IN THE SUPREME COURT)
OF THE TERRITORY OF)
PAPUA AND NEW GUINEA)

CORAM : MINOGUE, J.

In the matter of -

THE PUBLIC SERVICE ASSOCIATION OF PAPUA AND NEW GUINEA

Applicant

- and -

THE ADMINISTRATOR OF THE TERRITORY OF PAPUA AND NEW GUINEA

- and -

THE PUBLIC SERVICE COMMISSIONER OF THE TERRITORY OF PAPUA AND NEW GUINEA

Respondents

PORT MORESBY
22, 23, 26 and
27 September 1966.
3 October 1966.

J U D G M E N T

CASE STATED.

On 15th April 1965 the Public Service Association (hereinafter called the Association) pursuant to Section 7 of the Arbitration (Public Service) Ordinance 1952-1965 submitted to the Public Service Arbitrator, Mr. L. G. Matthews, by memorial, an application in respect of salary rates for Local Officers in the Public Service. A new wage and salary scale for these officers had been promulgated on 10th September 1964. I assume that the Administrator and the Public Service Commissioner lodged objections to the granting of the application for the alteration of these rates. The Arbitrator, as he was bound to do by Section 7 (5),

began this arbitration on the 26th October 1965 and has been intermittently taking evidence since that date.

Mr. Hawke who with Mr. Munro is appearing for the Association in the arbitration called as a witness Mr. D. M. Fenbury the Secretary of the Department of the Administrator. He is the departmental head of that Department. Evidence was led from him that in the period 10th to 14th August 1964 there was held in Port Moresby an annual conference of the District Commissioners of the Territory of which conference he was Chairman. At this conference the matter of the Local Officers new salary structure was discussed and the discussion and the results which flowed from it were embodied in a report. Mr. Hawke was going on to ask him as to the dissemination of this report when Mr. Wootten, who appeared with Mr. Marr for the Administrator and the Commissioner, took objection to any further questioning of this nature. Subsequently after receiving instructions from the Administrator Mr. Wootten claimed privilege of the Crown in relation to the production of the document entitled "Report of the District Commissioners' Conference held at Port Moresby 10th to 14th August 1964" and also of a memorandum written by the witness to the Public Service Commissioner dated the 17th August 1964 and tendered an affidavit of Sir Donald Mackinnon Cleland the Administrator in support of such claim. Mr. Hawke pressed strongly for the admission of both documents and lengthy argument ensued as to whether the Administrator's claim to privilege was rightly founded.

In the course of this argument further questions were asked of Mr. Fenbury to establish who was present at the Conference. It emerged that there were fourteen District Commissioners and two relieving District Commissioners. Also present was the District Commissioner from tbe British Solomon Islands Protectorate, Mr. Tedder, who attended as an observer and a full member of the Conference pursuant to an arrangement which has been in force for some time. Present also were three Under-Secretaries attached to the Department of the Administrator. These were three indigenous elected members of the House of Assembly - Mr. Matthias Toliman who was the

Under-Secretary, Department of the Administrator, Mr. Sinake Giregire who was the Under-Secretary attached to the Assistant Administrator (Services), and Mr. Nicholas Brokam who was at that time the Under-Secretary attached to the Assistant Administrator (Economic Affairs). In addition there were the District Officer, Port Moresby (Mr. Marsh) who had been acting as District Commissioner Central District until shortly before the Conference, a Headquarters officer (Mr. Martin) who attended as an observer, the Assistant Secretary, Department of the Administrator, Mr. Toogood who on occasions acted as Chairman, and an executive officer, Mr. Griffin, a relatively senior District Administration officer.

At the conclusion of the Conference a summary of the resolutions passed at the Conference was on or about the 6th of October 1964 forwarded to all heads of departments including the Land Titles Commissioner and to Messrs. Tedder, Marsh and Martin. At this time these individuals were notified that a copy of the Conference report would be forwarded in due course. Subsequently at various times the District Commissioners received each two copies of the report and departmental heads one copy. It was not clear whether the three Under-Secretaries had received copies although these were available for them if they wished them. Copies were also sent to the Public Service Commissioner and Mr. C. J. Lynch the Legislative Draftsman. Mr. Hawke himself had a copy although no evidence was tendered as to how he had come into possession of it. He stated that the copy which he had had no marking to show that it had a restricted circulation. In the course of argument Mr. Wootten indicated that he had a copy from the library of the Department of District Administration which was marked "Restricted". As appears from the affidavit of the Administrator the portion of the report constituted by pages 25 to 32 inclusive dealt with the Conference Agenda item 4(i) "Reconstruction of the Public Service".

In a judgment delivered on the 21st September the Arbitrator upheld the claim to privilege and refused to admit the documents tendered by Mr. Hawke. The Arbitrator's reasons for judgment are short and I think it convenient and desirable

to here embody them.

" In regard to the question of Crown privilege raised last week in these proceedings, I desire to state that I have now had the opportunity to carefully consider the whole matter, including the extensive argument before me.

The Public Service Association wants the documents concerned, which are fully described in the affidavit sworn on 14th September by His Honour the Administrator, published and analysed (as they desire in open hearing) against the privilege claimed by the Crown in respect of them. The Public Service Association does not deny that in a proper case there is a right of Crown privilege in the proceedings before me.

Firstly, if I proceed on the assumption that this tribunal, established by Territory Ordinance as an arbitral authority with specific powers to take evidence and compel the attendance of witnesses and the production of documents has the same powers as a judicial court in those respects, then it is necessary that the question of privilege be considered.

The authority stemming from Robinson's case has been applied in many different situations since it was decided. It seems that whatever the situation that arose from the later case of Duncan and Cammell Laird, subsequent English and Australian decisions have now brought the law into line in both countries.

The Grosvenor Hotel case in England and the very recent Stinvics' case in New South Wales are the most helpful, I consider, in reference to the type of documents having an analogy to those sought to be produced in these proceedings.

It seems clear to me, on the authority of these cases, that in view of the nature of the documents as disclosed in the Administrator's affidavit, it would not be proper to exercise the reserve-power, which it is stated courts have, to override the Crown claim to privilege. In consequence of that view, no purpose is to be served by exercising the power of a court to inspect the documents to see if the privilege should be overridden. Documents of the class and nature as shown in the affidavit should have privilege.

As to "publication" of the District Commissioners' Conference report, I consider that its distribution has not been inconsistent with the privilege. The Public Service Association points out that a copy is in its hands, one of the parties to these proceedings. But these arbitral proceedings are unique, probably, in that the Administration has to rely on its officers, members of the Public Service Association, to handle its official documents. Yet the Public Service Association wants the document to be part of its case before this tribunal.

In line with what I considered in the Magistrates' case last year, I am concerned at attempts by the Association to have produced before me matters of views, recommendations or advice tendered to the Administration and the Minister by its senior officials on the formulation of matters of policy and made part of its own case. There must be some limit

to such a process and I think the Administration - in the light of the cases that have been cited to me - has made a proper objection to the documents now in question being produced in this hearing.

This tribunal's duty is to determine a proper wage structure, having due regard to arguments and facts before it. The views that some departmental heads or district commissioners might have expressed to the Administration during the formulation of the ultimate decision - now over two years ago and when the wage structure has since been radically altered - would not materially assist that duty nor I consider, prejudice the Association's case if not put before me.

In my view, even if it came down to balancing considerations of competing public interest - that the public interest in relation to the present proceedings should be weighed against the law on privilege in relation to these type of documents - I do not regard that public interest as of more compelling importance, such as to override the entitlement to privilege.

There is the further Administration submission that only a fully judicial court could override a claim for privilege. In view of what I have said, based on the assumption - but certainly not the decision - that this tribunal had the same powers, it is unnecessary to express any view on this point.

I uphold the claim to privilege taken against the documents set out in the Administration's affidavit.".

At the request of Mr. Hawke the Arbitrator stated a case for the opinion of this Court in which he (the Arbitrator) asked the question whether on the whole of the relevant material before him he proceeded upon the correct principles of law in sustaining the Administrator's claim to privilege in respect of both documents. This he was empowered to do under Section 17A (1) of the Ordinance which reads :-

> " The Arbitrator may, at any stage of proceedings under this Ordinance, and shall if so directed by the Supreme Court, state in the form of a special case for the opinion of that Court a question of law arising in the course of those proceedings."

Initially Mr. Munro who appeared before me on behalf of the Association sought to show that privilege attached to neither document but shortly after argument began he withdrew his submission in respect of the memorandum written by Mr. Fenbury to the Public Service Commissioner and the argument proceeded in respect only of the report of the District Commissioners' Conference, or rather in respect of that part of the report

referred to in the Administrator's affidavit. I set out the relevant paragraphs of the affidavit of the Administrator.

"1. I am the Administrator of the Territory of Papua and New Guinea, and as such I am charged with the duty of administering the government of the Territory on behalf of the Commonwealth by virtue of S.13 of the Papua and New Guinea Act 1949 as amended.

2. I have given personal consideration to the document entitled :-

> Report of the Conference of District Commissioners held at Port Moresby 10th-14th August 1964

and in particular to the portion thereof constituted by pages 25 to 32 inclusive dealing with Agenda Item 4(i) "Reconstruction of the Public Service" and have formed the opinion that it would be injurious to the public interest for the said portion of the Report, or other evidence of the proceedings of the Conference dealt with therein to be produced or given in the abovementioned proceedings. I therefore claim the privilege of the Crown in respect of the said portion of the Report and of any such evidence and object to the production or giving thereof in these proceedings.

3. I have formed the opinion mentioned in paragraph 2 of this my affidavit because I have concluded that the non-disclosure of such portion of the Report and of the proceedings of such Conference is necessary for the proper functioning of the public service firstly because of the nature of the communications therein, being confidential communications between senior officers and the Administration on matters of policy, and secondly in that the freedom and candour and completeness of communication to from and between District Commissioners, departmental representatives and myself would be prejudiced and the freedom of such communication would be restrained if such evidence were so produced. The role of the said District Commissioners is described in my circular of 18th November 1964 as follows :-

> "District Commissioners remain my personal representatives in their Districts and are responsible for the smooth co-ordination of all administrative activities within the District. They are responsible to the Director of District Administration for the administration of their respective Districts. In times of emergency, the District Commissioner, who will be the judge of the circumstances obtaining, has authority to take any action he deems necessary to meet the situation."

It is essential that there should be the utmost candour and frankness of communication between the District Commissioners and myself and officers of the various Departments.

The Annual Conference of District Commissioners provides an opportunity for such communication and the Agenda item related to information regarding proposed changes in policy released to District Commissioners on a restricted and confidential basis, and their recommendations in regard to such policy.".

Mr. Munro submitted that in this case the Arbitrator in reaching his conclusion has either misunderstood or failed to apply the correct principles that should be applied in ruling on a claim of privilege. On the material before him and proceeding on the correct principles of law he could not properly have arrived at the conclusion that the nature of each document as disclosed in the Administrator's affidavit rendered it improper for him to uphold a claim for privilege. It was improper for him to look only at the nature of the documents as described in the affidavit of the Administrator. He was wrong in ruling that no purpose was to be served by inspecting the documents and in so doing he displayed an ignorance of the proper principles of the law relating to privilege. Further he was wrong in law in ruling that on the evidence before him the material contained in the documents could not be of material assistance to him in deciding the issues of the arbitration and that their non-production would not be prejudicial to the Association's case.

Mr. Munro founded strongly on Robinson v. State of South Australia (1931) A.C. 704 and on what he urged upon me was the proper view to be taken of the subsequent judicial development or exposition of the principles enunciated in that case. He took as his text the words of Lord Blanesburgh at page 714 in delivering the judgment of Their Lordships, "it is, their Lordships think, now recognized that the privilege is a narrow one, most sparingly to be exercised", and later at page 716, "in truth the fact that the documents, if produced, might have any such effect (i.e. to prejudice the Crown's case or to assist that of the other side) is of itself a compelling reason for their production - one only to be overborne by the gravest considerations of State policy or security.". Although the power of a Court to override a claim for Crown privilege is a reserve power that statement is to be interpreted in the light of the most important consideration that the privilege itself is a narrow one.

It is now the law, he said, that in Australia at any rate and so in this Territory, Robinson v. State of South Australia (supra) is to be followed rather than Duncan v. Cammell Laird (1942) A.C. 624. This is so even in England although there may in that country be more temerity in the face of a decision of the House of Lords in fully applying what is the modern doctrine. In Australia the Supreme Court of Victoria in Bruce v. Waldron (1963) V.R. 3 and in New South Wales the Court of Appeal in Ex parte Brown re Tunstall and Anor (1966) as yet unreported, make it clear that Duncan v. Cammell Laird should not be followed as did also the Court of Appeal in New Zealand in Corbett v. Williams (1962) N.Z.L.R. 878, and judges of Queensland in Sayers v. Perrin (1965) Q.R. 221 and Kleimeyar v. Clay (1965) Q.W.N. No. 26. He further argued that in ruling that the publication and distribution of the document was not inconsistent with the privilege claimed the Arbitrator was also wrong in law. This argument I will deal with at a later stage.

At the outset Mr. Munro drew my attention to the issues which he said were basic to the Arbitrator's decision and to the submissions made by Mr. Hawke in opening the Association's case before him. Mr. Hawke then asserted that a strong, efficient and contented Public Service was a sine qua non for the successful progressive development of the Territory - a proposition which I have no doubt was not disputed by the Administrator or the Commissioner - and informed the Arbitrator of his proposal to call evidence to support the proposition that the inadequacies of the new salary structure have engendered and are engendering a degree of dissatisfaction and indeed bitterness that is militating against the achievement of such a strong, contented and efficient Public Service. He stated that the Association's case would be that considerations of economic capacity should have a subsidiary place in the Arbitrator's mind when he ultimately decided the issues in the arbitration. The District Commissioners' report I understand was tendered as being highly relevant to this issue, that is whether the economic capacity of the country to pay is the determinant or whether political and social factors are equally if not more important. If the report is highly relevant, and there was nothing to enable the Arbitrator

to form the opinion that it was not, there was a compelling public policy that it should be received in evidence and any competing public policy should be clearly shown to be superior and to be supported by strong authority before the Arbitrator could override the public interest in the proper administration of justice. This arbitration, so Mr. Munro said, envisages a field of opinion evidence. The Administration has assessed its new salary scales on an opinion or opinions and from the Administrator's affidavit it appears that the opinions of the District Commissioners as expressed at the time of the report must have been of particular relevance in deciding whether pre-eminence should be given to one consideration or another, that is to economic capacity to pay or to social or political considerations.

Mr. Wootten met Mr. Munro's argument head on and said in effect that not only did the Arbitrator apply the correct principles of law but that he was clearly right in his application of them. Rarely he said could one find a case where the public interest in the claim to privilege was of more importance than in this instance. What is involved in this question is the right of the Government, the Minister or the Administrator to communicate on matters of policy with the District Commissioners assembled in conference, albeit in the presence of trusted and invited observers, without their having to conduct their discussions on the basis that they are at risk of disclosure. He argued strongly that it would be hard to imagine a situation where the public interest required such protection to be given more than it does in this Territory today. If the situation is that there may not be communications between the Administrator and District Commissioners or between them and the Administrator without these communications becoming public this would put special hindrance on their candour and freedom of discussion and the public interest would be clearly prejudiced. The District Commissioners are very senior and responsible persons and communications on matters of public importance between them and the Administrator must be considered to be of very high level indeed. The Administrator is directly responsible to the Governor-General for the administration of this Territory on behalf of the Commonwealth, and he put it that the freedom

and candour of communications between the District Commissioners and him is just as important as it would be between a departmental head in Canberra and his Minister.

It is necessary now to turn to the law applicable in this Territory to this case stated as I conceive it to be. Both parties before me agreed that so far as they were in conflict the decision in Robinson v. State of South Australia (supra) is to be preferred to that of Duncan v. Cammell Laird (supra) and I am happy to find myself in respectful agreement with the Courts of Appeal in England, New Zealand, Victoria and New South Wales and also with the judges of first instance in the Australian Capital Territory, the Northern Territory and Queensland who have considered the matter, that this is so. But what is the modern law with respect to Crown privilege not to produce documents or for that matter not to be compelled to give evidence on matters which are relevant to an issue before the Court.

It is clear enough from all the cases (and there was no attempt to deny the authority of Duncan v. Cammell Laird in this regard) that there are certain documents which are indubitably privileged once the nature of their contents or their description is asserted. Any document which in the opinion of a Minister involves the security of the State, diplomatic communications, a State paper such as Minutes of Cabinet or advice tendered to a Minister on a matter of Government policy by the head of his department would all come within this category. As Harman, L.J. said in Re Grosvenor Hotel London (No. 2) (1964) All E.R. 354 at p. 364 : "the nature of these has only to be indicated for it to be obvious that the responsibility for their disclosure or the contrary must rest on the Minister and on him alone and the Court will not interfere, for ex necessitate rei the political authority must be the best judge." Indeed it was into this category that Mr. Wootten, as I understand him, sought to subsume the District Commissioners' report. At the other end of the scale there are commonplace communications at low level between one public servant and another which no one could think should be privileged. An example which comes readily to mind is those communications connected with the day to day trading activities of the Crown

when it is engaged in such activities. Another could be interdepartmental minutes concerning the hire of junior or temporary staff.

I turn now to look more closely at Re Grosvenor Hotel London (supra) because it was so fully analysed before me and because it is the latest case in which the principles applicable have been discussed in detail. Both counsel claimed to derive strong support from it. The lease of the Grosvenor Hotel was about to expire. The lessor, the British Railways Board, desired to get possession and gave notice to the lessee that it would oppose a new tenancy and the lessee as it was entitled to do made application to the High Court for a new lease. For reasons which it is not necessary to enter upon here the Railways Board which had recently in effect been legislatively compelled to enter the hotel business desired an early hearing of the lessee's application. The lessee's interest was to delay the litigation and apparently in part for this reason kept pressing for discovery which the Railways Board was unwilling to give. The documents relevant to the protracted litigation before the Courts were claimed by the Railways Board to be protected by Crown privilege and were described as follows - (a) official letters by the Secretary of the Board to the Minister of Transport; (b) the reply of the Minister of Transport; (c) correspondence passing between the Board and members of the staff of the Minister (and the Treasury Solicitor); (d) memoranda made by the officers and servants of the Board relating to discussions with the officers of the Ministry of Transport and the Treasury Solicitor's department; (e) certain additional memoranda passing between the officers and servants of the Railways Board referring to special documents or to drafts thereof. Both Denning, M.R. and Salmon, L.J. were of opinion that the production of the documents was not necessary in order that justice should be done in the proceedings for the grant of a new tenancy. At the same time all the members of the Court held that they would not override the objection of the Minister and would not order production of the documents because they were of a class for which privilege could properly be claimed in pursuance of the purpose of securing freedom and candour of communication albeit Harman, L.J. expressed himself as

somewhat grudgingly willing to admit the claim. Harman, L.J. thought it clear that certain classes of document are privileged apart from their contents by the source from which they proceed and he cited with approval what was said by Lord Lyndhurst, L.C. in his judgment in Smith v. East India Company (1841) 1 Ph. at p. 54. He thought that the letters passing between the Secretary of the Board and the Minister and between the Minister and the Secretary may well be of the kind referred to by Lord Lyndhurst. Denning, M.R. thought it did appear that the documents concerned policy decisions at a high level as they related to decisions taken by the Minister in the national interest and not in the day to day affairs of the Railways Board. They had come into existence in pursuance of a statutory duty laid on the Minister and he had no trouble in appreciating that in order to secure freedom and candour in communications, documents of this class should not be disclosed in litigation. The Minister was asserting a valid public interest in the proper functioning of the Public Service.

On the other hand Denning, M.R. was conscious of the interests of justice as between Gordon Hotels Ltd. (the lessee) and the Railways Board. In the particular case he took the view that the documents were not necessary in order that justice be done and on balance did not think that the interests of justice required the production of the documents. Salmon, L.J. took much the same view but said at p. 372 : "the Courts may say; 'whilst we must accept the view of the Minister that he regards production of documents of this class as prejudicial to the public interest the prejudice (if it exists) is obviously so slight and the document which we have looked at is so material to the issues in this case that the public interest in the administration of justice must be the overriding consideration'". This is a power in the Court which he said would certainly be used very sparingly and he concluded that although the Court had this power which it may exercise in an extreme case this was not such a case and the Minister's objection to production should be upheld.

All the members of the Court closely considered the Minister's affidavit claiming privilege and thought it insufficient. It was principally in their assertion of the

Court's power to examine the Minister's reasons that they departed from the views expressed by Viscount Simon in Duncan v. Cammell Laird (supra). Although they found the affidavit insufficient they did not deem it necessary to inspect the documents for themselves but were content to accept the verbal amplification in argument by the Attorney-General of the reasons for non-disclosure.

In my view the case of Wednesbury Corporation v. The Ministry of Housing and Local Government (1965) 1 W.L.R. 261 does not take the matter further, although there is the useful passage by Salmon, L.J. at p. 274 where he distinguishes between communications at a high level such as Cabinet Ministers' despatches and communications from ambassadors abroad and classes of documents which constitute communications at a lower level. The latter he thought should be classified by the nature of the information they contained and he thought that with regard to such a class of documents the Minister should ask himself firstly - Do the documents belong to a class which contains information which in the public interest Public Servants should be able to give to each other with the utmost candour. Secondly, if they do contain such information is there a real possibility that the information will be given less candidly if such documents are subject to production and finally, bearing in mind the public interest in the proper administration of justice, would the public interest be so prejudiced by the production of such documents that production ought to be withheld. Salmon, L.J. in this case adhered completely to what he said in the Grosvenor Hotel (No. 2) Case and of course did not depart from his view that in rare cases the Court had the power if necessary to examine the documents and override the Minister's objection.

But where does one draw the dividing line between privileged and non-privileged documents or perhaps more accurately between those documents and classes of documents of which the Courts will not compel production and those of which they will. At either end of the scale the answer is easy enough. It is in what could well be a large field in the middle that the difficulty lies. It is in this area that a Court must closely scrutinize the claim to privilege before deciding that the affidavit is sufficient in law to

warrant the claim. It is in this area that the Court may have to inspect the document or documents in order to be able to decide. It is in this area too that the Court can be most exercised to balance competing claims of public policy - to balance the claim of the Crown against the interests of the litigant. In this middle and difficult field the answer will often turn on considerations of degree. How important is the secrecy of this or that class of document or of the purpose to be achieved by secrecy, e.g. to the preservation of candour and freedom of expression within the Public Service. How much of the contents have already been freely and openly disclosed to the public or to the litigant. How important is the document to the success of the litigant's case or the destruction of the case of his adversary. Provided that the Court has material before it to enable it to properly consider these competing considerations then the decision and the duty to decide rests with it. It can override the Minister's objection. It has been said again and again that the cases in which it will do this are rare but that seems to me to be another way of saying that the Court must always give full weight to the opinion of a Minister of State. If after doing this it has properly balanced the competing interests and it finds that asserted by the Minister to be the inferior in the case before it, its duty is clear. I do not think that Smithers, J. expressed the position too strongly when in Hazeltine Research Inc. v. Zenith Radio Corporation (1965) 7 F.L.R. 339 he said at p. 341 :

"That a party should be denied relief or should suffer punishment or judgment for lack of evidence when that evidence is in existence is certainly contrary to the public interest. In some cases this might be the result of sustaining the privilege claimed. Such an eventuality could be tolerated only in those special cases where there is a competing public interest involved of even more compelling importance and where production of the document would materially prejudice that interest. No doubt, documents properly immune from production are usually in the custody of a government department but the mere fact that documents are in government custody and not normally made available to the public cannot support immunity. Where therefore it is sought to support immunity by reference to an opinion the nature of the documents in question and the nature of the public injury which is feared should always appear.".

In some cases such as where national security is involved or where the documents are, or form part of, Cabinet Minutes that fact would only have to be stated for the paramountcy of the public interest against production to appear. It may be too that in a communication on government policy between a Departmental Head and his Minister the mere statement of the nature of the document would suffice. But in most other cases I would think a Court entitled to be given full information as to the nature of the documents and, in appropriate cases, to see the document for itself in order to judge whether the public interest in the administration of justice is to give way to a higher public interest.

It is hardly necessary to say that the District Commissioners are very senior and responsible officers directly responsible to the Administrator and with a knowledge second to none of affairs in their respective districts. I agree that they are the sort of people whose views the Administrator would seek and value as being of assistance to him in advising the Minister and the Government (whose representative he is) on the formulation of government policy as to the wage scales or wage structure of the Public Service of the Territory or at any rate of the Local Officer component thereof. The structure of the Public Service must surely involve important questions of policy. It may not be in the same category as secret defence or security matters but the Association's own case is that it is a matter which goes to the future development of an emerging country and the question of the efficiency and contentedness of that Service must be one of the prime concerns of Government. This would seem to make such a question a matter of policy of high order. At the same time I do not feel even in the context of this Territory that communications from District Commissioners fit into the "very high level" category referred to by Salmon, L.J. in the Re Grosvenor Hotel Case or the "high level" category referred to by him in the Wednesbury Corporation Case, or that a Court should say their nature has only to be indicated for it to be obvious that the responsibility for their disclosure or the contrary must rest on the Minister and on him alone.

Nevertheless it seems to me that the Conference at which Agenda item 4(i) was discussed was one requiring the utmost candour and freedom of discussion if it was going to be of any value and one in which if it were to be thought that the discussion and the results of or recommendations arising out of the discussion were to be published to the world at large that candour and freedom of discussion could be seriously inhibited. I do not think it an unfair way of testing the matter by asking was this the kind of conference at which one would expect the press to be present and to report the District Commissioners' views there expressed. To allow this document to be received now in a public hearing would I think be tantamount to saying that it was. To me it was not such a conference. I am mindful of the personnel present at the Conference and this in no way alters my view. I must surely assume that these recommendations related to, even if they did not ultimately affect, a policy decision taken before the promulgation of the wage scales on the 10th September and that they related to decisions ultimately taken by the Minister to use the words of Denning, M.R. "in the national interest". Again to use and adopt his words I can well see that in order to secure freedom and candour in communications, documents of this class should not be disclosed in litigation. I would therefore conclude that the relevant section of the District Commissioners' Report should prima facie be privileged against production. The question remains whether the public interest in the proper administration of justice would require a Court to overrule the Administrator's claim and order production of the report, the subject matter of this argument. I state the question in this form because in the event of my coming to the conclusion that it would, a further question will arise whether the same residual power resides in the Arbitrator. I do not need to repeat Mr. Munro's forceful argument as to the relevance and importance of this document. Without inspecting it I would assume that its contents disclose that a number of if not all the District Commissioners are recorded as having expressed views in support of Mr. Hawke's contentions and so the document may tend to have the effect of supporting the Association's case or destroying that of the Administration. But it has been submitted to the contrary that the Association's case could be better served

by its calling in evidence each of the District Commissioners, or such of them as it sees fit, who could give the best evidence of their considered views - that is viva voce evidence as distinct from a report prepared by no matter how able an officer based on his assessment of the views expressed in conference. Indeed I do not think I would be in error in taking notice of the fact that Mr. Fenbury has already in the arbitration expressed views in support of Mr. Hawke's case. It has been further submitted that the document is two years old, that it is hearsay evidence of doubtful probative value and able in no way to have its recommendations tested by cross-examination. It was said too that the Arbitrator was not bound by legal rules of evidence and quite apart from the question of privilege it was open to him to say that he would not receive this document. If he were bound by the rules of evidence I would have thought that he could not receive this report. A further and most important consideration which I must take into account is the fact that counsel for the Administration offered to make the report available to the Arbitrator on a confidential basis. This being so, leaving aside the other matters I have been discussing, I have difficulty in seeing how the Association's case could be prejudiced if the document could thus be received by him. The necessity for the preservation of candour and freedom of discussion in the particular circumstances seems to me to be very strong indeed and not lightly to be overridden. To answer the question propounded I am of the view that in all the circumstances of this case the public interest in the administration of justice would not require a Court to overrule the Administrator's claim.

What I have said does not in terms answer the question asked by the Arbitrator in the case he has stated and I turn now to consider this question. I understand him as saying that the law is correctly stated in the Grosvenor Hotel Case and in Ex parte Brown Re Tunstall and Anor (Stinvic's Case) and in this I think he is right. However in the sixth paragraph of his reasons for his decision I understand him to mean that he places the relevant position

of the District Commissioners' Report into the very high level category of documents or class of documents concerning which the reserve power of the Court should be used as was said in Ex parte Brown : "not at all where from the description of the documents it is apparent that they relate to such matters as defence, high policy, departmental minutes on matters of State and the like". If this is what he did it does not appear to me that he at this stage applied the correct principles because he failed to consider the competing interests of the administration of justice. This seems the more apparent when one looks at paragraph 10. I take the Arbitrator to be there saying that the law on privilege in relation to this type of document says that it is of a type which should not be produced, but even if he be wrong in this view and he has to consider competing public interests then he regards the public interest in non-disclosure as being the more compelling. It may be that because of what in my opinion is a mistaken categorization of the document he has only given perfunctory consideration to the real matters to which he should have directed his mind and to that extent he has not proceeded upon the correct principles of law. If he has not realised the necessity of carefully balancing the competing interests involved I think it must be said that he has not so proceeded. But in the light of what I have said had he correctly applied the law I consider that he would or should have arrived at the same result.

During the course of argument I expressed some concern at the Arbitrator's somewhat peremptory expression of opinion that the Report would not assist him in his duty to decide a proper wage structure. I thought at the time that to dismiss evidence which he had not seen or considered might well have been a denial of justice. But on reflection I have come to the view that even if he were to make the most favourable assumptions as to the contents of the Report he would be entitled to reject it as being of insufficient probative value.

Taking the view that I do, I think it unnecessary to consider whether in any event the Arbitrator has the powers that a Court would have to override the Administrator's objections if he thought they were not properly taken.

I think this is a question of some difficulty and a proper determination of it would require fuller argument than I have had and further consideration than I have been able in the time available to give it.

There remains the important question as to whether the privilege, which I have held to have been properly claimed by the Administrator, has been destroyed by publication of the document. Publication I take to mean such publication as would enable the contents of the document to become common knowledge amongst such members of the public as were interested to read it. Mr. Munro relied firstly on a sentence in the judgment of Robinson v. State of South Australia (supra) where it was said : "Lastly the privilege, the reason for it being what it is, can hardly be asserted in relation to documents the contents of which have already been published". He relied also on Kuruma v. The Queen and Christie v. Ford 2 F.L.R. 202, in which Kriewaldt, J. said at p. 209 : "Once it is appreciated that the privilege covers the information not the documents qua document, then if a copy of the document has come into the possession of the parties by means not shown to be reprehensible, the reason for the grant of privilege vanishes. The information is no longer secret. No good purpose is served by acceding to the claim for privilege". This was said in a civil action for damages for negligence arising out of a collision between two motor vehicles and the documents in question were statements made by defendants to the action to a Police Officer after the collision which was the subject of the action. I do not think that Kriewaldt, J. intended his remarks to have such a wide application as was contended for before me.

I have earlier indicated the evidence as to the dissemination of the documents. It was shown that in the case of the District Commissioners they were bound by the oath which they had taken not to divulge, except in the course of their duty, the contents of the document. It was also shown that the same consideration applied to the other senior Public Servants present at the Conference. The Under-Secretaries were similarly bound by a different oath, and I cannot think

that Mr. Tedder would in any way publish his copy so as to make it available for information of the public.

I accept Mr. Wootten's argument that I cannot draw any inference from the fact that the copy of which he was in possession was obtained from the library of the Department of District Administration and there remains only evidence of there being a further copy in the hands of Mr. Hawke. Mr. Wootten argued that the only conclusion that I could come to was that he had obtained his copy in some way which was reprehensible. I am not prepared to draw that inference but at the same time I cannot regard the existence of this one copy as being sufficient publication to destroy the privilege. That copies of what they themselves had recommended or decided should be handed for information to the District Commissioners themselves seems a natural procedure to me. As Mr. Wootten pointed out there was limited publication in Duncan v. Cammell Laird (supra) and also in Asiatic Petroleum Co. v. Anglo-Persian Oil Co. (1916) 1 P.B. 822, and in neither case was the privilege destroyed.

Accordingly in my opinion the privilege claimed has not been destroyed and the Arbitrator made no error in law in so deciding.