REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civ. App. No. P200 of 2014
Claim No. CV2012-04538

BETWEEN

The Minister of Planning and Sustainable Development

Appellant/Defendant

AND

The Joint Consultative Council for the Construction Industry

Respondent/Claimant

****

Panel:

P. Jamadar J.A.
N. Bereaux J.A.
R. Narine J.A.

Appearances:

R. Martineau SC, K. Ramkissoon and S. Sharma for the appellant

G. Petersons SC and Kingsley Walesby for the respondent

DATE DELIVERED: 28th October, 2016.

JUDGMENT

Delivered by R. Narine J.A.

1. This is an appeal from a decision of a judge of the High Court made under the Freedom of Information Act Chapter 22:02, ordering the appellant (the Minister) to provide information requested by the respondent (the JCC) by application dated 20th April 2012. The relevant facts are set out below.

2. The Minister initiated a request for proposals process to select a developer or developers for state lands located at Invader's Bay. The JCC contended that the request for proposal process amounted to a tender process. By letter dated 14th December 2011 the JCC sought an explanation from the Minister as to how this was possible since the Central Tenders Board had the sole and exclusive authority to act for and on behalf of the Government subject to limited exceptions which did not apply in this case. By letter dated 21st December 2011, the Minister informed the JCC that with respect to the query, advice was being sought from the Attorney-General.

3. In the Senate on 28th February 2012 the Minister was asked four questions by Senator Dr. James Armstrong in relation to the "Invaders Bay Request for Proposals". One of the questions posed to the Minister was whether the publication of the request for proposals conformed to the Tenders Board Act. The Minister answered as follows:

> *"the publication of the request for proposals was not the subject of nor required to be in conformity with the Central Tender's Board Act. Advice to this effect was received from the Legal Unit of the Ministry of Planning and the Economy and subsequently from the Office of the Attorney General."*

4. Shortly afterwards, during the same sitting of the Senate, there were exchanges between the Minister and other Senators including Senator Al-Rawi, who asked the Minister whether the advice received from the Attorney-General's Office and the Legal Unit of the Ministry of Planning and the Economy could be circulated by way of a written response to the Senate. The Minister responded *"I do not know why I should circulate the entire opinion"*.

5. By letter dated 1st March 2012 the Minister wrote to the JCC indicating inter alia, that based on the advice received from the Attorney General's Office, the request for proposals process was not required to be in conformity with the Central Tenders Board Act, Chap 71:91. By reply dated 29th March 2012, the JCC requested that the Minister publish the legal advice received in respect thereof.

6. By letter dated 20th April 2012 the JCC wrote the Minister pursuant to the Freedom of Information Act requesting access to various items of information as to whether the Minister had obtained legal advice on the applicability of the Central Tenders Board Act to the request for proposals process, if so when was the request for legal advice made and to whom was the request made. The JCC also requested copies of the written instructions and the legal advice received by the Minister from the Legal Unit of the Ministry and the Attorney General's Office. The letter was accompanied by a formal application of even date setting out the documents requested.

7. The JCC received no response from the Minister. By letter dated 27th June 2012 the JCC wrote again to the Minister indicating that he was in breach of section 15 of the Freedom of Information Act (the Act) by failing to indicate within 30 days whether he was acceding to or refusing the request. By letter dated 5th July 2012 the Permanent Secretary of the Ministry replied apologizing for the delay and informing the JCC that the matter was receiving attention. By letter dated 13th July 2012 the JCC reminded the Minister that it was still awaiting a copy of the requested information.

8. Not having received a response, on 10th August 2012 the JCC sent a pre-action protocol letter to the Minister indicating that the Minister was in direct and continuing breach of section 15 of the Act and requesting a response on or before 24th August 2012 failing which the JCC would apply for judicial review of the Minister's continued refusal and/or failure to provide a response.

9. By letter dated 16th August 2012 the Permanent Secretary of the Ministry wrote to the JCC refusing to provide the legal advice obtained on the ground that the instructions for the provision of the legal advice, the advice and its author were considered exempt under section 27(1) of the Act and that the revelation of same *"cannot be seen to be justified in the public interest"*. The JCC was also informed that the decision to move forward with the process and selection of the three (3) chosen investors was agreed upon by Cabinet. The Permanent Secretary stated further that the request for copies of instructions and legal advice provided by the Attorney General must be addressed to him since the Ministry of Planning and Sustainable Development had no authority to provide same.

10. On 31st October 2012 the JCC filed an application without notice for judicial review of the decision of the Minister by letter dated 16th August 2012 to refuse to provide copies of the written instructions, the legal advices and the identity of the author(s) of such legal advices received from the Legal Unit of the Ministry and from the Attorney General's Office.

11. The reliefs sought by the JCC included:

    (i) A declaration that the continuing decision of the Minister by letter dated 16th August 2012 to refuse to provide the information requested by the JCC in its Freedom of Information Application dated 20th April 2012, was illegal, null and void and of no effect.

    (ii) A declaration that the JCC was entitled to the information, and

(iii) An order of mandamus compelling the Minister to provide the information.

12. On 12th November 2012 the application came up before the Honourable Mr. Justice Seepersad who ordered that the Attorney General's Office be served with the application and adjourned the matter to 4th December 2012.

13. However, on 4th December 2012, the Minister wrote to the JCC stating that the instructions for the provision of the legal advice, the advice and the authors were considered exempt documents under section 29(1) of the Act on the ground of legal professional privilege and could not be made available to the JCC. The court adjourned the matter to the 13th December 2012 for the JCC to consider its position in light of the Minister's intention to rely upon this additional reason for refusing to provide the requested information.

14. On 13th December 2012 the JCC sought and was granted permission to amend its application filed on 31st October 2012 and to file a supplemental affidavit in support of the amended application on or before the 14th January 2013. On the 11th January 2013 an amended application was filed by the JCC seeking an additional relief as follows:

(i) A declaration that the Minister was not entitled to rely upon the additional reason for his refusal to provide the said information as set out in its letter dated 4th December 2012 as a ground for his refusal to provide the said information.

15. On 1st October 2013, the learned judge granted permission to the JCC to make a claim for judicial review, which was filed on 14th October 2013. On 14th July 2014 the learned judge ordered inter alia, that the JCC was entitled to the information requested in the Freedom of Information Application dated 20th April 2012 and

declared that the Minister's continued decision to refuse to provide the said information was illegal, null, void and of no effect .

16. On 23rd July, 2014 the Minister filed a notice of appeal seeking an order to set aside the declarations and orders of the learned judge.

17. On 4th August 2014 the JCC filed a counter-notice appealing against that part of the decision of the judge which allowed the Minister to rely upon the additional reason for refusing access to the information. The JCC is also seeking a declaration that the Minister was not entitled to rely upon the additional reason as set out in its letter dated 4th December 2012 as a ground for its refusal to provide the said information.

FINDINGS OF THE JUDGE

18. The trial judge found that the Minister's decision to refuse access to the information requested was flawed in so far as the Minister failed to adequately outline his reasons and the public interest considerations that formed the basis for his decision. In addition, the judge found that the Minister was entitled to rely upon the additional basis of legal professional privilege as set out in his letter of 4th December 2012. However, the judge went on to hold that the response of the Minister in the Senate made on the 28th February 2012 amounted to a waiver of the privilege. Further, the learned judge held that parliamentary privilege did not attach to the statement so as to prevent the JCC from relying on the statement as evidence of waiver of legal professional privilege in relation to the legal advice referred to in the statement. The judge went on to conclude that the requested information should be disclosed in the public interest under section 35 of the Act.

THE ISSUES

19. The issues that fall to be determined in this appeal are as follows:

(i) Whether the Minister is entitled to rely on the additional reason provided in his letter of 4th December 2012, which raised legal professional privilege for the first time.

(ii) Whether legal professional privilege applies to the information requested by the JCC.

(iii) Whether parliamentary privilege attaches to the Minister's statement made in the Senate on 28th February 2012.

(iv) Whether the JCC is entitled to rely on the Minister's letter dated 1st March 2012 as evidence of waiver of legal professional privilege.

(v) Whether the Minister waived legal professional privilege by making the statement in the Senate on 28th February 2012 and/or by his letter dated 1st March 2012.

(vi) Whether the judge was correct in finding that the requested information should be released in the public interest under section 35 of the Act.

THE COUNTER-NOTICE

20. As outlined above, the Minister refused to provide the requested information by letter dated 16th August 2012, citing as the reason for refusal that the legal advice and the identity of its author were exempt by virtue of section 27(1) of the Act and that the provision of same was not justified in the public interest. Section 27(1) of the Act provides:

> *"27. (1) Subject to this section, a document is an exempt document if it is a document the disclosure of which under this Act—*
>
> *(a) would disclose matter in the nature of opinion, advice or recommendation prepared by an officer or Minister of Government, or consultation or deliberation that has taken place between officers, Ministers of Government, or an officer and a Minister of*

Government, in the course of, or for the purpose of, the deliberative processes involved in the functions of a public authority; and

(b) would be contrary to the public interest."

21. On 31st October 2012 the JCC filed its application for judicial review of the decision to refuse the information. On 12th November 2012, the trial judge ordered service on the Attorney-General and adjourned the application to 4th December 2012. On this date the Minister wrote to the JCC indicating that the instructions for the provision of the legal advice, the advice itself, and the names of the authors were exempt by virtue of section 29(1) of the Act which provides:

> *"29. (1) A document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege."*

22. The trial judge received written submissions from the parties and gave a written judgment on the JCC's amended application for leave to apply for judicial review. On 13th October 2013 he gave a written ruling granting leave to the JCC to make the application. However, in paragraph 60 of his ruling, after considering the issue as to whether the Minister was entitled to rely on the additional reason for refusal based on section 29(1) of the Act the judge ruled:

> *"60. The court is of the view that the Applicant / Intended Claimant's argument that the JCC / Intended Defendant is limited to the reasons upon which it relied at the time of the refusal, is also not an arguable ground that has a realistic prospect of success."*

23. There was no procedural appeal filed against the refusal of leave in respect of this ground. Curiously however, the JCC included the same relief in its fixed date claim form filed on 14th October 2012, and revisited the issue in its written submissions at the trial stage. Quite unnecessarily in my view, in his judgment given on 14th July 2014, the trial judge at paragraph 35, referred to his earlier ruling and the authority of **Bowbrick v. Information Commissioner** App No. EA / 2005 / 0006 (on which he had relied in his ruling) and repeated his earlier decision that the Minister was entitled to rely on the additional reason stated in his letter of 4th December 2012.

24. Not having appealed this aspect of the judge's decision at the leave stage by way of procedural appeal, on 4th August 2014 the JCC filed a counter-notice in this appeal, seeking to set aside the trial judge's repetition in paragraphs 35 to 37 of his judgement of the ruling he had given at the leave stage refusing leave to the JCC to argue that the Minister was limited to the reasons upon which he relied on at the time of refusal, on the basis that it was not an arguable ground that had a realistic prospect of success.

25. In its written submissions before this court, the JCC maintained that it is entitled to pursue this issue for the following reasons:

(i) Neither the Minister nor the court objected to the inclusion in the relief claimed in the fixed date claim form, of a declaration to the effect that the Minister was not entitled to rely on the additional reason set out in the letter of 4th December 2012.

(ii) The JCC made further submissions on the issue at the trial stage, to which the Minister responded that, the court having already ruled on the issue, it was improper for the JCC to revisit it.

(iii) The trial judge granted permission to the JCC to make a claim for judicial review in respect of its entire claim.

(iv) The judge reconsidered the issue and adjudicated upon it in his final judgment in the substantive claim. This amounted to a new decision that the JCC was entitled to challenge in this appeal.

26. I find no merit whatsoever in these contentions. The trial judge, having expressly found that the ground was not an arguable one, and had no realistic prospect of success, was clearly stating that he was not granting leave for judicial review on the basis of that ground. To suggest that, because the judge went on in paragraph 68 to grant leave to institute an action for judicial review on the basis that *"the Applicant / Intended Claimant has an arguable ground(s) for judicial review with a realistic prospect of success"*, somehow entitled the JCC to pursue a ground which was expressly rejected by the judge as not being arguable and having no realistic prospect of success, is clearly untenable. Similarly, the submission that the trial judge applied a fresh adjudication to the issue at the trial stage is without basis. The judgment reflects that he merely repeated what he had said at the leave stage.

27. Some reliance was placed by the JCC on the cases of **Trevor Smith v. The Parole Board** [2003] EWCA Civ. 2014 and the decision of this court in **Ashford Sankar v. Public Service Commission** Civ. App. No. 58 of 2007.

28. In **Trevor Smith** (supra) the court was considering a situation in which permission had been granted in respect of some grounds but refused in respect of others at the leave stage, and the trial came before another judge. In that case, Lord Woolf opined that the judge hearing the main application would require "significant justification" before taking a different view from the judge who granted permission. However, if he came to the conclusion that there was good reason to allow argument on an additional ground, he had a discretion to permit it in the interests of justice.

29. In the case at hand, of course, the application for leave as well as the substantive matter came before the same judge. There is nothing to suggest from the record

that any additional material, or any novel issues of law was placed before the judge so as to persuade him to exercise a fresh discretion in the interests of justice. On the facts therefore, **Trevor Smith** is clearly distinguishable.

30. In **Ashford Sankar** (supra), the information requested by the applicant was refused by the Commission on the basis that the documents were internal working documents which were exempt under section 27 of the Act. At the trial however, the Commission sought to put forward additional reasons for the refusal, namely that the documents requested were a record of consultation and deliberations between members of the Commission to assist in their decision making process, and their disclosure was not in the public interest since it might inhibit frankness and candour in future discussions. It was against this background that the court commented at page 15 of the judgment:

> *"In these circumstances it is clearly undesirable that the respondent should be permitted to provide new reasons, or to add to, or augment vague or insufficient reasons originally advanced for refusal of access. In my view, to do so will ultimately frustrate the clear purpose of the Act, which is to permit the public to access information unless refusal of access can be brought within one of the exemptions specifically set out in the Act, and adequate and intelligible reasons are provided for such refusal."*

31. In expressing its reluctance to permit public bodies to supplement inadequate reasons for refusal to provide information, the court was not laying down a principle that would apply in all cases. Much will depend on the particular circumstance of the case, and the time at which the additional reasons are put forward. Clearly the longer the delay in providing the additional ground or refusal, the less likely the court will be in permitting reliance on it. The court will hardly shut out a public authority which is clearly entitled to rely on an exemption provided in the Act, but which through inadvertence did not include it as a reason at the time of refusal. In such a case, the applicant may not be entitled to the

information requested but may be compensated for unnecessary legal costs he has incurred.

32. In the instant case the Minister sought to introduce the additional reason for refusal under section 29(1) of the Act before leave was granted by the trial judge to bring the application for judicial review. The trial judge provided an opportunity to both parties to consider the issue and make submissions on it. The judge considered the issue and in a reasoned judgment ruled that the JCC's contention that the Minister was limited to the reason provided at the time of refusal, was not an arguable ground that had a realistic prospect of success. There was no procedural appeal from this refusal of leave by the trial judge. No reason has been advanced for the JCC's failure to appeal the refusal of leave within the time provided by the Civil Proceedings Rules 1998, Part 64.5. Accordingly, the JCC's counter notice must be dismissed.

LEGAL PROFESSIONAL PRIVILEGE

33. By letter dated 4th December 2012, the Minister invoked the exemption provided by section 29(1) of the Act which exempts access to documents that are protected by legal professional privilege.

34. Section 29(1) of the Act provides statutory recognition of a principle established for centuries in the common law. In **R v. Derby Magistrate's Court, ex parte B** [1996] AC 487, Lord Taylor CJ traced the history of the privilege through the case law from as early as 1577. Having considered the views expressed in the case law by such eminent jurists including Lord Brongham LC as far back as 1833 in **Greenough v. Gaskell** (1833) 1 My & K 98, and **Bolton v. Liverpool Corporation** (1833) 1 My & K 88, Lord Lyndhurst LC in **Holmes v. Baddeley** (1844) 1 Ph 476, Sir George Jessel MR in **Anderson v. Bank of British Columbia** (1876) 2 Ch. D. 644, and Cockburn CJ in **Southwark and Vauxhall Water Co. v. Quick** (1878) 3 QBD 315, Lord Taylor CJ concluded at page 507:

"The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."

35. Legal professional privilege has developed to protect communications between client and lawyer. The protection may take two forms – legal advice privilege and litigation privilege. The former is regarded as absolute and attaches to all communications between client and legal adviser for the purpose of obtaining legal advice. The latter attaches to all communications made between a client and his lawyer where litigation is pending or contemplated and made for the sole or dominant purpose of obtaining legal advice or conducting litigation (see: Halsbury's 5th edition, Volume 12, paragraph 647).

36. In **Three Rivers District Council v. Governor and Company of Bank of England (No. 6)** [2005] 1 AC 610 at 646, Lord Scott of Foscote made the following observations:

    (i) Legal advice privilege arises out of a relationship of confidence between lawyer and client. The confidential character of the communication or document is an essential element of the privilege.

    (ii) If the document or communication 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 client and it can be overridden by statute.

(iii) Legal advice privilege is both a procedural and a substantive right.

37. In **R (on the application of Morgan Grenfell & Co. Ltd) v. Special Commissioner** [2002] UKHL 21, at paragraph 7 of his judgment, Lord Hoffman described legal professional privilege as "a fundamental human right long established in the common law". In his view, an intention to override such rights must be expressly stated or appear by necessary implication (at paragraph 8).

38. In this appeal it is not in dispute that the instructions given by the Minister to his legal advisers and the advice received are prima facie protected by legal professional privilege. The question is whether the Minister waived the privilege by making the statement in the Senate and/or by his letter dated 1st March 2012 to the JCC, or whether access to the documents is justified in the public interest under section 35 of the Act.

WAIVER

39. The law with respect to waiver of legal professional privilege has been authoritatively canvassed by the Australian courts in three leading cases: **Mann v. Carnell** (1999) 201 CLR 1; **Osland v. Secretary to the Department of Justice** (2008) 234 CLR 275, and **British American Tobacco v. Secretary, Department of Health and Ageing** [2011] FCAFC 107. Although these authorities are not strictly binding on this court, I consider them to be of highly persuasive authority.

40. In **Mann**, the High Court of Australia noted that waiver may be expressed or implied. The test to be applied in the case of implied waiver is an objective one. The issue to be considered is whether the conduct of the person seeking to rely on the privilege is inconsistent with the maintenance of the privilege. The principles involved are set out at paragraphs 28-29 of the judgment:

"...Legal professional privilege exists to protect the confidentiality of communications between lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement. It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege. Examples include disclosure by a client of the client's version of a communication with a lawyer, which entitles the lawyer to give his or her account of the communication, or the institution of proceedings for professional negligence against a lawyer, in which the lawyer's evidence as to advice given to the client will be received.

Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is "imputed by operation of law". This means that the law recognizes the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege... What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large."

41. In **Osland**, Ms. Osland had been convicted and sentenced to imprisonment for murder. She petitioned the Governor of Victoria for mercy. The Attorney-General issued a press release stating that he had obtained advice from three senior counsel, who recommended that the petition should be denied. Ms. Osland sought access to the legal advice. The High Court of Australia unanimously held

that legal professional privilege had not been waived by the disclosure of the effect or gist of the advice. In the **British American Tobacco** case (supra) the Federal Court of Australia expressly approved the reasoning of Maxwell P at paragraphs 49 – 51 of his judgment:

> *"44. It is now clear that disclosure of the gist of a privileged communication does not necessarily effect a waiver of legal professional privilege. In **Secretary, Department of Justice v Osland** at [29]-[51], Maxwell P of the Court of Appeal of Victoria reviewed the authorities. At the conclusion of that review Maxwell P said at [49]-[51]:*
>
> *[49] Disclosure of the conclusion (or the gist, substance or effect) of legal advice may, or may not, amount to a waiver of privilege in respect of the advice as a whole. Whether it does in a particular case will depend on whether, in the circumstances of the case, the requisite inconsistency exists, between the disclosure on the one hand and the maintenance of confidentiality on the other. In **Bennett**, the majority of the Full Federal Court judged that there was inconsistency and hence waiver; in **British American Tobacco Australia Services Ltd v Cowell** (discussed below), this Court judged that there was not. In each case, there was a disclosure of the gist or substance of advice given. That opposite conclusions were arrived at is simply a reflection of the different circumstances of the respective cases.*
>
> *[50] The content of an advice will often include confidential information about instructions given by the client, or about evidence to be given by a witness, or about forensic investigations being or proposed to be undertaken. These examples are sufficient to demonstrate why it is simply not the*

case that the disclosure of the conclusions necessarily amounts to, or necessarily entails, the disclosure of the content. There is no necessary inconsistency between disclosure of the one and non-disclosure of the other.

*[51] As **Carnell** demonstrates, the inconsistency test readily accommodates the notion that, in appropriate circumstances, the privilege-holder may disclose the content of legal advice to a third party for a particular purpose without being held to have waived privilege in the advice. Likewise, in my opinion, the test of inconsistency is well capable of accommodating the notion that, in appropriate circumstances, the privilege-holder should be able to disclose publicly that it is acting on advice and what the substance of that advice is, without being at risk of having to disclose the confidential content of the advice."*

42. In **British American Tobacco**, The High Court of Australia expressly approved and applied the decisions in **Mann** and **Osland**. The facts of **British American Tobacco** are similar to those in this appeal. In that case, the respondent had denied access to a copy of a memorandum of advice provided by the Attorney-General on the ground of legal professional privilege. The appellant contended that the privilege had been waived by reference to aspects of the advice in a government response tabled in the Senate, by provision of a summary of the advice to a group of advisors to the government, and subsequent publication of the government response on a government website. The matter eventually came before the Federal Court of Australia, which held that (i) the legal professional privilege attaching to the legal advice was not waived by the acts of disclosure, since it did not seek to deploy a partial disclosure of the advice for forensic or any other advantage for itself, so as to make its conduct inconsistent with the maintenance of the privilege, (ii) the tabling of the government response in the Senate was protected by parliamentary privilege. However, that privilege did not

extend to the subsequent publication of the statements made in the parliament, and (iii) the disclosure of information to a group of government advisors was not made to "outsiders", and so was not inconsistent with the maintenance of the privilege.

43. In this appeal the JCC relies on two occasions of disclosure of the gist of the advice. The first disclosure was made by the Minister in the Senate on 28th February 2016. The Minister contends that this statement is protected by parliamentary privilege, and the JCC is not entitled to rely on the words spoken in the Senate as a basis for waiver of legal professional privilege.

PARLIAMENTARY PRIVILEGE

44. In this jurisdiction parliamentary privilege is provided by section 55 of the Constitution:

> *"**55.** (1) Subject to the provisions of this Constitution and to the rules and standing orders regulating the procedure of the Senate and House of Representatives, there shall be freedom of speech in the Senate and House of Representatives.*
>
> *(2) No civil or criminal proceedings may be instituted against any member of either House for words spoken before, or written in a report to, the House of which he is a member or in which he has a right of audience under section 62 or a committee thereof or any joint committee or meeting of the Senate and House of Representatives or by reason of any matter or thing brought by him therein by petition, bill, resolution, motion or otherwise; or for the publication by or under the authority of either House of any report, paper, votes or proceedings.*

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(3) *In other respects, the powers, privileges and immunities of each House and of the members and the committees of each House, shall be such as may from time to time be prescribed by Parliament after the commencement of this Constitution and until so defined shall be those of the House of Commons of the Parliament of the United Kingdom and of its members and committees at the commencement of this Constitution.*

(4) *A person called to give any evidence before either House or any committee shall enjoy the same privileges and immunities as a member of either House.*

45. The privilege as set out in section 55 of the Constitution may be traced as far back as the Bill of Rights 1689 which provides in Article 9 that "Freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place outside of Parliament". By virtue of section 12 of the Supreme Court of Judicature Act, the common law doctrines of equity and statutes of general application in operation as at 1st March 1848 in the United Kingdom are deemed to be enacted in Trinidad and Tobago from 1st January 1889. Article 9 of the Bill of Rights is therefore part of our law, in so far as it is not inconsistent with section 55 of the Constitution.

46. The privilege is rooted in two essential aspects of a working parliamentary democracy. At the heart of the privilege is the importance of the right of a Member of Parliament to speak freely and frankly without fear of civil or criminal proceedings being instituted against him in respect of words spoken by him. The privilege is also important in a democratic society in which the principle of the separation of powers applies.

47. The important public interest in maintaining parliamentary privilege and the court's reluctance to trespass on the domain of parliament were brought into sharp focus in the case of **Prebble v. Television New Zealand Ltd** [1995] 1 AC 321, which came before the Privy Council. In **Prebble**, a former Government Minister brought an action for libel against the respondent in respect of allegations made over the sale of State assets to the private sector on unduly favourable terms and with the motive of obtaining donations for the party. In its defence of justification, the respondent relied inter alia, on statements made in Parliament, which it alleged were calculated to mislead the House, or were otherwise improperly motivated by suggesting that the government did not intend to sell State assets, when there was in fact a conspiracy to do so, by dishonestly and improperly passing legislation. On an application by the Minister the trial judge struck out the allegations which he held might impeach or question proceedings in Parliament in contravention of Article 9 of the Bill of Rights 1689. The Court of Appeal upheld the decision, but ordered that the action be stayed unless the Privileges Committee waived parliamentary privilege. The Committee decided that it had no power to do so.

48. On appeal to the Privy Council, the Board held that the judge's decision to strike out the allegations and particulars was correct. However, the Minister's appeal on the stay of proceedings was upheld, on the basis that the JCC had raised a number of matters independent of the parliamentary material which could justify the alleged libel.

49. In delivering the judgment of the Board, Lord Browne-Wilkinson expressed the view that the trial judge in **R v. Murphy** (1986) 64 ALR 498 had placed too narrow a construction of Article 9 of the Bill of Rights. At page 333H – 334C, Lord Browne-Wilkinson stated:

> *"Finally, Hunt J. based himself on a narrow construction of article 9, derived from the historical context in which it was originally enacted. He correctly identified the mischief sought to*

be remedied in 1689 as being, inter alia, the assertion by the King's Courts of a right to hold a Member of Parliament criminally or legally liable for what he had done or said in Parliament. From this he deduced the principle that article 9 only applies to cases in which a court is being asked to expose the maker of the statement to legal liability for what he has said in Parliament. This view discounts the basic concept underlying article 9, viz. the need to ensure so far as possible that a member of the legislature and witnesses before committees of the House can speak freely without fear that what they say will later be held against them in the courts. The important public interest protected by such privilege is to ensure that the member or witness at the time he speaks is not inhibited from stating fully and freely what he has to say. If there were any exceptions which permitted his statements to be questioned subsequently, at the time when he speaks in Parliament he would not know whether or not there would subsequently be a challenge to what he is saying. Therefore he would not have the confidence the privilege is designed to protect."

50. In my view, the same sentiments may be expressed in this case. In this case the trial judge found that parliamentary privilege did not attach to the statements made by the Minister in the Senate. In coming to his decision the judge interpreted section 55(2) of the Constitution as laying down a prohibition against the bringing of civil proceedings against a member of Parliament in his personal capacity based on a cause of action that relates to a statement made by a member while speaking in Parliament. The Minister in this case is sued as an office holder who has taken a decision on behalf of his ministry, and by extension the government. In addition, the cause of action was not premised on his statement in Parliament, and so his statement could be considered in order to determine whether or not there was a waiver of legal professional privilege. This in a nutshell was the basis on which the

trial judge came to the conclusion that parliamentary privilege did not attach to the statement of the Minister made in the Senate.

51. In my view the decision of the trial judge on this issue was plainly wrong for two reasons. In the first place, section 55(2) makes no distinction between civil or criminal proceedings brought against the member in his personal capacity or in his capacity as an office holder. In either case, the member's freedom to speak freely and fully in the Parliament is restricted if statements he makes in the Parliament can become the subject of litigation against him. The important public interest protected by the privilege is to ensure that the member can have the confidence to speak freely without fear of civil or criminal proceedings whether in his personal capacity or as an office holder.

52. The second reason has to do with the nature of the privilege itself. In his judgment in **Prebble** at page 332E, Lord Browne-Wilkinson referred to Blackstone's Commentaries on the Laws of England 17th Edition (1830) Volume 1 page 163, where he stated:

> *"the whole of the law and custom of Parliament has its origin from this one maxim, that whatever matter arises concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere."*

53. In considering the nature of the privilege, and the principle enunciated above by Blackstone, Lord Browne-Wilkinson stated at page 335F:

> *"...The privilege protected by article 9 is the privilege of Parliament itself. The actions of any individual Member of Parliament, even if he has an individual privilege of his own, cannot determine whether or not the privilege of Parliament is to apply. The wider principle encapsulated in Blackstone's words*

quoted above prevents the courts from adjudicating on issues arising in or concerning the House, viz. whether or not a member has misled the House or acted from improper motives. The decision of an individual member cannot override that collective privilege of the House to be the sole judge of such matters."

54. It follows that once parliamentary privilege attaches to the statement, any issue that arises in relation to the statement falls to be decided by the Privileges Committee of the Senate, not the court. It also follows that the Minister could not override the collective privilege of the Senate, by purporting to waive parliamentary privilege.

55. It follows that since parliamentary privilege attaches to the Minister's statements made in the Senate on 28th February 2012, no issue of waiver of legal professional privilege arises in relation to them.

LETTER DATED 1ST MARCH 2012

56. The day after making his statement in the Senate, by letter dated 1st March 2012, addressed to the President of the JCC, the Minister essentially repeated that based on advice from the Attorney-General's Office, publication of the Request for Proposals for screening potential investors making an investment proposal in respect of state lands at Invader's Bay, was not required to be in conformity with the Central Tenders Board.

57. Before the trial judge, the JCC did not in its written submissions rely on this letter as evidence of waiver of legal professional privilege in respect of the advice. Accordingly, it is not surprising that the trial judge did not refer to the letter in considering waiver of legal professional privilege. However, the letter was annexed to an affidavit of Afra Raymond filed on 31st October 2012, and so was available for consideration by the judge, if he considered it to be relevant.

58. However, the Minister contends that the JCC ought not to be permitted to rely on the letter of 1st March 2012 as a basis for waiver of legal professional privilege, not having done so in the court below. In the Minister's submission, this court being a court of re-hearing is obliged to hear only the issues litigated in the court below.

59. This submission appears to miss the point that waiver of legal professional privilege was precisely the issue litigated in the court below. However, it was argued solely on the basis of the Minister's statement in the Senate. The letter essentially repeats the gist of the statement made in the Senate. Having concluded that in his statement made in the Senate the Minister waived the legal professional privilege in the advice, it would be astonishing to say the least, if the trial judge had formed a different conclusion if he had directed his attention to the letter in the context of waiver of legal professional privilege. In this case both the issue and the evidence were before the judge, and the judge made a clear determination of the issue in respect of a statement made in almost identical terms. In the circumstances, I can think of no good reason in principle to disallow the JCC from raising the same issue in this court albeit in relation to a different item of evidence that was before the court below.

60. The cases of **Mann**, **Osland** and **British American Tobacco** referred to above, establish that the test for implied waiver of legal professional privilege is an objective one, based on the inconsistency of the conduct of the person seeking to rely on the privilege with the maintenance of the privilege having regard to the circumstances of the particular case. In **Osland**, it was held by the High Court of Australia that there was no inconsistency between disclosing the fact of, and the conclusion of the advice for the purpose of informing the public that the recommendation made to the Governor that the petition be denied, was based on independent legal advice. In **Mann**, the purpose of the disclosure by the Chief Minister was to satisfy the Member of Parliament that the government had acted reasonably and in accordance with legal advice. In such circumstances, the court came to the conclusion that there was no inconsistency between the disclosure of

the fact of and the conclusion of the advice, while still maintaining legal professional privilege in respect of the advice itself.

61. In this case, the JCC contended that the disclosure of the gist and conclusion of the advice in the Senate, and its repetition in the letter of 1st March 2012, amounted to a waiver of legal professional privilege on the ground that the disclosure was made to secure a tactical advantage for the State. In his judgement, the trial judge found that the effect of the Minister's statement in the Senate "secured a benefit and/or advantage or justification for the [Minister] in so far as his maintenance that the decision to issue the Request for Proposals without ensuring that same had to conform with the provisions of the Central Tenders Board Act, was a sound and legally valid one". In the judge's view the publication of the gist and conclusion of the legal advice was inconsistent with the maintenance of legal professional privilege.

62. In the letter of 1st March 2012 the relevant words used by the Minister were:

> *"...I write to let you know that based on advice from the office of the Attorney-General I can say that the publication of the Request for Proposals for screening of potential investors making an investment proposal on State Lands located at Invader's Bay was not required to be in conformity with the Central Tenders Board Act."* (emphasis added)

63. It is clear that the letter does not expressly set out the content of the advice. The words "based on advice" must be given their ordinary and natural meaning, that what follows is a conclusion or inference derived from the advice by the writer of the letter. The conclusion, one expects, should be consistent with the advice, but to suggest that the words used convey "the gist" of the advice may require a strained construction of the words "based on advice".

64. The real question is whether or not the reference to the advice in the letter is inconsistent with the maintenance of legal professional privilege. The basis of the waiver of legal professional privilege as argued by the JCC is that the disclosure was made in order to secure a "tactical advantage" for the State by asserting that its actions were legal notwithstanding the JCC's assertions to the contrary.

65. The JCC has not in its submissions attempted to define what this "tactical advantage" is. In my view, I can see no difference between this case, and any situation in which a potential litigant seeks legal advice, acts on it, and informs the other side, that he has acted with the benefit of legal advice, as he is entitled to. Nothing prevents the other party from seeking legal advice of his own, and if the advice is different to that asserted by the other side, taking such action as he is advised. If a potential litigant is forced to disclose his legal advice, simply because the other side challenges it as being wrong, the entire administration of justice will crumble. As the case law has demonstrated, legal professional privilege is a cornerstone of the justice system, and cannot simply be brushed aside in this way. As the cases of **Mann**, **Osland** and **British American Tobacco** illustrate, the courts are slow to find waiver of legal professional privilege, even where the gist of the advice is disclosed.

66. For these reasons, I find no merit in the JCC's submissions that the Minister waived legal professional privilege either in his statement to the Senate or in his subsequent letter to the JCC.

THE PUBLIC INTEREST – section 35 of the Act

67. Section 35 of the Act provides:

> *"35. Notwithstanding any law to the contrary a public authority shall give access to an exempt document where there is reasonable evidence that significant—*

(a) abuse of authority or neglect in the performance of official duty; or

(b) injustice to an individual; or

(c) danger to the health or safety of an individual or of the public; or

(d) unauthorised use of public funds,

*has or is likely to have occurred **or** in the circumstances giving access to the document is justified in the public interest having regard both to any benefit and to any damage that may arise from doing so." (emphasis added)*

68. In this case no evidence has been put forward by either party with respect to the matters outlined in section 35(a) to (d). However, the use of the word or (which was previously "and" before the section was amended) before the words "in the circumstances", suggests to me that the words that follow provide a free standing basis for providing access where it is justified in the public interest, and the benefits of providing access outweigh "any damage" that may occur from doing so.

69. In **Caribbean Information Access Ltd. v. Minister of National Security** (unreported) Civ. App. No. 170 of 2008, Jamadar JA expressed the view that where a public authority withholds information on the ground that the document is exempt, it must conduct the "public interest override assessment and analysis", under section 35 and indicate to the applicant its reasons for refusal, having undertaken the exercise.

70. It is common ground in this case that the Minister did not inform the JCC that he had carried out the section 35 assessment, and did not provide reasons for his refusal, having done so. In fact, the Minister contends that the section 35 assessment did not arise, since the JCC had not placed before the authority any reasonable evidence of the matters listed in (a) to (d) of section 35. However as

noted earlier, the last three lines of the section following the word "or", may be construed as a distinct and separate basis for carrying out the assessment. In my view, there is no requirement under this limb of section 35 for the applicant to provide evidence of circumstances to trigger the process of assessment of public interest considerations, since such circumstances may be self- evident.

71. The issue in this appeal is whether, having regard to the circumstances of this case, giving access to the documents requested is justified in the public interest, having regard to any benefit and to any damage that may arise from doing so. This court requested the parties to file further submissions setting out what they perceive to be the benefits and the damage that may arise from providing access to the documents requested.

72. For the JCC, the following benefits were outlined:

(i) Disclosure will promote transparency, accountability and public understanding and involvement in the democratic process in relation to the activities of public authorities.

(ii) The information relates to the legality of the tender process relating to valuable State lands. It is in the public interest to ensure that the tendering process for the development of these lands is conducted in accordance with the law.

(iii) It is in the public interest to dispel rumours of corruption, misappropriation of public funds or mismanagement of taxpayer's money. It will also promote public confidence in public administration.

(iv) The refusal to provide the information can create a perception of misfeasance in the process and may result in a loss of public confidence.

73. The damage that may result from disclosure from the JCC's point of view, is:

(i) The purpose of legal professional privilege is to serve the administration of justice and safeguard the right of any person to obtain entirely frank and realistic legal advice. The privilege is a fundamental human right long established in the common law. To order disclosure may undermine the administration of justice and violate a fundamental human right.

(ii) To grant disclosure may prevent public authorities from conducting free exchange of views as to their legal rights and obligations, with those advising them without fear of intrusion.

(iii) The previously absolute discretion of the State to withhold or disclose legal advice, will now have to be balanced against the public interest under section 35.

(iv) The High Court could use the judgment of this court to order disclosure of legal opinions provided to the State if no compelling case is made to eclipse public interest.

(v) Loss of credibility. The State's repeated claims as to the conclusion of the advices would be open to public scrutiny.

74. According to the Minister, the sole benefit of allowing access is the public interest in ensuring that public authorities are transparent in their actions and accountable for the decision making process. However, the Minister submits that this consideration is of slight weight, since the Constitution contains provisions to make the Minister accountable to the public through Parliament, which is a much more effective instrument to promote transparency and accountability. In addition the Minister submits that disclosure in this case will undermine the confidentiality which Ministers enjoy with the Attorney-General in relation to legal advice.

75. In the Minister's submission the damage in allowing access far outweighs any perceived benefit. In setting out his concerns the Minister relied heavily on the importance of legal professional privilege in the context of the administration of our system of justice. The main factors outlined were:

(i) The public interest in the maintenance and preservation of the basic common law right of legal professional privilege which has now been elevated to the status of a fundamental human right: per Lord Hoffman in **R v. Special Commissioners & Ors.** (supra).

(ii) The interest in preserving and protecting legal professional privilege is a "towering public interest": per Lindsay J in **Saunders v. Punch Ltd** [1998] 1 WLR 986 at 998 C-D. Interference with the right to the confidence of privileged communications with one's lawyer seriously undermines the rule of law: **Warren v. Attorney General for Jersey** [2011] 2 All ER 513 at 522.

(iii) The candour of Ministers in communicating with their attorney and law officers may be affected if disclosure is granted.

(iv) There is a built-in public interest in the privilege itself, which commands significant weight.

(v) Legal professional privilege is a fundamental condition on which the administration of justice as a whole rests: **R v. Derby Magistrates Court** (supra).

(vi) The public interest in people being properly advised on matters of law is held to outweigh the competing public interest in making that evidence available: per Lord Rodger in **Three Rivers District Council** (supra) at paragraph 54. It is in the interests of the whole community that lawyers give their clients sound advice, based on the maintenance of the privilege: see Baroness Hale at paragraph 61.

76. In his judgment in considering the public interest the trial judge considered that the purpose of the Central Tenders Board Act is to avoid political interference in the process of awarding contracts which gives rise to an actual or perceived perception of misappropriation or mismanagement of taxpayer's money. He then referred to the case of **Bland v. Canada (National Capital Commission)** 1991 FTR LEXIS 995, where Justice Muldoon opined that it is always in the public interest to dispel rumours of corruption or just plain mismanagement of taxpayer's

money. The trial judge went on to consider the importance of accountability and transparency in the process and expressed the view that refusal of the information can create a perception that there may have been misfeasance in the process and such a perception can result in the loss of public confidence. On this basis, the judge concluded that it was in the public interest to disclose the documents requested.

77. In my view, the trial judge's analysis of the public interest was flawed for two reasons. Firstly, there was no evidential basis for his analysis of actual or perceived misfeasance, misappropriation or financial impropriety. Further, he did not factor in the importance of maintaining legal professional privilege in the circumstances of this case, and balance it against the perceived benefits of disclosure. In short, he did not carry out the balancing exercise of benefits and damage as envisioned by section 35.

78. I have set out in some detail the various matters outlined by the parties as being the benefits and the damage resulting from disclosure. Broadly speaking, the JCC advocates for disclosure on the basis of considerations of accountability and transparency in the process of inviting proposals for development of state lands in which the public has a legitimate interest. On the other hand, the Minister emphasises the importance of legal professional privilege in the operation of the administration of justice and the likely consequences of an order for access which essentially destroys the basis of the privilege.

79. Legal professional privilege has developed in the common law to the extent that it has now been elevated to the status of a fundamental human right. It is said to be at the foundation of our system of justice, and there is a "towering" public interest in preserving it. On the other hand, there is also the public interest in matters involving the management and allocation of state resources, and in ensuring transparency and accountability in processes involving State resources. This public interest is built into all matters in which the government makes decisions involving investment in development projects. Does this mean that in all such

matters the government is obliged to give up its right to legal professional privilege, and give access to legal advice it receives and instructions that it gives to its legal advisors be they internal or external to the government? The case law referred to earlier in this judgment suggests that the answer to this question must be in the negative. The question then becomes whether, in the particular circumstances of this case, is there any special feature that causes the balance to lean in favour of depriving the Minister of his fundamental right to legal professional privilege to which he is entitled like any other potential litigant? In my view, there is no such feature in this case.

80. In arriving at this conclusion, I bear in mind the consideration candidly put forward by the JCC on the "damage" side of the scale that is, the danger that the creation of a precedent which abrogates the State's right to legal professional privilege, may well open the floodgates for applications to the High Court for access to legal opinions provided to the State.

81. In concluding that the public interest does not require the Minister to give access to the documents, I bear in mind that the JCC is not without a remedy. If it holds the view that the process is unlawful, it is entitled to seek legal advice of its own and take such steps as may be advised to challenge the minister's decision.

DISPOSITION:

82. I would allow this appeal and set aside the orders of the trial judge.

Dated the 28th day of October, 2016.

R. Narine
Justice of Appeal.