The Court of Appeal for Bermuda

CIVIL APPEAL Ap of 2016

BETWEEN:

THE MINISTER OF FINANCE

Appellant

-and-

AP

Respondent

Before: **Baker, President**
Bell, JA
Bernard, JA

Appearances: Mr. Jeffrey Elkinson, Conyers Dill & Pearman Limited, for the Appellant
Mr. Steven White, Cox Hallett Wilkinson Limited, for the Respondent

Date of Hearing: **18 November 2016**

Date of Judgment: **25 November 2016**

JUDGMENT

Duty of disclosure on TIEA applications - whether usual principles affected

Bell, JA

Introduction

1. This appeal arises from a ruling made by Hellman J. dated 23 March 2016, in which he discharged an earlier production order ("the Production Order"),

which he had made on an ex parte basis, following an application made pursuant to Section 5 (2) of the International Co-operation (Tax Information Exchange Agreements) Act 2005 ("the 2005 Act"). The Production Order itself was obtained pursuant to a request ("the Request") from the Government of Republic A ("the Requesting Government") to the Government of Bermuda, which had been received on 18 August 2015. The applicable Tax Information Exchange Agreement ("TIEA") made between the Requesting Government and the Government of Bermuda is dated 7 October 2010, had become effective on 3 November 2010, and is defined as "the Agreement".

2. By a cross-summons dated 16 October 2015 issued in response to the Respondent's application to set aside the ex parte order, the Appellant ("the Minister"), the plaintiff in the court below, had sought an order backed by a penal notice that the Respondent should comply with the Production Order to the extent that it had not already done so.

3. The learned judge began his judgment by setting out the statutory framework contained in the 2005 Act, by which the Government of Bermuda gives effect to requests for mutual legal assistance made pursuant to TIEAs. The judge set out the pertinent parts of the Agreement, pursuant to which the application leading to the grant of the Production Order had been made, and then turned to the request itself, which related to the tax affairs of two nationals of the Requesting Government, whom the judge defined as "the Subjects". The tax purposes for which the underlying information had been requested were stated to be, first, the determination, assessment and collection of taxes, and, secondly, the investigation or prosecution of tax matters. As to prosecution, the Request stated that it was believed that the availability of the requested information would assist the Requesting Government in launching a criminal prosecution against the Subjects for a wilful attempt to evade taxes and related offences prescribed in the relevant act of the Requesting Government.

4 The judge then turned to the four grounds on which the Respondents had sought review of the Production Order. The first was material non-disclosure, the second related to the breadth of the material covered by the Production Order, the third related to the period of time covered by the Production Order, and the fourth was the fact that the Production Order had sought the production of material said to be covered by legal professional privilege.

Material Non-Disclosure

5. The judge began by setting out the ambit of the duty of disclosure as summarised in Commercial Injunctions by Steven Gee QC in the following terms:-

> "Any applicant to the court for relief without notice must act in the utmost good faith and disclose to the court all matters which are material to be taken into account by the court in deciding whether or not to grant relief without notice, and if so on what terms. This is a general principle which applies to all applications for relief to be granted on an application made without notice. It applies not just to disclosure of facts but to absolutely anything which the judge should consider. It is part of the duty of an applicant for without notice relief to present the application fairly."

6. The judge pointed out that the above principles were well recognised in Bermuda, and that on an application for an ex parte order, the applicant's duty of full and frank disclosure included all material matters which were known or ought to have been known by the requesting party. The judge referred specifically to the fact that it was no answer to an allegation of non-disclosure that the applicant did not disclose the matters in question to the court because the requesting party did not disclose them to the applicant.

7. The judge then set out the relevant law in terms of the authorities, and I will come to these in due course. Particularly, the judge referred to two decisions of

this Court which had been decided under the provisions of the USA – Bermuda Tax Convention Act 1986 ("the 1986 Act"); the judge had previously referred in his ruling to the fact that the 1986 Act contained a different scheme to that of the 2005 Act, noting that under the 2005 Act, it would generally be impractical for the court to seek to determine a dispute about any facts stated in the request, and the court would not generally attempt to do so. But the judge noted that such impracticality would not affect the ability of the court to consider whether there had been full and frank disclosure on the ex parte application.

8. The judge identified three instances of material non-disclosure, the third of which he dealt with in the context of the third ground mentioned above, namely that the period of time covered by the Production Order was too wide, and included material that was not foreseeably relevant. The first instance of material non-disclosure related to the fact that the request made by the Requesting Government had stated that it did not possess any details of three accounts ("the Three Accounts"). These had been referred to in Annexure A to the Request, which identified three accounts in HSBC Bank Geneva (as defined) in the name of the Respondent, the assets in which the Requesting Government maintained were in fact held by the Respondent for the Subjects.

9. The particular non-disclosure stems from the statement made in the Request that the Requesting Government did not possess any details of the Three Accounts, including the bank statements for the relevant period, and, having tried all legal routes, had been unable to obtain them. As the judge found, this statement was demonstrably incorrect. There had been a previous production order dated 3 February 2012, pursuant to which the Respondent had filed an affidavit and exhibit, including precisely this material, which had then been forwarded to the Requesting Government. As the judge commented, this material formed the core of the material sought by the current request. Submissions were made as to why the request might have overlapped the

previous request, but the judge pointed out that submissions were not evidence, concluding that if the court had been made aware of the previous requests, it would not have ordered the provision of duplicate material without receiving an explanation as to why it had been sought.

10. The second material non-disclosure arose because the Request stated that enquiries carried out by the income tax authorities within the Requesting Government had revealed that the Subjects had income and assets taxable in their home country which had not been disclosed or reported to the relevant authorities. The judge carried on to point out that what the Request had omitted to mention was that the material which had been provided pursuant to the 2012 request and production order showed that no transactions had been carried out on two of the Three Accounts, and that the third account had been opened in 2004, and had fallen to a zero balance in 2007. Based on the material provided pursuant to the previous request, the Respondent's tax assessment for the assessment year 2005/06 had been reopened. The consequent re-assessment had been the subject of a written ruling by two Deputy Commissioners of Income Tax in the relevant governmental department of Republic A ("the Tax Commissioners") on 16 March 2015. The Tax Commissioners had concluded that the source of the funds received into the third account had been verified, and were accepted as being sourced from business receipts of the Respondent's group entities. Consequently, the Tax Commissioners' written ruling concluded with a statement that the re-assessment proceeding, initiated in consequence of the material provided pursuant to the 2012 request and production order, "is hereby dropped".

11. The judge understandably regarded the failure to disclose that ruling as a serious instance of material non-disclosure. He described it as highly material to the court's decision to make the Production Order, and said that if he had been aware of the relevant material on the ex parte application, he would not have made the Production Order without receipt of some evidence explaining

why the relevant department was seeking to disregard its own findings as to the source of the monies deposited into the third account. The judge pointed out that once the Minister had been alerted to the point by the affidavit evidence filed by the Respondent, he would have expected the Minister to file evidence providing an explanation, not only as to why the findings in the report had been disregarded, but also as to why material non-disclosure had taken place. He commented that it was surprising that the Minister had chosen not to file any such evidence. The judge concluded by saying that there had been a serious failure by the Minister to discharge his duty of full and frank disclosure, that the failure had been neither remedied nor explained, and that in the circumstances he was satisfied that the Production Order should be discharged.

The Remaining Grounds on which Review was Sought

12. In light of the judge's finding on the first ground on which review of the Production Order was sought, that of material non-disclosure, it was not strictly necessary to consider the remaining grounds, but the judge understandably chose to do so out of deference to the submissions which had been made to him. However, this appeal is concerned only with the issue of material non-disclosure, and for that reason there is no need for this Court to consider the second and fourth grounds upon which the Respondent sought review, although it is necessary to consider the third ground, that the period of time covered by the Production Order was too wide, since this ground also was one of the bases upon which the judge found there to have been material non-disclosure. The senior corporate counsel for the Respondent had, in his affidavit evidence, set out the corporate history of the Respondent, dealing with the time of its incorporation, its status as a publicly traded company, and the time of its subsequent amalgamation with another company. The judge read the statement made in the Request as suggesting that the information in the possession of the Requesting Government and its income tax authorities

(indicating that the Subjects had been actively engaged in setting up the Respondent company), as referring to its merger, rather than its incorporation. The judge regarded the failure of the Request to make this clear as being a further instance of material non-disclosure, since he accepted the statement of corporate counsel for the Respondent that the only possible interest of the Subjects in the Respondent prior to the merger would have been as holders of publicly traded stock. The judge concluded that had he not discharged the Production Order on the basis on the non-disclosure previously referred to, he would have been minded to vary the start date for the period with which he was concerned to the date of the incorporation of the Respondent.

Grounds of Appeal

13. As indicated above, the essential thrust of the Notice of Appeal was in relation to the judge's finding that there had been material non-disclosure on the application made to him for the Production Order. First, it was said that the nature of the hearing before the judge was "more administrative than adversarial", and that the ordinarily principles relating to the discharge of orders obtained ex parte on the grounds of non-disclosure were either not applicable, or should have been tempered having regard to the inherently administrative nature of the application. Secondly, it was submitted that the judge failed to give consideration to the principles of comity as between treaty partners, in relation to which it was submitted that "any allegations concerning a statement by the requesting country", by which I understand the Notice of Appeal to mean any non-disclosure in relation to the application for a Production Order, was not a matter to be dealt with by the court, but should have been dealt with between the treaty parties. Next it was suggested that in relation to the 2012 application, the judge should have taken into account the fact that the Minister could not reject a request made pursuant to a TIEA when brought forward on the basis of a criminal investigation, as opposed to the civil investigation which had been the basis of the 2012 production order. Next, it

was suggested that the fact that the Requesting Government had in the Request indicated that this was an initial request (thereby ignoring the existence of the 2012 request) was something on which the Minister was entitled to rely. The next ground was that in insofar as there had been a written ruling by the Tax Commissioners, the Minister had relied upon its treaty partner, and could not be held accountable for their omission, and should not have the burden of ascertaining the true facts in issue. This ground carried on to say that the judge had erred in finding that this was a serious instance of material non-disclosure since the judge had, by implication, found that the Minister was under a duty to challenge or investigate the statements made by the Requesting Government. The next ground was that the judge had failed to give sufficient weight to the fact that the findings of the Tax Commissioners' assessment related to the Respondent, rather than to the Subjects. Finally, was it was submitted that insofar as the judge had found that the Respondent had previously provided the documentation sought, the correct course for the judge to follow was to amend the Production Order, rather than to discharge it.

The Nature of the Application to the Judge

14. The notion that the normal rules relating to ex parte applications were inapplicable to applications made pursuant to the 2005 Act lies at the root of this appeal, and can no doubt be considered together with the ground that because the application was made pursuant to the treaty underlying the 2005 Act, the judge could essentially not go behind any material non-disclosure in the application, but was obliged to leave that as a matter between the Requesting Government and the Government of Bermuda. Mr. Elkinson for the Minister submitted that once the Respondent had raised issues regarding the accuracy of the information submitted in support of securing the Production Order, it should have been left to the Minister to take matters up with the Requesting Government, and the judge should have stayed his order until such

time as there was an explanation, rather than have set it aside. The efficacy of such a course is rather gainsaid by the fact that the Minister in this case had had the opportunity to ascertain the true position from the Requesting Government, after the Respondent's complaints had been made, with a view to filing evidence to explain the "demonstrably incorrect" information which had been contained in the Request. As the judge pointed out in relation to the failure to mention the finding of the Tax Commissioners, he would have expected the Minister to file evidence providing an explanation as to why those findings had been disregarded, and also as to why the material non-disclosure had taken place. The judge was understandably surprised that the Minister had chosen not to file any such evidence.

15. Kay JA dealt with similar issues in this Court in the case of *The Minister of Finance –v- AD* [2015] CA Bda 18 Civ. That case was concerned with the right of a person against whom a production order had been made to secure disclosure of the documents which had been placed before the judge by the Minister in support of the application. Having identified that issue, Kay JA immediately referred to the judge's finding in the case of *Ministry of Finance –v- E,F,H and O* [2014] Bda LR 54, to the effect that in accordance with general common law principles, the subject of the production order was entitled to such disclosure. Kay JA considered "that a person who is served with an order which had been obtained ex parte has a common law right, properly described as fundamental, to disclosure of the material placed before the judge on the ex parte application". Particularly, noted Kay JA, until recent amendments to the legislation, the procedure in Bermuda had been based on executive decision subject to judicial review. He carried on to say ... "the choice of moving to an originating judicial process necessarily carries with it the fundamental rights which inhere in such a process". Finally, Kay JA rejected the contention of counsel appearing for the Minister in that case that an application by the Minister was of an exceptional kind, which did not necessitate the application attracting the same rigorous standards of fairness by way of fundamental right

as arose in such cases as *Al Rawi v. Security Service and others* [2102] 1 All ER 1 and *R (BSkyB Ltd) –v- Central Criminal Court* [2012] QB 785. The latter case concerned an application for a production order under the UK Police and Criminal Evidence Act 1984, and as such bore marked similarities to the facts of the case before us. Counsel had submitted that there was a distinction to be drawn between the procedure to be adopted at trial, and what was essentially a procedural application for an order in aid of a police investigation. Moore-Bick LJ stated (paragraph 28)

> "there is no material distinction for these purposes between a trial and any other form of contested proceedings. It is a fundamental principle of fairness at common law that a party should have access to the evidence on which the case against him is based and thus an opportunity to comment on it and, if appropriate, challenge it"

Mr. Elkinson urged that equitable principles were not applicable to applications of this nature. But the principles governing ex parte applications, both in terms of those governing the right to have access to the evidence presented to the judge, and those governing the obligation to give full disclosure of all material facts, are common law principles, and apply to ex parte applications whether made, as here, under the provision of the 2005 Act, or in the context of seeking equitable relief, such as when an application for a Mareva injunction is made.

16. A further citation that is appropriate for mention on this aspect of matters comes from the case of *An Informer –v- A Chief Constable* [2013] QB 579, where Toulson LJ (as he then was) said at paragraph 73;

> "The duty to make a proper disclosure to the court on a without notice application is a duty imposed by the courts under their inherent powers to regulate court procedures, and it applies in both civil and criminal litigation".

17. And, finally, I would refer to the case of *Commercial Bank of The Near East Plc – v- A,B,C and D* [1989] Vol 2 Lloyd's Law Reports 319, where Saville J (as he then was) said at page 323;

> "It must always be remembered that the granting of ex parte relief provides (albeit so that justice can be done) an exception to the most basic rule of natural justice – that both parties should be heard. Thus the need for full disclosure by the party seeking relief – and thus to my mind the need to continue to make full disclosure while the proceedings remain on an ex parte basis".

18. In regard to the ground of appeal suggesting that different considerations arose because of the relationship between treaty partners such that the court should not deal with matters of non-disclosure, but should leave that as a matter to be resolved between the treaty partners themselves, Mr. Elkinson produced no authority to suggest that different considerations arose in the context of applications made pursuant to a treaty. More significantly in this regard, he relied upon the cases which had been decided under the very different regime applicable to requests for production orders under the 1986 Act. The judge had referred in his ruling to the fact that the 1986 Act contained a different scheme to that of the 2005 Act. And no great weight should be put on those cases which arose pursuant to applications made under the 1986 Act. But there is a further point to be made here, which is that the terms of the treaty itself do not support Mr. Elkinson's contention. Article 1 of the treaty concludes with the following words:

> "The rights and safeguards secured to persons by the laws or administrative practice of the requested Party remain applicable to the extent that they do not unduly prevent or delay effective exchange of information."

These words strongly support the argument that the duty of disclosure is unaffected by the treaty.

19. It is no doubt appropriate at this stage to deal with one further aspect of material non-disclosure. As I understood the argument for the Minister, this was that the Minister was entitled to rely on what he described as the certification of the requesting country, which, submitted Mr. Elkinson, was something that the Minister could not go behind. It was argued for the Respondent that the Minister had been aware of the 2012 production request, and so aware that pursuant to this the relevant documents had been produced by the Respondent and had been sent to the Requesting Government. Mr. Elkinson advised that there had been seventy-seven requests between 2013 and 2014, suggesting that the Minister could not be expected to focus on the earlier application and by means of a comparison conclude that the latter application was inaccurate, insofar as it failed to refer to the 2012 production and the matters which arose in consequence of that.

20. To my mind, that submission seems to miss the point of the obligation of full and frank disclosure of all material matters, and the consequences which fall to be considered when there is non-disclosure of material matters. This is not a question of determining fault as between the Minister and the Requesting Government. It matters not to my mind who was responsible for the inaccurate or incomplete information being put before the judge on the ex parte application for the Production Order. The question is not where the responsibility or blame lies for the inaccurate and incomplete information; the treaty parties might as well be agent and principal, insofar as the Minister is seeking the Production Order not for his own benefit, but in the discharge of Bermuda's treaty obligations for the benefit of its treaty partner, in this case the Requesting Government. What matters is that misleading formation was presented to the judge on an ex parte application. I therefore agree with the judge when he stated at paragraph 22 of his ruling that "It is no answer to an allegation of non-disclosure that the applicant did not disclose such matters to the court because the requesting party did not disclose them to the applicant." Where, as in this case, the misinformation and omissions were highly

material, it is hard to see what alternative the judge could have had but to set aside the ex parte order.

21. So in relation to the first and second grounds of appeal, I would hold that these have no merit.

22. Turning to the third ground, that the judge failed to take into account that the Minister could not reject a request made pursuant to a TIEA, I am by no means satisfied that the Minister is in fact precluded from taking up queries with the Requesting Government, based on the OECD manual on the implementation of exchange of information provisions for tax purposes, which was included in the material put before us. In relation to the content of the request, the document included any number of comments suggesting that the converse was the case, for example as follows:

> "An incomplete request will increase delays since the foreign company or authority may have to ask for more details to answer the request properly."

> "The competent authorities should consult in situations in which the content of the request, the circumstances that led to the request, or the foreseeable relevance of requested information are not clear to the requested State. However, once the requesting State has provided an explanation ..."

These extracts suggest to me that the position as put in this third ground is overstated, and is in any event covered by the comments made in paragraph 20 above.

23. Similarly, the fourth ground can be dealt with shortly, insofar as it too has been dealt with in paragraph 20 above. To my mind, the suggestion that the Minister may have been entitled to rely on the inaccurate information given by the Requesting Government does not mean that that is an end of the matter. As stated before, the question is not whose fault it was that inaccurate or

misleading information was presented to the judge: it is simply that such was the case.

24. In relation the written rulings of the Tax Commissioners, the fifth ground of appeal urges that the judge erred in holding that the failure to disclose that the written ruling was a serious instance of material non-disclosure, as the judge found it to be. Not surprisingly, the judge regarded it as "highly material" to his decision to make the Production Order. It is hard to see how he could have held otherwise, when the relevant income tax department was seeking to disregard its own finding as to the source of the monies deposited in the third account, and yet had failed to disclose that earlier finding.

25. The sixth ground of appeal can be run together with the prior one, insofar as it was suggested that the finding of the Tax Commissioners related to the Respondent, rather than to the Subjects. In my view, that matters not. What does matter is that the Tax Commissioners had investigated the position on the basis of the material disclosed in 2012, and had concluded that the funds in the third account were accepted as being sourced from business receipts of the Respondent group entities, so that the re-assessment of the Subjects' tax position was dropped. The terms of the 2015 requests should be borne in mind; the basis for repeating the 2012 request was that it was again maintained that the Subjects had used the Respondent's bank accounts to shield unaccounted assets from the tax department by transferring them illegally and placing under the control of the Respondent, while they were still in fact held for the benefit of the Subjects. Annexure A said in terms that Republic A's tax authorities had exhausted all domestic means to get the information sought, and were seeking the information in question because of the inadequacy of the information they had. Yet part of the information they were seeking had already been provided. Against this background it is hard to think of anything more material than the finding by the Tax Commissioners that the funds in the particular account were indeed sourced from business

receipts of the group entities, that is to say they belonged to those group entities, and not to the Subjects.

26. Finally, I should address the submission made on behalf of the Minister that the judge should have amended the Production Order rather than discharged it. This might have been an appropriate course had the error been minor and innocent. But it was neither of these; the failure to advert to the 2012 request seems to have been a tactical decision made by the Requesting Government. I make it clear that I attach no blame to the Minister in regard to this aspect of matters. But it was a highly material piece of information, and the fact that the Tax Commissioners had in the course of the re-assessment of the Subjects' tax position reached the conclusion that they did, and that this was withheld from the judge, can only be described as egregious. If there had been some explanation, it may conceivably have been open to the judge to consider the making for a further production order. But looking at all the circumstances of this case, it seems to me that the judge had little choice but to discharge the Production Order, for the reasons he gave.

The Stanford Case (*Stanford International Bank Limited* [2011] Ch. 33 EWCA)

27. I am conscious that I have not previously made reference to this case, to which both counsel referred. Mr. Elkinson maintained that the case should be distinguished on the basis that it was not a treaty case. Mr White for the Respondent relied upon the case as authority for the proposition that since the application was a judicial process initiated at the request of the foreign state, there was no need to draw a distinction between the Minister's knowledge and that of the Requesting Government. That no doubt reinforces Mr White's position, but for the reason set out in paragraph 20 above, I would have regarded that proposition as an entirely logical one in the circumstances of this case.

Conclusion

28. For the reasons set out above I do not find any merit in the remaining grounds of appeal, and would therefore dismiss the appeal. At the end of the day, the point is a relatively narrow one – whether the common law safeguards applicable to ex parte applications generally are applicable to ex parte applications for relief under the 2005 Act. For the reasons given above, I believe they are.

Bell, JA

I agree

Baker, P

I agree

Bernard, JA