not a record for which an exemption is claimed should indeed be treated as exempt from disclosure.

15. And this view of section 45 may at first be seen as bolstered by section 26 which, in recognizing that although records may be exempt from disclosure on various grounds identified in other listed provisions of the FOI Law[12], states that :

> "26 (1) *Notwithstanding that a matter falls within section 18, 19(1)(a), 20(1)(b), (c) and (d), 21, 22, 23 and 24, access shall be granted if such access would nevertheless be in the public interest.*
>
> (2) *Public interest shall be defined in regulations made under this Law[13]".*

16. Of those provisions of the FOI Law listed above in section 26(1), the one of particular relevance here and one of two provisions relied upon by the Premier in his certification of exemption, is subsection 20(1)(c) which reads:

> "20 (1) *A record is exempt from disclosure if –*
>
> *(a) ...*
>
> *(b)...*
>
> *(c) it is legal advice given by or on behalf of the Attorney General or the Director of Public Prosecutions.*

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[12] And still further grounds for exemption are recognized in Part III, sections 15, 16 and 17 of the FOI Law.

[13]. "Public interest" came to be defined in regulation 2 of the Freedom of Information (General) Regulations 2008 (the" 2008 Regulations")in the following non-exclusive terms:
"public interest" means but is not limited to things that may or tend to-

(a) Promote greater public understanding of the processes or decisions of public authorities;
(b) Provide reasons for decisions taken by Government;
(c) Promote the accountability of and within Government;
(d) Promote accountability for public expenditure or the more effective use of public funds;
(e) Facilitate public participation in decision making by the government;
(f) Improve the quality of services provided by Government and the responsiveness of Government to the needs of the public or of any section of the public;
(g) Deter or reveal wrongdoing or maladministration;
(h) Reveal information relating to the health and safety of the public, or the quality of the environment or heritage sites, or measures to protect any of those matters; or
(i) Reveal untrue, incomplete or misleading information or acts of a public authority."

(d) ..."

17. Subsection 20(2) goes on to provide, also of relevance here, that the initial decision regarding whether a record is exempt from disclosure under subsection 20(1)(c), shall be taken not by the information manager of the public authority concerned but by the Minister or chief officer concerned. This may be seen as recognizing both the important and personal nature of the exemption based on legal advice privilege. Without more however, it would also appear that subsection 20(2) when read with section 26, contemplates that an "initial decision" as to exemption taken by the Minister would be exactly that and that the further decision as to access to the record in the public interest, would be up to the Commissioner and ultimately, up to the Governor.

18. Further, the FOI Law goes on it appears in support of this objective, in section 25 to provide, as to the effect of certification of exemption, in the following terms:

> "25 (1) *Where-*
>
> (a) ...
>
> (b) *a Minister responsible is satisfied that an application for access relates to a record to which sections 15, 16, 20(1)(b), (c) and (d) and 22, as the case may be, applies,*
>
> *the Governor or the Minister responsible, as the case may require, may issue a certificate to the effect that the record is an exempt record and shall specify the basis of the exemption.*
>
> *(2) ...*
>
> *(3) Where a certificate is issued under subsection (1) under the hand of the Governor, it shall be conclusive that the record is exempt and no judicial proceedings or quasi-judicial*

proceedings of any kind shall be entertained in relation thereto."

19. Accordingly, here too as in the case of section 45(2), finality and non-justiciability are ascribed to a certificate of exemption issued under the hand of the Governor but not, it would seem, to one issued under the hand of a Minister.

20. Unless there is some other basis for qualifying his section 45(2) power of investigation, that conclusion would therefore suggest that, overly strict or not, in the absence of a certificate from the Governor, the Premier's certification of exemption is no answer to the Order or to the Commissioner's present reference of a failure on the part of the Premier to deliver up the Report for his inspection.

21. As will become apparent below however, such a conclusion cannot be reached without a proper examination and application of the principles of legal professional privilege and without a proper understanding of their importance.

22. For these purposes, two other provisions of the FOI Law also arise for construction, when considering whether it might be appropriate for the Commissioner to invoke his powers of investigation under section 45 in this case.

23. The first is section 17 of the FOI Law, that other provision cited by the Premier in his certification of exemption and which provides in relevant part as follows:

> "17. *An official record is exempt from disclosure if-*
>
> (a) *it would be privileged from production in legal proceedings on the ground of legal professional privilege.."*

24. The first thing to note about this provision in section 17(a) is that it speaks to exemption being ascribed on the basis of what has become known as "litigation

privilege", seemingly a different basis than that of legal advice privilege, also certified by the Premier by reference to subsection 20(1)(c), as already identified above.

25. The second thing to note is that unlike the "legal advice" exemption afforded by section 20(1)(c), the "litigation privilege" exemption afforded by section 17(a) does not depend upon ministerial certification. It operates directly by the words of the statute themselves. And so, the third thing to note is that section 17(a) is not included within section 26 (1), where the latter states that, notwithstanding ministerial certification of exemption, access shall be granted *"if such access would nevertheless be in the public interest"*.

26. This seemingly different treatment of "litigation privilege" and "legal advice privilege" by the FOI Law, will be discussed below.

27. The second further provision of the FOI Law requiring of recognition now is section 42(4) which states that:

> *"On the consideration of an appeal, the Commissioner –*
>
> *(a) may, subject to paragraph (b), make any decision which could have been made on the original application; and*
>
> *(b) shall not nullify a certificate issued under section 25."*
> **[emphasis added]**

28. Given the obvious conflict between this provision in emphasis in section 42(4)(b) and the seemingly unfettered power of investigation given by section 45 (as described above), the canon of construction which requires that a statute be construed as a

whole so as to avoid absurd consequences, applies here with full force. The principle is summarized by Bennion[14] in these terms (op cit. ibid):

> *"The court seeks to avoid a construction that produces an absurd result, since this is not likely to have been intended by Parliament. Here the courts give a very wide meaning to the concept of "absurdity", using it to include virtually any result which is unworkable or impractical, inconvenient, anomalous or illogical, futile or pointless, artificial, or productive of a disproportionate counter-mischief."*

29. Applying that principle here, it would be, at the very least "anomalous or illogical", "futile or pointless" for the Premier to be regarded by Parliament as entitled to issue a certification of exemption which shall not be nullified, even while the Commissioner is able nonetheless to determine that the exempt record may be disclosed in the public interest. And, as I trust will become clear below, such absurdity would be even more pronounced where, as here, the basis of the ministerial certification is legal professional privilege.

30. Indeed, as a practical matter, the absurdity that the Commissioner might nullify a ministerial certification during the course of his investigations by causing its publication, may be regarded as safeguarded against by section 45(1) (above) which provides in part that the Commissioner, in calling for an exempt record for inspection, *"shall take such steps as are necessary or expedient to ensure that the*

[14] Bennion on Statutory Interpretation, 6th Edition, Lexis Nexis, Part XX1, Section 312, "Presumption that "absurd" result not intended by Parliament.

record is inspected only by members of staff of the Commissioner acting in relation to that matter".

31. Whether or not this safeguard is implicitly to be regarded as sufficient to allow the Commissioner to demand the production of a record which is ministerially certified to be exempt based on legal professional privilege and which section 17(a) itself expressly exempts on that basis, is very much a question at the heart of this matter[15].

32. Before turning to examine the applicable legal principles, I must however explain that I do not approach this matter as if by way of a review or appeal against the Order. As already noted, the statutory right of appeal (by way of Judicial Review) has not been taken by the Premier's office. But the Order having been referred by the Commissioner under section 48 for enforcement in exercise of this Court's powers of contempt, it is essential, as I will explain further below, that I am first satisfied about the validity and efficacy of the Order before this jurisdiction of the Court might be invoked.

Legal professional privilege

33. The meaning of legal professional privilege – including litigation privilege and legal advice privilege recognized respectively above by sections 17(a) and 20(1)(c) of the FOI Law – is not defined or explained by the FOI Law itself. The privilege is a

[15] I am not required here to decide whether despite section 42(4)(b), the Commissioner could require the production and direct the disclosure of records which are the subject of ministerial certification of exemption on grounds other than legal professional privilege and so, while I am doubtful that that could be so, I will express no concluded views on that issue.

construct of the common law and so it is to the common law principles to which one looks for an explanation of its meaning.

34. The principles were recently considered and applied by this court in Porter-Shirley v Whittaker[16] and for the purposes of my decision on this matter, I think I can safely adopt and apply them as taken from the discussion of the case law in the *Porter-Shirley* judgment, starting at para 26:

> "26. *Legal professional privilege is an important and substantive right that protects a client from having to disclose confidential communications passing between the client and his or her lawyer. "It is a fundamental human right long established in the common law", said Lord Hoffman in R(Morgan Grenfell & Co. Ltd) v Special Commr. of Income Tax [2003] 1 A.C at 606. The modern case law on legal professional privilege has divided the privilege into two categories, 'legal advice privilege' and 'litigation privilege'. The two categories were authoritatively described in Three Rivers D.C. v Bank of England [2005] 1 A.C. 610, per Lord Scott:*
>
> > *'Litigation privilege covers all documents brought into being for the purposes of litigation. Legal advice privilege covers communications between lawyers and their clients* whereby legal advice is sought or given.'
>
> 27. *Citing Lord Jauncey's dictum from the earlier House of Lords decision in In re L (A Minor) (a Police Investigations: Privilege) [1997] A.C 16 at 26, Lord Scott accepted (at [2005] 1 A.C 610, para 10) that litigation privilege is to be described as "essentially a creature of adversarial proceedings" which could not be claimed in order to protect from disclosure a report (or other document) prepared for use in non-adversarial proceedings.*

[16] 2016(1)CILR 140. The principles were also earlier extensively considered and applied by this Court in Attorney General v Bridger 2013 (2) CILR N[9], written judgment delivered on 8 November 2013; per Williams J.

28. *Legal advice privilege ... is not so circumscribed. As Lord Carswell also explained in his speech in Three Rivers ([2005] 1 A.C 610, (at para 65)):*

> *'[Legal professional] privilege is commonly classified in modern usage under the sub-headings of legal advice privilege and litigation privilege ... The former covers communications passing between lawyer and client for the purpose of seeking and furnishing advice, whether or not in the context of litigation. The latter, which is available when legal proceedings are in existence or contemplated, embraces a wider class of communication, such as those passing between the legal adviser and potential witnesses'* (emphasis supplied).

29. *As Lord Carswell went on further to explain (ibid, at para 100), in common with the rest of the court, that litigation privilege extended to documents or other communications which may have come into being but only for "obtaining of legal advice in anticipation of litigation", or as earlier proposed in Waugh v British Rys. Board [1980] A.C. 521, only if the document in question had been brought into existence for the 'dominant' or 'paramount' purpose of litigation.*

....

34. *The cases examined by the House in Three Rivers (above) were regarded (ibid, at para 105, per Lord Carswell) as establishing, so far from legal advice privilege being an outgrowth and extension of litigation privilege, that legal professional privilege is a single integral privilege, and that it is litigation privilege that is restricted to proceedings in a court of law by the requirements (a) that litigation must be in progress or in contemplation; (b) that the communications must have been made for the sole or dominant purpose of conducting that litigation; and (c) that the litigation must be adversarial, not investigative nor inquisitorial.*

35. *Lord Scott also went on to explain in Three Rivers (ibid, at paras 24-27) that for legal advice privilege to be recognized (as a component of legal professional privilege), there are at least four factors to be considered:*

> *'First, legal advice privilege arises out of a relationship of confidence between lawyer and client. Unless the communication or document for which privilege is sought is a confidential one, there can be no question of legal advice privilege arising. The confidential character of the communication or document is not by itself enough to enable privilege to be claimed but is an essential requirement.*
>
> *'Second, if a communication or document qualifies for legal professional privilege, the privilege is absolute. It cannot be overridden by some supposedly greater public interest. It can be waived by the person, the client, entitled to it and can be overridden by statute (c.f. R(Morgan Grenfell & Co Ltd.) v Special ComMr. of Income Tax (above) but is otherwise absolute... [L]egal professional privilege, if it is attracted by a particular communication between lawyer and client or attaches to a particular document cannot be set aside on the ground that some other higher public interest requires that to be done.*
>
> *'Third, legal advice privilege gives the person entitled to it the right to decline to disclose or to allow to be disclosed the confidential communication or document in question. There has been some debate as to whether this right is a procedural or a substantive right. In my respectful opinion the debate is sterile. Legal*

advice privilege is both. It may be used in legal proceedings to justify the refusal to answer certain questions or to produce for inspection certain documents. Its characterization as procedural or substantive neither adds to nor detracts from its features.

'Fourth, legal advice privilege has an undoubted relationship with litigation privilege. Legal advice is frequently sought or given in connection with current or contemplated litigation. But it may equally well be sought or given in circumstances and for purposes that have nothing to do with litigation. If it is sought or given in connection with litigation, then the advice would fall into both of the two categories. But it is long settled that a connection with litigation is not a necessary condition for privilege to be attracted: see, e.g., Greenough v Gaskell (1833) 1 M.& K. 98, 102-103, per Lord Brougham and Minet v Morgan (1873) L.R. 8 Ch App 361.

'On the other hand it has been held that litigation privilege can extend to communications between a lawyer or the lawyer's client and a third party or to any document brought into existence for the dominant purpose of litigation. The connection between legal advice sought or given and the affording of privilege to the communication has thereby been cut'."

36. *The principle that the scope of protected communications is very wide and is not limited to legal advice was also emphasized by Lord Carswell in his speech in Three Rivers (above, at para 111) affirming the earlier pronouncement of*

the principle by the House[17] in Minter v Priest [[1930] AC 558]] that –

> *'... all communications between a solicitor and his client relating to a transaction in which the solicitor has been instructed for the purpose of obtaining legal advice will be privileged, notwithstanding that they do not contain advice on matters of law or construction, provided that they are directly related to the performance by the solicitor of his professional duty as legal adviser of his client.'*

37. As to the 'absolute' nature of the privilege, and where legal advice privilege attaches, it will not be overridden on the basis simply that the protected information would be relevant to the just resolution of a dispute before a court. There are competing public policy concerns arising and the law explains that the balance is to be resolved in favour of the privilege.

"38. Lord Nicholls of Birkenhead was regarded by the court in Three Rivers (ibid, at para 112, per Lord Carswell) as having stated the principle "in modern legal parlance" in In re L (A Minor) (Police Investigation: Privilege) (above, at 32) where he said:

> *'The public interest in a party being able to obtain informed legal advice in confidence prevails over the public interest in all relevant material being available to courts when deciding cases.'"*

35. So, in summary for present purposes, we see that the privilege is a fundamentally important right and although recognized as having two categories - litigation and

[17] And as also earlier restated by Taylor LJ in Balabel and Another v Air India [1988] 1 Ch. 317.

legal advice privilege- is really a single integral (or unitary) privilege which the law regards in the public interest as prevailing over other public interests, in the absence of clear legislative provision to the contrary.

36. More specifically, the case law is also clear that the public interest in a party being able to rely upon the protection of legal professional privilege (in both its categories) will prevail over the public interest in a statutory authority (such as the Commissioner here) being able to carry out his functions of investigation, unless the statute is unambiguously clear in its intention to override the protection of privilege.

37. This principle was more fully explained by Lord Hoffman in his lead judgment on behalf of the House in R(Morgan Grenfell & Co. Ltd.) v Special ComMr. of Income Tax (above). The case concerned whether the Special Commissioner of Income Tax (the "Inspector") could demand to see documents relating to the legal advice which Morgan Grenfell ("MG") had obtained from leading counsel and solicitors about whether an asset divestment scheme which had been sold to Tesco (the super-market chain), would work for the purposes of avoiding taxation. There was no dispute that MG had been completely open with the Inspector about how the scheme would work, disclosing all relevant transactions.

38. Over MG's objection to the disclosure on the ground that the documents were protected by legal professional privilege[18] (referred to in the case and hereinafter as "LPP"); the Inspector invoked his power under section 20(1) of the Taxes Management Act 1970 (as substituted by section 57(1) of and Schedule 6 to the

[18] And on the further basis that the documents were irrelevant to the investigation.

Finance Act 1976 and amended by section 142 of the Finance Act 1989) (the "Act") which provided that:

> *"Subject to this section, an inspector may by notice in writing require a person (a) to deliver to him such documents as are in the person's possession or power and as (in the inspector's reasonable opinion) contain, or may contain, information relevant to (i) any tax liability to which the person is or may be subject, or (ii) the amount of any such liability..."*

39. The Inspector issued a notice under this section demanding to see a wide range of documents relating to the advice MG had sought and received in connection with the Tesco transaction. MG issued judicial review proceedings to quash the notice on the grounds of *ultra vires*, contending, first, that the documents could not reasonably be thought to contain relevant information and secondly, that the Act upon its true construction did not entitle the Inspector to require delivery of documents subject to LPP.

40. Having been unsuccessful before both the Divisional Court and the Court of Appeal, MG appealed ultimately and successfully to the House of Lords on the sole question of the construction of the Act.

41. In the opening passages of his opinion, Lord Hoffman recorded the fundamental premises upon which he proceeded to the construction of the Act (at paras 7and 8):

> *"7. Two of the principles relevant to construction are not in dispute. First, LPP is a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice. The cases*

establishing this principle are collected in the speech of Lord Taylor of Gosforth CJ in R v Derby Magistrates Court, Ex p B [1996] AC 487. It has been held by the European Court of Human Rights to be part of the right of privacy guaranteed by article 8 of the Convention (Campbell v United Kingdom (1992) 15 EHRR 137; Foxley v United Kingdom (2000) 31 EHRR 637) and held by the European Court of Justice to be part of Community law: AM & S Europe Ltd v Commission of the European Communities (Case 155/79) [1983] QB 878.

8. *Secondly, the courts will ordinarily construe general words in a statute, although literally capable of having some startling or unreasonable consequence, such as overriding fundamental human rights, as not having been intended to do so. An intention to override such rights must be expressly stated or appear by necessary implication. The speeches of Lord Steyn and myself in R v Secretary of State for the Home Department, Ex p Simms [2002] 2 AC 115 contain some discussion of this principle and its constitutional justification in the context of human rights. But the wider principle itself is hardly new. It can be traced back at least to Stradling v Morgan (1560) 1 PI 199."*

42. Section 20(1) of the Act contained no express reference to documents attracting LPP and therefore the question for their Lordships became whether the exclusion of LPP from the exercise of the Inspector's power, was a necessary implication of the section, considered in the broader context of the history and other related provisions of the Act.

43. The argument on behalf of the Inspector was that LPP had been excluded by necessary implication because Parliament had provided in other related provisions, a number of distinct safeguards and restrictions for the protection of the taxpayer, including an express preservation of LPP by virtue of judicial or senior administrative

oversight, for documents of a client which happen to be in the possession of a barrister, advocate or legal adviser. Further, it therefore followed, that no wider qualification of the general words of section 20(1) was intended so as to preserve LPP in respect of documents in the possession of the client itself, such as MG was in the case. The inescapable inference was said to be that LPP was therefore not intended to be preserved for documents in the possession or power of the taxpayer, and this was the argument that had succeeded in the courts below.

44. Their Lordships rejected this argument. They could find no rational basis for Parliament intending to preserve LPP for documents in the hands of the lawyer but not for documents (which may well be copies or originals of the same documents) in the hands of the taxpayer: per Lord Hoffman, at para 22. He noted that the irrationality of such a scheme had been the subject of searching commentary and rejected in A.M&S Europe Ltd v Commission of the European Communities (above, at 913-914).

45. The Inspector also argued that it was important for the revenue to have access to the taxpayer's legal advice in cases (such as allegedly was MG's) in which liability may turn upon the purpose with which the taxpayer entered into a transaction or series of transactions. That this was particularly true of some anti-avoidance provisions.

46. This argument also proved to be unpersuasive with their Lordships. As Lord Hoffman observes (at para 38),:

> *"There are many situations in both civil and criminal law in which liability depends upon the state of mind with which something is done.*

Apart from the exceptional case in which it appears that the client obtained legal advice for the purpose of enabling himself better to commit a crime (R v Cox and Railton (1884) 14 QBD 153) this is not thought a sufficient reason for overriding LPP. In a given case, [the court] must infer the purpose from the facts".

47. In similar vein, Lord Hoffman had approved earlier in his judgment (at para 31) of the judgments of the New Zealand Supreme Court in Commissioner of Inland Revenue v West-Walker [1954] NZLR 191, in which the judges had concluded, in the context of a statutory power to require the production of documents and information for the purposes of the administration of the taxing statutes, that LPP was not merely a rule of evidence but a substantive right founded upon an important public policy which was not overridden by the competing public interest in the enforcement of the revenue laws. They therefore rejected the New Zealand Revenue's argument that the statutory obligation to disclose documents for the purposes of the Revenue's investigations must be construed as overriding the crucial duty of confidence which is protected by LPP.

48. Lord Hoffman went on to conclude (at paras 37- 39), that there was insufficient ground for finding a necessary implication that LPP had been excluded by section 20(1) of the Act. That it was of course, open to Parliament, if it considered that the Revenue required such powers, to enact them in unambiguous terms. But there was also, he advised, the Human Rights Act 1998 to be borne in mind and, (as mentioned above[19]), that the European Court of Human Rights had held that LPP is a fundamental human right which can be invaded only in exceptional circumstances.

[19] Again citing Foxley v U.K. (above) at para 44)

On behalf of the Inspector, it had been said that the public interest in the collection of taxes could provide the necessary justification but Lord Hoffman said that he very much doubted that this could be so.

49. Lord Hobhouse delivered his reasons for agreeing with the opinion delivered by Lord Hoffman.

50. He proceeded (at para 44) by reciting more fully the applicable principle of statutory interpretation as it had been pronounced in *ex parte Simms*[20] per Lord Hoffman himself (above, at p.131):

> *"Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights... The constraints upon its exercise by Parliament are ultimately political, not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."*

51. Lord Hobhouse continued (at para 44 et seq):

> *"The context in which Lord Hoffman was speaking was human rights but the principle of statutory construction is not new and has long been applied in relation to the question whether a statute is to be read as having overridden some basic tenet of the common law.*

[20] Above, at page 131.

(Viscountess Rhondda's Claim [1922] AC 339; B.v. DPP [2000] 2 AC 428). The protection given by the common law to those entitled to claim legal professional privilege is a basic tenet of the common law as has been reaffirmed by the case of 'B' (sup).

"It is accepted that (the Act) does not contain express words that abrogate the taxpayer's common law right to rely upon legal professional privilege. The question therefore becomes whether there is a necessary implication to that effect. A necessary implication is not the same as a reasonable implication as was pointed out by Lord Hutton in B v DPP (sup. at 481). A necessary implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation. [**Emphasis added**]

"In the present case the statutory language falls far short of meeting this criterion... At best from the point of view of the Revenue the legislation is equivocal. Left to myself I would incline to the view that the implication, if any, is that the Legislature was intending to preserve the legal professional privilege of the taxpayer rather than abrogate it; otherwise, why preserve it in respect of documents in the hands of the adviser when the client has not consented to waive the privilege? Further, the argument that a general public interest in collecting revenue for the Executive suffices (in peace-time) implicitly to override the basic right and public interest represented by legal professional privilege is contrary to the authorities and the principles which the Revenue accept that those authorities lay down."

52. In light of sections 17(a) and 20(1)(c) of the FOI Law which as we have seen protect LPP expressly, and in the absence of any express provisions abrogating LPP, the question therefore becomes whether, by necessary implication, the powers of

investigation vested in the Commissioner by section 45 can properly be construed as infringing or abrogating LPP.

53. I discern that an answer to this question is readily apparent but before venturing to express it, there are still further passages from Lord Hoffman's opinion in R(Morgan Grenfell& Co) (above) which should be considered.

54. These arise from his consideration (at paras 26- 33) of the judgment of the Court of Appeal in Parry-Jones v Law Society [1969] 1 Ch 1.

55. In that case, the Law Society had a statutory power to make rules to enforce compliance with the Solicitors' Accounts Rules and Solicitors' Trust Accounts Rules and had made rules which entitled it for this purpose, to require a solicitor to produce documents relating to his practice [or to any trust] of which he was a solicitor trustee, to an appointed investigator. The Law Society appointed an accountant to conduct an investigation and Mr. Parry-Jones objected to a request for production of documents on the ground that some of the documents contained confidential information relating to clients which could not be disclosed without their consent. He issued a writ claiming an injunction to restrain the Law Society from proceeding with its request. Buckley J. at first instance, struck out the writ as disclosing no cause of action and his order was affirmed by the Court of Appeal.

56. The Court of Appeal dealt with the matter in separate judgments to similar effect delivered by Lords Denning and Diplock (with both of whom Lord Salmon, the third member of the Court agreed). They held that as between solicitor and client there were two distinct privileges: the first relating to legal proceedings, commonly called

legal professional privilege which required that a solicitor must not disclose in any legal proceedings any communications between himself and his client without the client's consent. The second privilege was said to arise out of the confidence subsisting between solicitor and client similar to the confidence which applies between doctor and patient, banker and customer, accountant and client, and the like. The law they held, implies a term into the contract whereby a professional man is to keep his client's affairs secret and not to disclose them to anyone without just cause. That this particularly applies in the relationship of solicitor and client: the solicitor is not to disclose his client's affairs to anyone at all except under the most special and exceptional circumstances. In rejecting Mr. Parry-Jones' reliance on these principles to the effect that the accountant sent by the Law Society should therefore not be allowed to see documents relating to a client's affairs, the Court of Appeal concluded that the contract between solicitor and client must be taken to contain the implication that the solicitor must obey the law, and, in particular, he must comply with the rules made under the authority of statute for the conduct of the profession. If the rules require him to disclose the client's affairs, then he must do so.

57. The House of Lords in R(Morgan Grenfell) (above) disagreed with this approach, declaring (per Lord Hoffman at para 30) that:

> *"(While) one can hardly imagine a stronger Court of Appeal... I am bound to say that I have difficulty with the reasoning. It is not the case that LPP does no more than entitle the client to require his lawyer to withhold privileged documents in judicial or quasi-judicial proceedings, leaving the question whether he may disclose them on*

other occasions to the implied duty of confidence. The policy of LPP requires that the client should be secure in the knowledge that protected documents and information will not be disclosed at all. The reasoning in the Parry-Jones case suggests that any statutory obligation to disclose documents will be construed as overriding the duty of confidence which constitutes the client's only protection. In the present proceedings, however, it is accepted that the client is protected by LPP and that this can be overridden only by primary legislation containing express words or necessary implication."

58. Lord Hoffman then commented further on the *Parry-Jones* case in terms which are particularly note-worthy here, given the investigatory nature of the roles proposed to have been undertaken by the accountant on behalf of the Law Society in that case and by the Commissioner in this case (at para 32):

> *"This is not to say that on its facts the Parry-Jones case was wrongly decided. But I think that the true justification for the decision was not that Mr. Parry-Jones's clients had no LPP, or that their LPP had been overridden by the Law Society's rules, but that the clients' LPP was not being infringed. The Law Society were not entitled to use information disclosed by the solicitor for any purpose other than the investigation. Otherwise the confidentiality of the clients had to be maintained. In my opinion, this limited disclosure did not breach the client's LPP or to the extent that it technically did, was authorized by the Law Society's statutory powers. It does not seem to me to fall within the same principle as a case in which disclosure is sought for a use which involves the information being made public or used against the person entitled to the privilege."* [**Emphasis added**.]

59. And so we see from this foregoing dicta that Lord Hoffman, even while confirming the unitary and absolute nature of the privilege that is LPP, at once recognizes that there may be permissible degrees of its infringement where there is a statutory duty to comply with an investigation, drawing the line at the point where the

infringement could involve the information disclosed for the purposes only of the investigation being made public or used against the person entitled to the privilege.

60. An obvious question that arises from the application of this dictum to the present case, is whether the investigation sought to be carried out by the Commissioner under section 45 of the FOI Law is such as would involve only a similar limited and permissible infringement upon the claim of the Premier to LPP and so also - and notwithstanding section 42 (4)(b) that it shall not be nullified – a permissible limited infringement upon the Premier's certification of exemption issued pursuant to section 25.

Analysis

61. Limited though any proposed infringement upon the fundamental right of LPP might be, as in the *Parry-Jones* case itself, its legitimacy will depend upon an examination of the statutory context, to discern the justification and purpose of the infringement. As the principles from the case law affirm, this examination will be even more essential where what is proposed could involve the outright abrogation of the fundamental right.

62. In *Parry-Jones*, it is implicit from Lord Hoffman's reasoning that an infringement was permissible only because the investigation was not about the client whose information was to be disclosed for the limited purposes of the investigation. The investigation was about the professional conduct of Mr. Parry-Jones himself. Hence, at least in part, the assurance that the information would not be disclosed publicly or used to the detriment of the client to whom the protection of LPP belonged.

63. Query then, whether, in the absence of clear words in the FOI Law itself, even a limited disclosure to the Commissioner (and his staff) can be justified in a case like the present, where the ultimate objective of an investigation would be to decide in the public interest whether or not to disclose publicly, privileged information which would likely relate to the actions or inactions of the person (here the Premier) entitled to LPP.

64. That, it seems to me, is a fair and realistic way of regarding the investigation by the Commissioner in this case and of describing the position of the Premier (in his capacity as Minister) as the person entitled to LPP. The Commissioner's stated objective is to satisfy himself whether the exemption claimed is justified but if he decides otherwise, there is no stated intention not to complete his statutory remit "in the public interest" by granting disclosure. For the reasons already explained, there is no reason to doubt that proposition even while there is no suggestion that the Premier's ministerial certification was issued other than in good faith.

65. The starting point of the analysis must be, in my view, the recognition of the importance of the entitlement to LPP. Having regard to the meaning and effect of LPP as explained by the case law, the Premier, as a minister and public authority within the meaning of the FOI Law, must, as a necessary implication of sections 17(a) and 20(1)(c), be recognized as a person entitled to the protection of LPP. Any other

view would render meaningless the right under the FOI Law itself to issue a ministerial certification based on LPP[21].

66. The importance of LPP to the conduct of the affairs of the Ministry of the Premier for the advancement of the public interest is self-evident and may not be understated.

67. As Lord Justice Taylor explained in the Balabel case[22]:

> *"Although originally confined to advice regarding litigation, the privilege was extended to non-litigious business. Nevertheless, despite that extension, the purpose and scope of the privilege is still to enable legal advice to be sought and given in confidence.... Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly to be done in the relevant legal context."*

68. Given the sensitive and important nature of the subject-matter of the Report, the recognition of the absolute nature of the privilege is as important in the present context as in any other. The Premier must be able to obtain confidential legal advice. He must be able like any private citizen, freely and fully to disclose to his lawyers matters of utmost sensitivity and confidence without fear of such matters being revealed against his wishes. Without this assurance, the proper conduct of the important business of his Ministry on behalf of the public would not be possible. The right to LPP in his Ministry will, therefore, be no less important than when

[21] It is of interest also to note that under the comparable UK FOI Act to be further discussed below, records to which LPP attaches are among those categories of public records given complete exemption from disclosure.
[22] Above, at 330.

asserted by a private individual, such as MG was in the context of their Lordships' judgments in R(Morgan Grenfell) (above).

69. And it is here that the practical significance of the two different categories of the privilege may be recognized in the context of the present case, unitary though the privilege is.

70. As shown above[23] and of relevance to litigation privilege as recognized by section 17(a) of the FOI Law, there are already in being, as a matter of public record, some 34 cases before this Court involving appeals against or judicial review of the decisions of the immigration authorities and giving rise to issues which are therefore likely to be the subject of advice or commentary in the Report. Some of those cases were already pending and many others likely to have been reasonably anticipated[24], at the time when the Report was commissioned. There is every reason positively to recognize therefore, the *bona fides* of the Premier's certification of litigation privilege in respect of the Report.

71. The same must be true , a fortiori, of his certification under section 20(1)(c) of legal advice privilege, which, as we have seen from the discussion of the principles above, is not as circumscribed as litigation privilege and so must even more readily be accepted as attaching to the Report.

72. With all the foregoing in mind, in my view the difference in treatment to arise in this context from the fact that the Premier acts as a minister and public authority and not as a private citizen, is not one of substance but one merely of form. It is a

[23] Annex 2.
[24] Given the expected number of such cases to arise from outstanding applications as discussed in the media. See FN 6 above and Annex 1.

difference which is ordinarily, in the usual case, to be reflected in the public rather than private nature of the record in dispute and is recognized by the FOI Law itself where it provides in section 26(1) that access to an exempt record, in the appropriate circumstances even to one so certified by a minister, shall be granted "*if such access would nevertheless be in the public interest*". This however, only brings the debate full circle back to the question whether the public interest in disclosure is paramount and how is that "*public interest*" to be determined where, as in this case, there is a ministerial certification by reliance on LPP and in circumstances where section 42(4)(b) of the FOI Law provides that such a certification issued under section 25, "*shall not be nullified*".

73. When the factual and statutory contexts are considered fully and carefully, the Commissioner's investigation as already explained, can realistically be regarded only as aimed at determining whether, despite the Premier's ministerial certification of LPP (which cites both sections 17(a)[25] and 20(1)(c)), he might disallow the exemption claimed, allow the appeal and so order disclosure of the Report "*in the public interest*".

74. It is on this basis that I consider that the Parry-Jones case, as explained by Lord Hoffman (above) in R(Morgan Grenfell) is on its facts, most readily distinguishable from the present. Unlike in Parry-Jones, there is no reason to assume from the Commissioner's reference to the Court invoking its compulsory powers of contempt for enforcement of the Order, that the Report, even if attracting LPP, will not be

[25] Superfluously, see fn 17(above).

disclosed, and will not be disclosed even if, in the words of section 26 of the FOI Law and in the Commissioner's view, *"access shall be granted if such access would nevertheless be in the public interest."*

75. From all the circumstances presented and notwithstanding the terms of the Commissioner's letter of reference to the Court, that remains a moot issue. I must therefore now turn squarely to address the question whether the FOI Law, by necessary implication, allows the Commissioner to call for its inspection and disclose the Report, depending on his view of the public interest and notwithstanding that LPP must be regarded as attaching to the Report.

76. There is no question but that an important aspect of the public interest of which section 26 speaks is the right of the public to freedom of information about the workings of government[26]. But as appears from section 4 of the FOI Law itself, that is not an absolute right but one which is qualified properly in recognition of the plurality and complexity of the "public interest", given its widest meaning[27].

77. As Lord Hoffman explains in R(Morgan Grenfell) (above), the preservation of LPP, apart from being a fundamental human right, is itself an important aspect of the public interest in the widest sense. So much so, that in his view as expressed on

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[26] Section 4 states this in elegant and compelling terms:" The objects of this Law are to reinforce and give effect to certain fundamental principles underlying the system of constitutional democracy, namely-

(a) governmental accountability;
(b) transparency; and
(c) public participation in national decision-making,

by granting to the public a general right of access to records held by public authorities, subject to exceptions which balance that right against the public interest in exempting from disclosure governmental, commercial or personal information".

[27] A similar qualification exists upon the Constitutional right to the freedom of expression of which the right to information about government is a part. See section 11(2) of the Constitution.

behalf of the House, it could not be trumped by the other important public interest then under consideration – the due enforcement of the revenue laws.

78. That was clearly the view taken of a similar matter much earlier in 1954 by the New Zealand Supreme Court in terms which were also approved by Lord Hoffman on behalf of the House (see the West-Walker case above, at para 47 of this ruling). It is a view which, as the case law as discussed above more generally affirms, will apply also in other contexts where a competition is seen to arise as between the preservation of LPP and the advancement of other public interests. For instance, as we have seen from the discussion in the Porter-Shirley v Whittaker and Bridger cases of the Three Rivers case (all above) and those earlier cases which are therein discussed, this will be so even where the competition is between the preservation of LPP and the just resolution of a case before the court.

79. And this proposition can be readily tested in the present context by asking the question rhetorically, what would be the outcome if a party to one of the many immigration cases now or in the future brought before the court, were to invite the Court to direct disclosure of the Report, either from the Premier's Office or from his lawyers at Ritch & Conolly? The case law is clear that such an invitation would be refused. Yet there is nothing in the FOI Law itself which suggests, by necessary implication, that the public interest in access to the Report through the office of the Commissioner, would be more important than the public interest in access for the just resolution of those cases before the Court. Nor does the fact that the FOI Law expressly grants exemption for LLP under sections 17(a) and 20((1)(c) even while it

seems to grant unfettered powers to the Commissioner under section 45, give rise to a necessary implication in favour of disclosure. That kind of circular argument - citing the "*distinct safeguards and restrictions*" in other provisions of the Act - was expressly disapproved of in R(Morgan Grenfell) (above) by their Lordships.

80. In the absence of unambiguous words in the FOI Law requiring that a different view be taken here in favour of disclosure in the public interest, I am compelled to conclude that LPP is to be preserved despite the seemingly unfettered nature of the Commissioner's powers of investigation described in section 45. Moreover, and to the extent that the FOI Law addresses the subject, this conclusion is implicit in the cumulative import of sections 17(a), 20(1)(c) and 42(4)(b), to the effect that the Premier's certification (here relying on LPP) shall not be nullified. When seen in that light, both sections 45(2) and 26(1) are revealed respectively to be expressed in illogical and anomalous terms, where they speak – in conflict with and in contradiction of section 42(4)(b) - of no record being withheld from the Commissioner's investigation and of access being mandated by him "*if such access would nevertheless be in the public interest*". Neither the Order nor a later decision granting access can be effected by the Commissioner, without the impermissible nullification of the ministerial certification and infringement or outright abrogation of the absolute right that is LPP.

81. More specifically for present purposes, when seen in this wider context of the FOI Law, the fact itself that the Commissioner is given by section 45 a seemingly

unfettered power of investigation (including inspection), does not give rise to a necessary implication that LPP should be either infringed or abrogated.

82. Further in this wise, I see no basis either for a necessary implication in favour of public access arising from the fact that section 45 reposes an ultimate discretion in the Governor to issue certification of exemption, the power which the Governor has not seen fit to exercise in this case. No such implication necessarily arises where the right to claim LLP is vested not in the Governor but in the Premier in his ministerial capacity and where the FOI Law itself allows the Premier to issue certification of exemption which "*shall not be nullified*".

83. For the sake of completeness, nor is there anything in the definition of "*public interest*" as set out in the 2008 Regulations (see fn 12 above), to suggest that other public interests (including the public interest in the preservation of LPP) are to be relegated in importance to the right of the public to freedom of access to government records.

84. Rather, "public interest" is not there so compendiously defined as to exclude other competing public interests.

85. For all the foregoing reasons, I am compelled to the conclusion that section 45 of the FOI Law, even when read with section 26, neither expressly nor by necessary implication allows the abrogation or infringement of the fundamentally important right of LPP. In the circumstances here presented, that right must be regarded as being available in all its fullness to the Premier as Minister and public authority

responsible for the protection and management of the other important public interests which the Report was commissioned to address.

86. This conclusion carries clear ramifications for the appropriate treatment of the Commissioner's reference which invites the Court to enforce the Order by way to sanction for contempt. I turn to deal with this issue finally below.

Contempt of Court

87. In light of the decision at which I have arrived, I consider that it is important to explain the nature of the contempt powers of the Court, to illustrate the need to have conducted the analysis of the legal principles which led to my conclusion. These provisions of the FOI Law present novel questions. While there have been applications to the courts by way of appeal against decisions of the Commissioner pursuant to section 47 of the FOI Law[28], this is the first occasion on which this Court has been required to deliver a decision on a reference by the Commissioner pursuant to section 48[29].

88. The meaning, application and consequences of the words from section 48: *"and the court may consider such failure under the rules relating to contempt"* – have not yet therefore, been the subject of judicial consideration or pronouncement[30].

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[28] See for instance, Governor v Information Commissioner 2015 (1) CILR 285. In that case the Governor's claim to exemption on grounds, inter alia, of LLP, failed because he had waived LLP by the disclosure of the written legal advice which he had received. No waiver is alleged to have occurred in the present context.

[29] Other such references have been resolved by the public authorities' compliance after the references and so without the need for a decision by the Court. See for instance, reference dated 7 November 2013 re Decision 33-01113 re the Cayman Islands National Insurance Company's failure to comply.

[30] The same seems to be true of the position in England and Wales, so far as research has shown. There, appeals have been taken under the Freedom of Information Act 2000 (the "UK FOI Act") all the way to the Court of Appeal (see for instance: R(Evans) v The AG and The Information Commissioner [2014] EWCA Civ 2) but not under the equivalent section 54(3) of the FOI Act on grounds of contempt. That subsection provides that: "*Where a failure to comply is certified under subsection*

89. These words from section 48 could themselves be more clearly expressed. At least three questions arise from them.

90. First, what are the objectives of this recourse by way of reference to the Court?

91. It appears to be settled principle that a reference of this kind from an administrative or quasi-judicial tribunal such as is the Commissioner here, requires the Court by way of oversight, not simply to enforce the Order but to ensure the proper administration of the statute in question- here the FOI Law. The position is like that which appertains as between the Courts and the administrative tribunals for which oversight is vested in the Courts in England and Wales. See for instance, the discussion in Halsbury's[31] on the application of the law of contempt to Inferior Courts and Tribunals appointed under the Inquiries Act 2005.

92. While the power to sanction there for contempt is now statutorily based[32] the application of the inherent power of the court in this context has long been recognized and has been the subject of high judicial pronouncement[33]. See, for instance, the judgments of the English Court of Appeal in A-G v Clough [1963] 1 QB

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(1), the court may inquire into the matter and, after hearing any witness who may be produced against or on behalf of the public authority, and after hearing any statement that may be offered in defence, deal with the authority as if it had committed a contempt of court".

Given the novel issues arising, I record here that I have had the benefit of consultation with my colleagues Quin ,Williams, Mangatal and McMillan JJ, on the technical and procedural issues although this decision and its reasons, are entirely my own.

[31] 5th Ed. Vol 22, Para 61 et seq.

[32] The Contempt of Court Act 1981. Halsbury's (op cit, at para 62 note 8) assumes that the provisions of the Contempt of Court Act 1981 apply to inquiries under the Inquiries Act 2005 as they had applied to inquiries under the predecessor Tribunals of Inquiry (Evidence) Act 1921. A fuller discussion of the case law is available at Halsbury's 4th Ed, Vol 9(1), para 455.

[33] The inherent power is expressly recognized for these purposes by the Grand Court Rules Order 52 rule 9 which states: "Nothing in the foregoing provisions of this Order shall be taken as affecting the power of the Court to make an order requiring a person guilty of contempt of court, or a person punishable by virtue of any enactment in like manner as if he had been guilty of contempt of the Court ,to pay a fine or to give security for his good behavior, and those provisions, so far as applicable, and with the necessary modifications, shall apply in relation to an application for such an order as they apply in relation to an application for an order for committal." [**emphasis added**].

773 per Lord Parker CJ and A-G v Mulholland [1963] 2 QB 477, per Lord Denning dealing with appeals from decisions which had been made by the courts below, in enforcement of decisions of tribunals appointed under the then operative Tribunals of Inquiry (Evidence Act) 1921.

93. Specifically, for the present purposes, in the latter case it is stated by Lord Denning (at 487) that the certificate of the chairman of a tribunal to the Court of failure to comply with the tribunal's order is not binding on the Court, and the Court must itself "*inquire into the matter afresh to see if an offence has been committed*".

94. This dictum explains the approach which I have taken here to the Court's role in response to the Commissioner's reference.

95. Accordingly, while, as the case law also advises, the Court will hesitate to refuse a reference by the Commissioner[34], its responsibility requires that it satisfies itself that in all the circumstances, a citation for contempt would be appropriate.

96. In this case, the same result would be arrived at by another route, that which must be recognized by asking a further question. That is, for the purposes of the application of the court's contempt jurisdiction, how is the jurisdiction to be exercised?

97. As already noted, the contempt jurisdiction must not of course, be confused with the statutory appellate jurisdiction. Nonetheless, the invocation of the Court's powers of contempt is no trivial matter and must be regarded as requiring of the most cautious approach.

[34] A-G v Clough (above) at 785 per Lord Parker in respect of the Chairman's decision.

98. For instance, an immediate implication of treating with the Commissioner's reference "as if it is an order of the Court" would be to regard non-compliance as a prima facie contempt and the Premier being liable summarily to show cause why he should not be sanctioned for contempt. But while this summary inherent jurisdiction of the Court is well recognized, its invocation is discountenance other than for those exceptional cases where necessary to preserve respect for the Court's authority or to ensure due administration of justice; as the Court of Appeal explained in *WX v YZ* 2002 CILR 514.

99. And so, even if the Order were to be treated as one, disobedience of which immediately invokes the summary process for being a *prima facie* contempt, this would not hamper the discretionary nature of the Court's inherent jurisdiction, which is itself recognized by section 48 of the FOI Law, where it states that the Court "*may consider ...such failure under the rule relating to contempt of court.*" The proper exercise of that discretion, as the Court of Appeal also explained in *WX v YZ* (above), requires the Court to consider the "*nature of the order and effect of the breach.*"

100. And so, for the avoidance of doubt, and as will be apparent from the foregoing examination of the FOI Law and its application in all the circumstances presented, I have also regarded the exercise of the contempt jurisdiction as a matter of discretion which requires the court to be first satisfied about the appropriateness of enforcement of the Order - even if to be regarded as a valid order - by way of contempt.

101. A third question which I think for good measure should also be addressed here, is whether this Court should be deemed to be exercising its criminal or civil powers of contempt.

102. Although this classification has been described as an "arid" one[35] and as one to be abandoned altogether[36], it is one which the courts continue to recognize since, depending on which power of contempt is invoked, different procedural consequences would follow[37].

103. On any view of the principles, it would be wrong to deal with this matter as if it were a criminal contempt. Treating the referenced breach of the Order as if it were a breach of an order of the court itself would be to treat it as a civil contempt and this is how I consider a reference for failure to comply with a decision of the Commissioner should be regarded[38].

104. Had I concluded that it was appropriate to call upon the Premier to answer for failure to comply, I would therefore have been obliged to direct service of the Order upon him with notice of an order of this Court for his compliance and allowing him the opportunity to explain any reasons for his failure to comply. This, presumably, would have involved the very matters covered by his ministerial certification of

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[35] See Aldrige, Eady & Smith on Contempt Chapter 3-20 (Smeet & Maxwell, 4th Ed.) making the point, among others, that penal sanctions can flow from either form of contempt.

[36] Report of the Phillimore Committee on Contempt of Court, Cmnd, 5794 (1974) para 169, UK.

[37] See generally, the discussion on this subject at Aldrige (above) Ch 3-25 et seq.

[38] This is ordinarily, the way in which a failure to comply with an order of the court would be treated. By contrast, criminal contempts include contempts in the face of the court; publication of matter scandalizing the court; acts calculated to prejudice the fair trial of a pending case (criminal or civil); reprisals against those who participate in legal proceedings for what they have done; impeding service of, or forging, the process of the court; and also most contempts in relation to wards of the court: see Aldrige (op cit) ch 3-27

exemption or any other explanation upon which he might have sought to rely[39], including the taking of testimony from witnesses.

105. In an appropriate case of a reference under section 48, where there is a clear *prima facie* showing of contempt for disobedience of a valid and effective directive or order of the Commissioner, this is the procedure, by way of committal for civil contempt, which I consider should be invoked.

106. For all the reasons explained above, I do not consider that there is here a prima facie showing of contempt. It is, to say the least, very doubtful that the Commissioner can compel the Premier to hand over the Report for his inspection or ultimate disclosure. The Premier remains entitled to LPP as that entitlement has not been unambiguously or by necessary implication removed by the FOI Law.

107. The Order is therefore at least of doubtful validity and an inappropriate basis upon which to invoke the contempt jurisdiction of this Court. It would therefore be inappropriate to invoke *mutatis mutandis*, the procedure prescribed by GCR Order 52 which first requires a *prima facie* showing of a breach of a valid and enforceable order.

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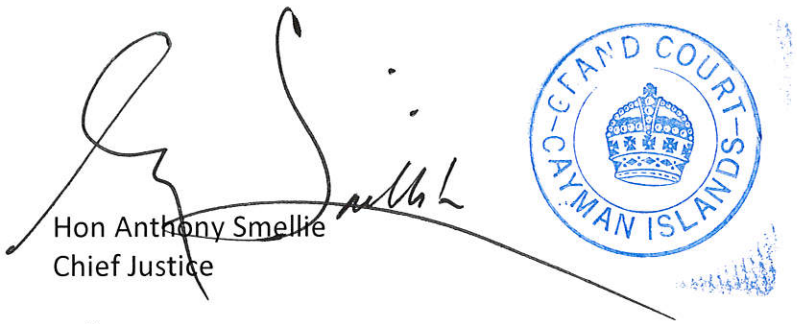
[39] In keeping, mutatis mutandis, with Grand Court Rules Order 52: the power of the Court to punish for contempt may be exercised by an order of committal to prison. This power, by Order 52 rule 4 , can only be exercised upon an application for committal made by notice of motion and supported by an affidavit which must be served personally upon the person sought to be committed, although by subrule 4(3)the court may dispense with the service of the notice of motion if it thinks it just to do so.

Summary of conclusions

- LLP is an absolute and fundamental right, recognized by the FOI Law itself.
- In the absence of clear and unambiguous words, LLP can be regarded as subject to being infringed only by the necessary implication of other provisions of the FOI Law, here in particular, section 45.
- The important objective of the FOI Law of ensuring public access to government information does not itself give rise to the necessary implication that that objective takes precedence over the equally important public interest in the preservation of LLP.
- Neither expressly nor by necessary implication, does the FOI Law vest the Commissioner with the power to infringe or abrogate LLP. It is also very doubtful that he can call for the Report without purporting to nullify the Premier's certification of exemption issued pursuant to section 25 of the FOI Law.
- For those reasons, the Order is of doubtful validity and efficacy.
- In seeking to exercise its powers of contempt for the enforcement of the Order, this Court, both as a matter of the proper exercise of its oversight jurisdiction and as a matter of its proper exercise of discretion, must first be satisfied that the Order, like an order of the Court itself, is valid and enforceable and that it would be appropriate to do so.

- For all the foregoing reasons, in the present circumstances it would not be appropriate to enforce the Order. The Commissioner's reference is therefore refused.



Hon Anthony Smellie
Chief Justice

26th January 2017