



# The Court of Appeal for Bermuda

## CIVIL APPEAL No 4 of 2013

Between:

**THE MINISTER OF FINANCE**

Appellant

**-v-**

**BUNGE LTD**

Respondent

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**Before: Zacca, President  
Evans, J.A.  
Ward, J.A.**

**Appearances:** Mr. Mark Pettingill, Attorney-General, & Ms. Shakira Dill, for the Appellant  
Lord Pannick, QC and Mr. Jeffrey Elkinson for the Respondent

**Date of Hearing:**

**7 November 2013**

**Date of Judgment:**

**18 November 2013**

### JUDGMENT

**Evans, J.A.**

1. This appeal is against the judgment of Hellman J dated 13 March 2013 which granted an application for judicial review made by Bunge Limited (“Bunge”) in relation to a statutory demand for information made by the Minister of Finance, the Appellant, under the International Cooperation (Tax Information Exchange Agreements) Act 2005 (“the 2005 Act”). As stated in its Preamble, the Act “makes general provision for the implementation of tax information exchange agreements entered into by the Government of Bermuda.....with other jurisdictions....”.
2. The relevant Agreement was made between the Governments of Bermuda and Argentina and came into force on 14 October 2011 (“the Agreement”). It provides by Article 1 –

“the competent authorities of the contracting parties shall provide assistance through exchange of information that is relevant to the administration and enforcement of domestic laws of the contracting parties concerning the taxes and the tax matters covered by this Agreement.....Information shall be exchanged in accordance with the provisions of this Agreement and shall be treated as confidential in the manner provided in Article 8.”

Article 5 is headed “Exchange of Information upon Request” and reads –

“1. The competent authority of a requested party shall provide upon request in writing by the requesting party information for the purposes referred to in Article 1.....”.

3. In the present case, Argentina was “the requesting party”. Article 6 of the Agreement lists certain requirements for “information” to be provided by the requesting party in support of its request to the requested party, Bermuda.

Article 6 reads –

“6. The competent authority of the requesting party shall provide the following information to the competent authority of the requested party when making a request for information under this Agreement in order to demonstrate the relevance of the information to the request:

- (a) the identity of the person under examination or investigation;
- (b) the period for which the information is requested;
- (c) the nature and type of the information requested, including a description of the specific evidence sought and the form in which the requesting party would prefer to receive the information;
- (d) the tax purposes for which the information is sought and the reasons for believing that the information request is relevant to the administration or enforcement of the domestic law of the requesting party;
- (e) to (h) etc.”.

It must be noted that the “information” that must be provided by the requesting party (Argentina) to the requested party (Bermuda) is distinct from the “information” which Argentina requests Bermuda to provide to it.

4. The Agreement contains a Confidentiality clause which reads –

**“Article 8  
Confidentiality**

1. All information provided and kept by the competent authorities of the contracting parties shall be kept confidential, in the same conditions as

that obtained under its domestic laws.....and shall be disclosed only to persons or authorities (including courts and administrative bodies) officially concerned with the purposes specified in Article 1 and used by such persons or authorities only for such purposes, including the determination of any appeal, or the oversight of the above. For these purposes, information may be disclosed in public court proceedings or in judicial proceedings.”

**The 2005 Act**

5. In order to comply with its international obligations under this and other Agreements of this sort, known collectively by their anagram “TIEA”, Bermuda enacted the 2005 Act. It provides –

**“Duties of the Minister**

- 3. (1) The Minister is the competent authority for Bermuda under the agreements.
- (2) The Minister may provide assistance to any requesting party according to the terms of the agreement with that party.

**Power to require information**

- 4. (1) The Minister may, by notice in writing served on any person in Bermuda, require the person to provide any information that the Minister may require with respect to a request for assistance by a requesting party.
- (2).....

**Power to require information**

- 5. (1) The Minister may, by notice in writing served on any person in Bermuda, require the person to provide any information that the Minister may require with respect to a request for assistance by a requesting party.
- (2).....

**Statutory duty to provide information**

- 6. (1) A person on whom a notice has been served under section 5 shall provide the information specified in the notice to the Minister, within the period specified in it.

(Failure to provide information as required by section 6(1) is a criminal offence: section 9)

**Judicial review**

8A Nothing in this Act shall preclude the right of any person to apply for judicial review of any matter undertaken pursuant to this Act.

6. Bunge, a company located in Bermuda, was served with a statutory “Notice to deliver up information pursuant to section 5 of the Act” dated 21<sup>st</sup> November 2012 and signed by the then Minister of Finance. It refers to a request for information received from the Government of Argentina “in accordance with” the Agreement, and it “directs” Bunge to “deliver to [the Minister] all such information as is within your possession, custody or control in relation to the tax payer”. “The taxpayer” is not expressly defined, but that appears to be the intention of paragraph 1.5 which reads –

“The Information relates to the Argentina taxpayer:  
Bunge Argentina S.A.  
[with its address in Argentina]”.

That company is a subsidiary of Bunge.

7. The Notice refers to the Request received from the Government of Argentina. The Minister states that it is “in writing and signed in accordance with [the Agreement] by [the] Director of International Taxation for the Federal Administration of Public Revenues who at the time of sending the Request was known to me to be a Senior Tax Official designated by the Argentinian Government”. It states “the Request seeks information (“the Information”)...in accordance with [the Agreement]” (para.1.2), that the Information “relates to the carrying out of the laws of Argentina” (para.1.4) and to the Argentina taxpayer (as above)(para.1.5) and that “The Request is in respect of a criminal tax matter and relates to the taxable period 2008 and 2009 in accordance with [the Agreement]” (para.1.6). The Notice further states –

“1.7 The said ...Director of International Taxation has signed the Request and confirms that the Information sought in the said Request is in accordance with Article 5 of [the Agreement] and I concur.”

8. Part 2 of the Notice after directing Bunge to provide “all such information [etc.] in relation to the taxpayer” (as quoted above) continues –

“Specifically, the said.....Director of International Taxation seeks from Bunge Limited details regarding the following:

In regards to Bunge Argentina S.A.

1. Bank Accounts [etc.]
2. Transfer Accounts [etc.]

3. Balances [etc.]

In regards to Bunge Limited (Bermuda)

4. Inform the legal status (branch, subsidiary, etc.) of the Uruguayan companies BUNGE URUGUAY S.A. and BUNGE AGRITRADE S.A. regarding Bunge Limited.
5. Details of transactions – inform the transactions performed (sales and purchases) by [the two Uruguayan companies].....”.

9. In summary, the Notice contains the Minister`s assertion that the Request made by Argentina “is in accordance with” the Agreement; it specifies some but not all of the information that the Agreement requires Argentina to provide to Bermuda in support of its Request; and it includes unexplained demands in respect of the Uruguayan companies.

**The issue**

10. The Application is for “an Order of Mandamus to compel production of the Request that gave rise to the Notice”. Bunge`s contention is that a notice is only valid under section 5 of the 2005 Act if the Minister requires the information “with respect to a request for assistance by a requesting party”, meaning a request made under and in accordance with the relevant Agreement. Therefore, it is submitted, the person on whom the notice is served must know the terms of the request, in order to determine that the information is required “with respect to a request for information” that the Minister has received. And in order to comply with the Agreement, Argentina must have provided to Bermuda the detailed “information” listed in Article 5 paragraph 6 (a) to (h), quoted above. That too is something the recipient of the notice is entitled to know.
11. The Minister disputes that the terms of the request must be disclosed, contending that it is a document received in confidence from the Government of a foreign country, which it is not required to disclose under the terms of the 2005 Act. Moreover, Article 8 of the Agreement imposes a strict duty of confidence on

the Government of Bermuda, whose international reputation would be seriously damaged if the confidence was broken.

12. The Judge placed great reliance on the judgment of this Court in the case of *Lewis & Ness v. Minister of Finance* [2004] Bda.L.R.66, where a similar question arose in relation to a statutory notice served in Bermuda pursuant to *The USA-Bermuda Tax Convention Act 1986* (hereinafter “the 1986 Act”). Having considered that judgment and the Confidentiality issues raised in the present case, he held –

“I therefore make an order for mandamus that the Respondent must produce to the Applicant so much of the Request as is necessary to show that the statutory requirements for the Request have been complied with, but redacted to exclude any sensitive material” (judgment para.39).

### **The Appeal**

13. In support of the Appeal, the Attorney General appearing on behalf of the Minister submitted, first, that the Judge was wrong to place reliance on *Lewis & Ness*, which was decided under the 1986 Act whose terms are different from those of the 2005 Act which governs the present case. He emphasised the importance for Bermuda of keeping documents and information confidential when they are received in confidence from other Governments, and he referred in particular to the Commentary on the OECD Model Law on which the Bermuda/Argentina Agreement is based. The Commentary includes this with regard to Article 8 (quoted above) –

“94. Ensuring that adequate protection is provided to information received from another Contracting Party is essential to any exchange of information instrument relating to tax matters. Exchange of information for tax matters must always be coupled with stringent safeguards to ensure that tax information is used on ly for the purposed specified in Article 1 of the Agreement.....

96. The information may be disclosed only to persons and authorities involved in the assessment or collection of, the enforcement or prosecution in respect of.....taxes covered by the Agreement. This means that the information may also be communicated to the taxpayer.....The Agreement only permits but does not require disclosure of the information to the taxpayer.....”.

14. He referred also to a response received from the Argentine tax authorities, apparently in relation to this case. This included –

“4. We state under sworn statement that, maintaining confidentiality and avoiding the disclosure of the terms of the information exchange request is essential for the success of tax audit proceedings that are being carried out in this company.

In our request, we have clearly expressed the importance of confidentiality as regards the information provided in it, by virtue of the provisions in Section 8 of this TIEA....”

15. The Attorney General developed further submissions regarding Bunge’s contention that “fairness requires [the Minister] to disclose details of the Request”. He referred to the judgment of the Court of Appeal for Jersey in *Durant International Corporation etc.v. A-G and Federal Republic of Brazil* [2006] JLR 112 which reads–

“34.....In drawing that balance, the confidential character of letters of request issued in respect of current criminal investigations is entitled to substantial weight. International practice is that they are kept confidential.....They commonly contain, or are accompanied by, information about the current state of the investigation. Such information may have an important bearing on the Attorney General’s decision whether to supply otherwise confidential financial information in response to the letters and it is clearly desirable that foreign courts and prosecuting authorities should be able to transmit it with proper safeguards against the disclosure of those parts of it which are confidential....”.

The judgment also referred to *R.(Evans) v. Serious Fraud Office Director* [2003] 1 WLR 299 (Div. Ct.) as showing “that the court will ordinarily start from the position that the letter of request relating to a current criminal investigation is not a disclosable document, and that disclosure to the person under investigation of information about the nature of the criminal investigation will generally be enough”.

16. Lord Pannick QC for Bunge, Respondents to the Appeal, did not dispute these statements of principle. He submitted, first, that the issue in the present case is governed by the terms of the 2005 Act. Section 3(2) reads “The Minister may provide assistance to any requesting party” - the use of “may” means that the Minister must exercise a discretion and is not a mere “conduit pipe” – and the discretion must be exercised “according to the terms of [the Agreement]”. Secondly, the power given by section 5(1) is to obtain information required “in respect to a request for assistance by a requesting party”. Whether the information demanded by the notice falls within that category cannot be determined, he submitted, unless the request is produced, and without it the

Court cannot exercise its power to review the Minister's decision. He submitted that the authorities cited by the Attorney General, *Durant* and *Evans* (above), show that fairness can require disclosure, as it did in *Lewis & Ness* (above) and as it does in the present case. With regard to Confidentiality, clause 8 in the Agreement expressly provides for disclosure in judicial proceedings, and section 8A of the 2005 Act recognises the right to claim judicial review of the Minister's decision; the clause does not prevent disclosure of the Request in these proceedings, and he submitted that it should be produced without them.

**Lewis & Ness v. Minister of Finance [2004] Bda.L.R.66**

17. We accept the Attorney General's submission that the present case is not governed by the judgment in *Lewis & Ness* and we recognise that his judgment may have given the impression that the learned Judge was over-influenced by it. He recognised that 1986 Act is in different terms from the 2005 Act, not least because section 5(5)(a) specifies that the notice must contain "the pertinent details of the request to which the notice relates", and that it gave effect to Bermuda's obligations under a different international agreement (the USA-Bermuda Tax Convention 1986). He made a detailed comparison of the two Acts (judgment paras. 12-15) in the course of which he referred to "different drafting techniques to achieve the same end". But we do not consider that the learned Judge lost sight of his target, which was to apply the 2005 Act and the TIEA in the present case. Moreover, we agree with his further reference to *Lewis & Ness* in paragraph 36 of his judgment, where he said in effect that principles of fairness and justice have to be allowed to operate under both Acts. If that is the relevant "principle" underlying the *Lewis & Ness* judgment, the Attorney General accepted that it should apply in the present case also. He could hardly do otherwise.

**Discussion**

18. Having received a request for information from the Argentine authorities, the Minister is obliged by the Agreement to consider whether the request is made "in conformity with" the Agreement; if it is not, the Minister may decline to assist



(Article 7(a)). The task includes considering whether Argentina “when making the request” has provided the “information” that Bermuda was entitled to receive under Article 6.

19. Having decided to obtain information from the Bermuda company, the Minister’s powers are defined by the 2005 Act.

The Minister may assist Argentina, but only “according to the terms of [the Agreement]” (section 3(2)). Therefore, the Minister was under a statutory obligation in Bermuda to consider whether, as required by Article 7(a) of the Agreement, the request was in conformity with Article 1, and whether Argentina had provided the relevant information required by Article 6. If satisfied, the Minister was permitted to issue a notice in writing requiring information from the Bermuda company “with respect to [the] request for assistance” the Minister had received (section 5(1) of the 2005 Act).

20. Section 8A of the Act expressly permits judicial review of the Minister’s decisions. In our judgment, the conclusion is inescapable that the legislators contemplated that the terms of the request would be made available to the Court for that purpose. Without them, the review could not be carried out.

21. Disclosure to the Court and for the purpose of court proceedings is expressly permitted by Article 8 of the Agreement. Such disclosure therefore does not involve any breach of the Article, and we note that the Argentine authorities in the present case, although they stressed the need for confidentiality in tax matters of this sort, recognised that the obligation is defined in Article 8 (paragraph 14 above).

22. More difficult is the question whether disclosure of the terms of the request in advance of Court proceedings involves a breach of Article 8. For practical reasons, it would clearly be unsatisfactory if proceedings had to be begun before disclosure could be made. The correct legal analysis, in our judgment, is as follows –

- (a) on the true construction of section 5(1) of the 2005 Act, the person on whom the notice is served is entitled to see, and the Minister is bound to produce, the terms of the Request, so far as they are relevant to the notice that is given. Hence the Judge's qualified ruling "so much of the Request as is necessary to show that the statutory requirements for the Request have been complied with, but redacted to exclude any sensitive material" (judgment para.39), with which we agree. Without production of the terms of the Request, the person cannot know that the notice is valid;
- (b) the "principle of justice and fairness" applied in *Lewis & Ness* both supports the above construction of the 2005 Act and provides an independent ground for requiring production of the terms of the Request in a particular case;
- (c) disclosing the terms of the request in the above circumstances does not involve any breach of Bermuda's international obligations under Article 8 of the Agreement. When proceedings are commenced, production is expressly permitted. In advance of proceedings, the rights of the person on whom the notice is served can be formulated in terms of the order which would be made by the Court, if an Application were made to it. Those rights can and should be recognised before proceedings are begun.

23. The limits of disclosure in court proceedings are governed by the discretion of the Court, and one consequence of the above analysis is that the extent of disclosure before proceedings are begun may be subject to the same limits as the Court would be likely to impose. In the present case, as the Attorney General correctly submits, the notice in many places does refer to the terms of the request or indicates what information was provided by Argentina as required by Article 6. But that is not the same as producing the request, to the extent indicated by the Judge (see above), and it prompts the question – if the terms of the request including all the information required by Article 6 are included in the notice, what is the objection to producing the request, redacted as necessary, itself? However, if it were a case where the notice set out the terms of the request *verbatim*, that might be held to be sufficient disclosure and there would be no right to see the original, before or after proceedings were begun.

#### **Further matters**

24. In paragraph 41 of his judgment, the Judge appears to have contemplated that in a disputed case, the Court might examine the documents in issue "at a hearing in the absence of the Applicant". We consider it most unlikely that that would be

permissible, but it has not been suggested in the present case and we express no other view.

25. The submissions for the Minister came close to suggesting that the person on whom a notice is served under section 5 of the 2005 Act must accept the Minister's decision that the notice is in accordance with the request received from the foreign state, thus (possibly) raising the constitutional issue whether the Minister has an unlimited discretion which cannot be questioned even by the Courts, famously exemplified by *Liversidge v. Anderson* [1942] AC 206 (and cf paragraph 37 of the judgment in the present case). We should record that the Attorney General expressly disclaimed any such contention in the present case, and in any event it would clearly be impossible in the face of section 8A which permits judicial review.

### **Costs**

26. The Attorney General submitted that, regardless of the outcome, no Costs Order should be made against the Minister in proceedings of this sort. The reason he gave was that the proceedings are necessary in order to ensure that Bermuda performs its international obligations to preserve confidentiality and to safeguard its reputation for observing them.
27. We could not accept this submission because the Court would only order costs against the Minister in a case where the Court was unable to accept submissions made on his behalf as to the content of Bermudian law. Moreover, section 4 of the 2005 Act provides –

#### **“Grounds for declining a request for assistance**

4. (1) The Minister may decline a request for assistance where the requesting party does not agree to pay the costs of providing the assistance, whether incurred by the Minister or any other person.”

We can assume, therefore, that the Minister is entitled to be indemnified by Argentina against all costs properly incurred, unless for any reason it was decided to proceed without that safeguard in the present case.

**Conclusion**

28. For the above reasons, the Appeal is dismissed. The Minister shall pay the Appellant`s costs, to be assessed if not agreed.

*Signed*

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Evans, JA

*Signed*

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Zacca, P

*Signed*

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Ward, JA