In The Supreme Court of Bermuda

CIVIL JURISDICTION

2016: No. AA1

In the matter of a request for exchange of information under the International Cooperation (Tax Information Exchange Agreements) Act 2005

BETWEEN:-

MINISTER OF FINANCE

Plaintiff

-and-

(1) AAA GROUP LIMITED
(2) WX as the former Liquidator of
AAA PRIVATE TRUST COMPANY LIMITED

Defendants

REDACTED JUDGMENT

(In Chambers)

Application to set aside production order under International Cooperation (Tax Information Exchange Agreements) Act 2005 – whether Constitution engaged so as to give rise to duty of heightened scrutiny – whether material non-disclosure – whether production orders too wide – whether committal proceedings lie for breach of production order

Date of hearing: 18th May 2016
Date of judgment: 1st July 2016

Mr Jeffrey Elkinson, Conyers Dill & Pearman Limited, for the Plaintiff

Mr Keith Robinson and Mr Henry Tucker, Appleby (Bermuda) Limited, for the Defendants

Introduction

1. In this ruling I shall refer to the various parties and entities mentioned as follows:

   (1) The Plaintiff, the Minister of Finance, as "the Minister".

   (2) The requesting State, the Kingdom of Sweden, as "Sweden".

   (3) The investigating agency, the Swedish Tax Board, as "STB".

   (4) The Defendants collectively as "AAA".

   (5) The First Defendant, AAA Group Limited, as "AAA Group".

   (6) AAA Private Trust Company Limited as "AAA PT".

   (7) The Second Defendant, WX as the former liquidator of AAA PT, as "the Liquidator".

2. By summonses dated 2nd March 2016 AAA seek review of two production orders ("the Production Orders") dated 4th February 2016. They were made by the Court *ex parte* on an application by the Minister, which was made on 2nd February 2016 pursuant to: (i) section 5(2) of the International Cooperation (Tax Information Exchange Agreements) Act 2005 ("the 2005 Act"); and (ii) a request ("the Request") dated 3rd December 2015 made under the Tax Information Exchange Agreement or "TIEA" between

Sweden and Bermuda which was concluded on 16th April 2009 ("the Agreement").

3. By orders dated 24th March 2016 the Court granted AAA leave to seek a review of the Production Orders and ordered that the Minister disclose to AAA the documents filed with the Court on the Minister's *ex parte* application.

Statutory framework

The 2005 Act

4. The 2005 Act contains the statutory mechanism by which Bermuda gives effect to requests for mutual legal assistance made pursuant to TIEAs entered into by the Government of Bermuda.

5. Section 3(1) provides that the Minister is the competent authority for Bermuda under the TIEAs. Section 3(2) provides that the Minister may provide assistance to any requesting party according to the terms of the agreement with that party.

6. Section 4(1) provides that the Minister "*may*" decline a request for assistance where there is provision in the applicable agreement for him to do so. Section 4(2) sets out a number of circumstances in which the Minister "*may*" also decline a request for assistance. These include at section 4(2)(a) if the information relates to a period that is more than six years prior to the tax period in respect of which the request is made; and at 4(2)(c) if the request pertains to information in the possession or control of a person other than the taxpayer that does not relate specifically to the tax affairs of the taxpayer.

7. I am satisfied that in this particular statutory context "*may*" means "*may*" not "*shall*". Thus the grounds for declining a request for assistance set out in section 4 are discretionary. The Minister is not obliged to decline a request

where there are grounds for him to do so. I shall return to this point later in the judgment when I come to consider what role, if any, the Constitution plays in the construction of section 4.

8. Section 5(1) provides that where the Minister has received a request in respect of which information from a person in Bermuda is required, the Financial Secretary may apply to the Supreme Court for a production order to be served upon the person referred to in the request directing him to deliver to the Minister the information referred to in the request. Section 5(11) provides that for these purposes the Financial Secretary includes an Assistant Financial Secretary.

9. Section 5(2) provides that the Supreme Court may, if it is satisfied that the conditions of the applicable TIEA are fulfilled, or alternatively that the Minister's decision to honour a request is in the interest of Bermuda, make a production order requiring the person referred to in the request: (a) to deliver to the Minister the information referred to in the request; or (b) to give the Minister access to such information, within 21 days or, pursuant to section 5(3), such other period as the Court may specify.

10. Section 5(6) provides that a person served with a production order under section 5(1) who is aggrieved by its service may seek review of the order within 21 days of its service. Section 5(6B) provides that upon such application the Court shall decide whether to grant the person a right of review. Section 5(6A) provides that a person served with a production order who wishes to view the documents filed with the Court on the application for the production order shall not be entitled as against the Minister to disclosure of such documents until he has been granted a right of review under section 5(6B) and the Court has directed disclosure of such documents as it considers appropriate for the purposes of the review.

11. Section 9(1) provides that where a person is required by a production order to produce information to the Minister, and contravenes the order without reasonable excuse, the person is guilty of an offence. Section 9(4) provides

that an offence under this section is triable summarily and that the offender is liable on conviction to a fine not exceeding $10,000, imprisonment for a term not exceeding six months, or to both.

The Agreement

12. Article 1.1 of the Agreement sets out the object and scope of the Agreement.

"*The competent authorities of the Parties shall provide assistance through exchange of information that is relevant to the administration or enforcement of the domestic laws of the Parties concerning taxes covered by the Agreement. Such information shall include information that is relevant to the determination, assessment and collection of such taxes, the recovery and enforcement of tax claims, or the investigation or prosecution of tax matters. 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.*"

13. Article 4.2 glosses the meaning of "*relevant*".

"*The term 'relevant' wherever used in the Agreement with respect to information, shall be interpreted in a manner that ensures that information will be considered relevant notwithstanding that a definite assessment of the pertinence of the information to an on-going investigation could only be made following the receipt of the information.*"

14. Article 5.5 provides in material part:

"*This Agreement does not create an obligation on the Parties to obtain or provide:*

. . . . .

(b) information relating to a period more than six years prior to the tax period under consideration;

(c) information unless the applicant Party has pursued all means available in its own Party to obtain the information, except those that would give rise to disproportionate difficulties;

(d) information in the possession of or obtainable by a person other than the taxpayer that does not directly relate to the taxpayer."

15. Article 5.7 provides:

"*If information is requested that relates to a person that is not a resident, nor a national, in one or other of the Parties, it shall also be established to the satisfaction of the competent authority of the requested Party that such information is necessary for the proper administration and enforcement of the fiscal laws of the applicant Party.*"

16. Article 5.8 provides in material part:

"*The competent authority of the applicant Party shall provide the following information to the competent authority of the requested Party when making a request for information under this Agreement to demonstrate the relevance of the information sought to the request:*

. . . . .

(c) to the extent known, the name and address of any person believed to be in possession of or able to obtain the information requested;

. . . . .

(e) a statement that the applicant Party has pursued all means available in its own Party to obtain the information, except those which would give rise to disproportionate difficulties;

and to the fullest extent possible:

. . . . .

(g) the tax purposes for which the information is sought and why it is relevant to the determination of the tax liability of a taxpayer under the laws of the applicant Party;".

17. Article 5.6 provides:

"*Where the applicant Party requests information with respect to a matter which does not constitute serious tax evasion, a senior official of its competent authority shall certify that the request is relevant to, and necessary for, the determination of the tax liability of the taxpayer under the laws of the applicant Party.*"

18. Article 1(q) defines "*serious tax evasion*" to mean:

"*... willfully, with dishonest intent to defraud the public revenue, evading or attempting to evade any tax liability where an affirmative act or omission constituting an evasion or*

attempted evasion has occurred. The tax liability must be of a significant or substantial amount, either as an absolute amount or in relation to an annual tax liability, and the conduct involved must either constitute a systematic effort or pattern of activity designed or tending to conceal pertinent facts from or provide inaccurate facts to the tax authorities of either Party, or constitute falsifying or concealing identity. The competent authorities shall agree on the scope and extent of matters falling within this definition;".

19. Article 13.2 provides:

"*The Agreement shall enter into force on [25th December 2009] and shall thereupon have effect*

(a) for criminal tax matters, from the date of entry into force; however, no earlier than January 1st, 2010;

(b) for all other matters covered in Article 1, on taxable periods beginning on or after the first day of January of the year next following the date on which the Agreement enters into force, or where there is no taxable period, for all charges to tax arising on or after the first day of January of the year next following the date on which the Agreement enters into force, however, no earlier than January 1st, 2010."

The Request

20. The Request identifies the persons under examination as BBB, a Swedish company, and DE, who is alleged to be resident in Sweden. Information is sought for the period 1st January 2010 – 31st December 2013 inclusive. The taxes to which the request relates are "*Personal income, tax on capital income (dividend, capital gain)*" and the purpose for which the information is requested is the determination, assessment and collection of taxes.

21. The relevant background is set out in the Request and reproduced in the unredacted version of this judgment.

22. The Request goes on to state that the persons believed to be in possession of the information requested are AAA PT and AAA Group. The information sought from AAA Group relates to AAA PT and not AAA Group. The Request bears a signature above the rubric "*Authorised signature of*

requesting competent authority". Applying the presumption of regularity, it is to be presumed that the signatory was indeed authorised unless the contrary is demonstrated. See, for example, R v CII [2008] EWCA Crim 3062 at para 26.

Material sought

23. The Production Orders require the production of the information requested in the Request. This is summarised in the unredacted version of this judgment.

24. The Production Orders were served by cover of letters dated 5th February 2016 from Wayne Brown, Assistant Financial Secretary (Treaties), which stated that the name of the requesting country was Sweden and that the taxable period under investigation was 1st January 2010 to 31st December 2013.

25. The covering letters included an explanatory paragraph which stated, among other things, that during the period under investigation AAA Group and AAA PT had the same ultimate owner. That statement was not justified by the Request and should not have been made.

Grounds on which review is sought

26. I do not propose to address each and every point made by AAA. However the main grounds on which they seek review of the Production Orders, although characterised under a number of headings at the hearing, may be summarised as follows:

    (1) There was material non-disclosure by the Minister when obtaining the Production Orders.

(2) The Production Orders include material which is not foreseeably relevant. For this and other reasons they do not comply with the Agreement.

(3) There are technical defects on the face of the Production Orders.

27. AAA submit as a preliminary point that the Production Orders should receive heightened scrutiny from the Court as they involve a derogation from the companies' constitutional rights to protection for privacy of home and other property and protection from deprivation of property.

Preliminary point: the Constitution

28. Section 7 of the Constitution is headed "*Protection for privacy of home and other property*".

29. Section 7(1) provides that except with his consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

30. Section 7(2) provides in material part that nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of section 7 to the extent that the law in question makes provision *inter alia* to enable an officer or agent of the Government to enter on the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax, rate or due, except so far as that provision, or, as the case may be, thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

31. Section 13 of the Constitution is headed "*Protection from deprivation of property*".

32. Section 13(1) provides that no property of any description shall be compulsorily taken possession of, and no interest in or right over property of

any description shall be compulsorily acquired, except where certain conditions set out in that subsection are satisfied.

33. Section 13(2) provides in material part that nothing contained in any law shall be held to be inconsistent with or in contravention of section 13(1) – (a) to the extent that the law in question makes provision for the taking of possession or acquisition of any property, interest or right *inter alia*: (i) in satisfaction of any tax, rate or due; and (ix) for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry; except so far as that provision, or, as the case may be, thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

34. Assuming, for the sake of argument, that sections 7 and 13 of the Constitution are engaged by the compulsory production of copy documents under the Production Orders, the requirements imposed by the Production Orders fall within the exceptions set out in those sections and are therefore not inconsistent with or in contravention of them.

35. I therefore reject any suggestion that either section of the Constitution requires the Court to interpret "*may*" in sections 4(1) and 4(2) of the 2005 Act as meaning "*shall*" or something akin to "*may in exceptional circumstances*". Any such suggestion is unsupported by authority.

36. That being the case, it is difficult to see what relevance the Constitution has to the application to set aside or vary the Production Orders other than being invoked for rhetorical effect.

First ground: material non-disclosure

37. It is trite law that an applicant for an *ex parte* order has a duty to make full and frank disclosure to the court. The duty of disclosure applies not only to material facts known to the applicant but also to any additional facts which

he would have known if he had made such inquiries. See Brink's Mat Ltd v Elcombe [1988] 1 WLR 1350 EWCA *per* Ralph Gibson LJ at 1356 F – H.

38. The duty of disclosure is a continuing one. While the proceedings remain on an *ex parte* basis, the applicant has a duty to the court to bring to its attention any subsequent material changes in the situation, ie any new or altered facts or matters which, had they existed at the time of the application, should have been disclosed to the Court. See Commercial Bank of the Near East plc v A [1989] 2 Lloyd's Rep 319, cited in Commercial Injunctions by Steven Gee QC, Fifth Edition, at para 9.021.

39. In Minister of Finance v Ap [2016] SC Bda 30 Civ, the Court considered the scope of the duty of disclosure in the context of applications under the 2005 Act. In particular, as Hellman J stated at para 22:

> "*Where an application is made to the court pursuant to a letter of request, the applicant's duty of full and frank disclosure includes all material matters which are known or ought to be known by the requesting party. 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.*"

40. In re Stanford International Bank Ltd [2011] Ch 33 EWCA, to which the judge made detailed reference in his judgment, provides support for this proposition.

41. AAA's case on non-disclosure is based on an affirmation filed by YZ, a lawyer who is a director of BBB and legal advisor to DE. The contents of his affirmation are set out in the unredacted version of this judgment.

42. In light of YZ's affidavit, AAA allege that on the *ex parte* application for the Production Orders the Minister failed to disclose (because the Swedish authorities did not inform him) that:

    (1) The transactions about which information is sought relating to the sale of BBB ("the BBB Transactions") took place in 2008 – 2009, prior to the period under investigation, which commenced on 1st January 2010.

This was the date on which the Agreement entered into force. Consequently, by the start of the period under investigation, AAA PT was no longer a shareholder in BBB. The statements in the Request that BBB was owned by AAA until 22nd August 2010, and that from 23rd August 2010 and forward BBB has been owned by another company, CCC, are, it is therefore submitted, materially incorrect.

(2) On 8th December 2015, just five days after the date of the Request, the Swedish authorities requested further information from BBB, which BBB promptly supplied. AAA invites the Court to infer from this that the STB had not, contrary to what was stated in the Request, pursued all possible means to obtain the requested information in Sweden.

43. In Minister of Finance v Ap, the Court considered to what extent it could properly take into account evidence adduced by a respondent seeking to demonstrate that the *ex parte* applicant for a production order under the 2005 Act had not made full and frank disclosure. Distinguishing the decisions of the Court of Appeal in The Minister of Finance v Braswell [2002] Bda LR 51 and Coxon v Minister of Finance [2007] Bda LR 78, Hellman J concluded at para 33:

"*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. However, if the party seeking review of a production order can establish to the standard required on an application for summary judgment that a fact stated in the request is incorrect, then, when considering whether there has been full and frank disclosure, that is in my judgment something which the Court should properly take into account. When considering whether there has been full and frank disclosure, the Court can in any event take into account any fact or matter which the party seeking review claims to be material but which was not disclosed by the applicant for the production order.*"

44. In the present case, I am satisfied that, through the documents exhibited by YZ, AAA have established to the standard required on an application for summary judgment that the BBB Transactions took place prior to the period under investigation. The authenticity of the documents has not been

challenged. The STB were not in possession of this documentation until after the date of the Request, but they were in possession of it prior to the date of the application. I therefore find that there was non-disclosure by the Minister regarding the dates of the BBB Transactions, although the fault lies not with him but with the STB. Indeed, on the material which is now before me it appears that the Court was positively misled. The non-disclosure was material in that if the BBB Transactions occurred during the period under investigation then their relevance to the determination, assessment and collection of taxes in relation to BBB for that period would be much more readily foreseeable than if they did not.

45. On account of the material non-disclosure, I shall vary the production orders to exclude the requirement to provide information relating to the BBB Transactions. If the STB takes the view that, notwithstanding that they occurred in 2008 – 2009, the BBB Transactions are foreseeably relevant to their investigation then it is open to them to make a fresh application. In that event the Court would be assisted by an explanation of their relevance.

46. Such a request would not offend against the presumption that a treaty does not have retrospective effect as although the information sought would predate the coming into force of the Agreement it would relate to a taxable period commencing after it came into force. I shall deal with this point further when I come to consider the technical defects allegedly to be found on the face of the Production Orders.

47. I am less impressed by AAA's argument that the Minister failed to disclose that the STB had allegedly not pursued all possible means to obtain the requested information in Sweden. Assuming, for the sake of argument, that the BBB Transactions were foreseeably relevant, it was both reasonable and prudent for the STB to seek information about them from the various parties involved. The Request is also concerned with the tax liabilities of DE. On YZ's own admission, DE has failed to respond to a request for information from the STB which was at the date of the Request more than six months old. Whether pursuing DE for the information further would give rise to

disproportionate difficulties is a matter which the STB is best placed to judge.

Second ground: foreseeable relevance

48. Under Article 1 of the Agreement, information supplied pursuant to the Article must be "*relevant*" to the administration and enforcement of the domestic laws of the requesting Party concerning taxes covered by the Agreement, and in this case to the determination, assessment and collection of such taxes or the investigation or prosecution of tax matters.

49. In this context, "*relevant*" means "*foreseeably relevant*", which is the standard of relevance in Article 1 of the OECD Model TIEA. See Minister of Finance v Ap at paras 46 – 50.

50. A helpful gloss on the meaning of "*foreseeably relevant*" is to be found in the Commentary to Article 26 of the OECD Model Tax Convention. I am satisfied that "*foreseeably relevant*" means the same thing in that Convention as it means in Article 1 of the OECD Model TIEA. As stated in Minister of Finance v Ap at para 51, it would make no sense for the phrase to have different meanings when both instruments are part of the same global system of treaties on taxation.

51. The Commentary to Article 26 states in material part:

> "*In the context of information exchange upon request, the standard requires that at the time a request is made there is a reasonable possibility that the requested information will be relevant; whether the information, once provided, actually proves to be relevant is immaterial. … At the same time, paragraph 1 [of Article 26] does not obligate the requested State to provide information in response to requests that are 'fishing expeditions', i.e. speculative requests that have no apparent nexus to an open inquiry or investigation.*"

52. The Singapore High Court has considered the meaning of "*foreseeably relevant*" as it occurred in Article 28 of the Singapore-India double taxation

convention. In Comptroller of Income Tax v AZP 14 ITLR 1155; [2012] SGHC 112, Choo Han Teck J stated at para 10 that the applicant must: "*show some clear and specific evidence that there is a connection between the information requested and the enforcement of the requesting state's tax laws.*" In Comptroller of Income Tax v BJY 16 ITLR 324; [2013] SGHC 173, Andrew Ang J stated at para 28 that the applicant: "*must at the very least explain why the particular information requested is thought to be possibly relevant.*"

53. The Agreement requires that the applicant provides to the fullest extent possible information as to the tax purposes for which the information is sought and why it is relevant to the determination of the tax liability of the taxpayer in question. In my judgment, this requirement will be satisfied if the Court is able to conclude from the evidence adduced by the applicant that there is a reasonable possibility that the information requested will be relevant. Its relevance may be readily apparent from the background material provided in the request even if the request does not spell out the link between the requested information and the investigation in express terms. However any explanation will undoubtedly assist the court, and without an explanation the court may well conclude that the information sought is not foreseeably relevant. It is not for the Court to speculate.

54. To require clear and specific evidence that there is a connection between the information requested and the enforcement of the requesting State's tax laws is in my judgment to put the test too high as such clear and specific evidence may form part of the requested information and therefore be unavailable to the applicant at the time of the request.

55. As I have ruled that the Production Orders should be varied to exclude the requirement to provide information relating to the BBB Transactions, they will be limited to information which is in my judgment foreseeably relevant to an assessment of the capital gains and income tax of BBB and DE during the period under investigation. It is reasonable for the STB to investigate whether capital gains have arisen in relation to any assets held by agents or

nominees and whether income has been channelled through third parties. But the Request should not form the basis for a fishing expedition. Documents produced may therefore be redacted to exclude information about persons falling outside the ambit of the Production Orders as varied.

56. Whether payments to a third party made for the benefit of the taxpayer or at the taxpayer's request relate to the affairs of the taxpayer directly as opposed to indirectly is likely to be a question of fact and degree which may not be capable of resolution until after the requested information has been produced. For purposes of a production order their classification does not much matter. Although Article 5 of the Agreement does not require the Minister to provide information that does not relate to the affairs of the taxpayer directly, it does not prohibit him from doing so. Provided that the information is foreseeably relevant, the Minister is entitled to seek its production.

57. AAA fairly makes the point that it should not be for the recipient of a production order to have to work out what is foreseeably relevant. I therefore agree that the phrase "*Any documents foreseeably relevant to the Trust for the period*" at para 24(1) above is too broad and should be deleted from the Production Orders.

Third ground: technical defects

Reference to OECD Commentary

58. AAA objected to the following paragraph in the Production Orders, chiefly on the grounds that the Commentary to which it refers is allegedly not part of Bermuda domestic law.

> "*Note that, pursuant to paragraph 114 of the Commentary to the OECD Model Tax Information Exchange Agreement, information dated prior to or after the taxable period under investigation must also be provided if the information relates to the taxable period*".

59. Para 114 of the Commentary states in material part that in relation to the OECD Model TIEA:

> "*The rules [on the effective dates of the Agreement] do not preclude an applicant Party from requesting information that precedes the effective date of the Agreement provided it relates to a taxable period or chargeable event following the effective date.*"

60. That is a correct statement of the position under the 2005 Act as read in conjunction with the Agreement. As Hellman J stated in Minister of Finance v A Company [2015] Bda LR 72 at para 27:

> "*Bermuda is presumed to legislate in accordance with its treaty obligations. When construing the 2005 Act it is therefore permissible to take into account the terms of the applicable TIEAs and the model conventions and official commentaries which provide their legal context. See, for example, the decisions of the Court of Appeal in Lewis & Ness v Minister of Finance [2004] Bda LR 66 at para 31(applicable treaty) and the Supreme Court of Canada in Crown Forest Industries Ltd v Canada [1995] 2 SCR 802, 125 DLR (4th) 485 at para 44 (model conventions and official commentaries).*"

61. In so far as AAA were suggesting that this was not the position under the 2005 Act, their objection was misconceived. Although I accept that the paragraph should have referred to the 2005 Act read in conjunction with the Agreement rather than to para 114 of the Commentary. The paragraph, which has been included as a standard provision in draft production orders submitted to the Court, is intended to explain why the documents that are ordered to be produced include documents generated outside the period under investigation.

62. However I agree with AAA's supplementary objection that the paragraph could be read as imposing an obligation to produce documents over and above those identified in the Annexes to the Production Orders. I shall therefore vary the Production Orders to delete the offending paragraph. Further, I direct that the paragraph should not appear in draft production orders submitted to the Court in future.

Penal notice

63. AAA's second criticism is that the Production Orders should not have included a penal notice. They submit that the recipient of a production order under the 2005 Act cannot be subject to punishment for civil contempt when the obligation imposed is not a private law obligation but a public law obligation, the breach of which is a criminal offence. They further submit that civil contempt is applicable only to private and not public injury, for which proposition they rely upon Halsbury's Laws of England, volume 9(1) at para 402, which defines "*civil contempt*" as "*contempt in procedure ... consisting of disobedience to the judgments, orders or other processes of the court, and involving private injury*".

64. AAA's submissions are flawed for a number of reasons. Whether the proceedings in which the court makes an order involve public or private law (or indeed whether the proceedings are civil or criminal) is not relevant to whether the contempt is civil or criminal. Thus in Director of the Serious Fraud Office v B [2014] AC 1246, upon which, ironically, AAA relied, the UK Supreme Court upheld an order for committal for civil contempt for breach of a restraint order made under the UK Proceeds of Crime Act 2002. This was notwithstanding that the restraint order was obtained by the State in the course of a criminal investigation which could by no stretch of the imagination be described as private law proceedings. Similarly, deliberate breach of an order made in judicial review proceedings might give rise to proceedings for contempt.

65. Lord Toulson JSC, giving the judgment of the Court, stated at para 42 that in England and Wales the question whether a contempt is a criminal contempt depends on the nature of the conduct. He explained the difference between civil and criminal contempt at paras 37 – 39:

"***37*** *There is a distinction long recognised in English law between 'civil contempt', ie conduct which is not in itself a crime but which is punishable by the court in order to ensure that its orders are observed, and 'criminal contempt'. Among modern authorities, the distinction was explained in general terms in Home Office v Harman [1983] 1 AC*

280 (in particular by Lord Scarman, at p 310) and Attorney General v Times Newspapers Ltd [1992] 1 AC 191 (in particular by Lord Oliver of Aylmerton, at pp 217–218).

***38** Breach of an order made (or undertaking obtained) in the course of legal proceedings may result in punishment of the person against whom the order was made (or from whom the undertaking was obtained) as a form of contempt. As Lord Oliver observed in Attorney General v Times Newspapers Ltd, although the intention with which the person acted will be relevant to the question of penalty, the liability is strict in the sense that all that is required to be proved is the service of the order and the subsequent doing by the party bound of that which was prohibited (or failure to do that which was ordered). However, a contempt of that kind does not constitute a criminal offence. Although the penalty contains a punitive element, its primary purpose is to make the order of the court effective. A person who commits this type of contempt does not acquire a criminal record.*

***39** A criminal contempt is conduct which goes beyond mere non-compliance with a court order or undertaking and involves a serious interference with the administration of justice. Examples include physically interfering with the course of a trial, threatening witnesses or publishing material likely to prejudice a fair trial.*"

66. The position under the 2005 Act is slightly different as the Act subjects conduct of a kind which is generally classified as a civil contempt to a criminal penalty. I am inclined to think that it is the nature of the conduct rather than whether or not it may be prosecuted as a criminal offence that determines whether a contempt is civil or criminal. But it is not necessary to decide the issue. Conduct which is both a contempt of court and a criminal offence may be dealt with either through contempt proceedings or by way of a criminal prosecution.

67. This was stated very clearly by the Divisional Court in Solicitor General v Cox [2016] EWCA 1241 (QB), a recent decision which was not handed down until after the hearing in the instant case, although I have received written submissions upon it from both parties. The Solicitor General sought committal of the respondents for taking photographs in court during the sentencing hearing of their friend for murder, and for posting some of those photographs on Facebook. Taking photographs in court was a criminal offence under the Criminal Justice Act 1925. One of the respondents did not go so far as to submit that an act which was a criminal offence could not also

give rise to proceedings for contempt. But he did submit at para 21 that the fact that taking photographs in court was a criminal offence did not make the act of itself a contempt of court; and that neither would the fact that the photographs were taken in disobedience to a direction of the court.

68. The Court disagreed. Ouseley J, with whom Lord Thomas CJ joined in the judgment, stated at para 31:

> "*The fact that taking photographs in court and publishing them are criminal offences, does not prevent those acts being punishable as contempts of court as, for the reasons we have given, these actions pose serious risks to and interfere with the due administration of justice: the court obviously has power, as it needs, to deal immediately with anyone seen taking photographs, in order to maintain control over its proceedings, and to avoid it standing powerless while the law designed to protect the administration of justice is broken before it. . . . While a summary criminal charge may be the appropriate response to some illegal photography, there are other cases in which it will not be and needs either swifter or more condign action by the court to uphold the due administration of justice; this was such a case. It clearly required the Attorney General to bring proceedings for contempt, taking into account the gravity of the risks and of the interference with the due administration of justice.*"

69. The policy reasons for pursuing contempt proceedings in respect of behaviour which was punishable by the criminal law were explained further by Clerk LJ, giving the leading judgment in the Scottish case of Robertson and Gough v HM Advocate 2008 JC 146 HCJ, when refusing to quash findings of contempt against the complainer for appearing naked in court. The judge stated at para 67:

> "*More fundamentally, the submission of counsel fails to recognise the different provinces of the court and the Crown in relation to contemptuous behaviour. It is for the Crown to decide whether an instance of contempt amounts to a crime and, if so, whether it is in the public interest to prosecute it. But the court has interests of its own in the enforcement of standards of decorum in its proceedings and in the eliciting of full and truthful evidence. The nature of the judicial process and the primacy of the rule of law make it essential that every court should have power to vindicate its authority against contemptuous challenges, and to do so by punishing contempt at its own hand (Johnson v Grant, Lord President Clyde, pp 790, 791; cf Jacob, The Inherent*

Jurisdiction of the Court , p 27). By dealing with contempt promptly the court can bring home to the contemnor the seriousness of his conduct and deter others, and can impose a penalty with a first-hand appreciation of the seriousness of the offending conduct."

70. Moreover, whereas the object of a criminal prosecution is to punish the wrongdoer, in the case of a breach of a court order the purpose of contempt proceedings is often primarily coercive, to obtain compliance with the order. See, as set out above, para 38 of the judgment of Lord Toulson JSC in Director of the Serious Fraud Office v B. Thus a criminal prosecution and contempt proceedings may serve different purposes.

71. To be clear, these cases, which on the facts concern criminal contempts, are authority for the general principle that behaviour which both constitutes a contempt and is punishable by criminal law may be dealt with through contempt proceedings. I am satisfied that this principle applies irrespective of whether the contempt is civil or criminal. The policy reasons supporting its application to criminal contempt apply equally to civil contempt. Were the principle inapplicable to civil contempt, and assuming that breach of production orders made under the 2005 Act is a civil and not a criminal contempt, the Court would be rendered toothless and unable to enforce such orders. I am satisfied that that was not the legislative intent.

72. This reasoning is supported by Minister of Finance v A Company, in which the Court accepted that in principle the Minister could bring contempt proceedings against a non-compliant recipient of a production order made under the 2005 Act.

73. I am therefore satisfied that the Production Orders were correctly endorsed with a penal notice. If I had upheld AAA's objection, the remedy would not have been to discharge the Production Orders but to remove the penal notice.

Summary

74. The Production Orders are varied as indicated above. The terms of the amended Production Orders are set out in the Schedule to the unredacted version of this judgment. I have streamlined the list of documents to be produced in order to avoid duplication.

75. This judgment raises two practice points which I hope those acting for the Minister will bear in mind when making future applications under the 2005 Act:

    (1) This is the second case in a matter of months in which the Court has varied or discharged production orders due to the applicant's breach of the obligation to make full and frank disclosure. The requesting State is expected to assist the Minister by supplying him with the information necessary to comply with his obligations in this regard. Before applying for a production order under the 2005 Act, the Minister or those acting for him would be well advised to liaise with the requesting State to ensure that it understands this.

    (2) The Minister or those acting for him may wish to ensure that the requesting State has the opportunity to comment on any application to vary or discharge a production order. It is, of course, open to the Minister to file an affidavit in response to such an application, e.g. to clarify why certain information is foreseeably relevant and to address any allegations of material non-disclosure. Such an affidavit may assist both the Court and the Minister's case.

76. I shall hear the parties as to costs.

DATED this 1st day of July, 2016

Hellman J