



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2020: No. AA348

IN THE MATTER OF THE REQUEST FOR EXCHANGE OF INFORMATION UNDER THE INTERNATIONAL COOPERATION (TAX INFORMATION EXCHANGE AGREEMENTS) ACT 2005 (SECTION 2) AND THE CONVENTION ON MUTUAL ADMINISTRATIVE ASSISTANCE IN TAX MATTERS IN RESPECT OF THE AGREEMENT BETWEEN BERMUDA; UNITED KINGDOM AND THE REQUESTING COUNTRY, THE REPUBLIC OF INDIA

BETWEEN:

THE MINISTRY OF FINANCE

Applicant

-and-

IJK LIMITED

Respondent

RULING (REDACTED)

Date of Hearing: 29 September 2021

Date of Judgment: 10 November 2021

Appearances: **Mr. Jeffrey Elkinson, Conyers Dill & Pearman, for the Minister of Finance**
David Kessaram, Cox Hallett Wilkinson Limited, for the Respondent

RULING of Mussenden J

Introduction

1. The Respondent, IJK Limited (the “**Respondent**” or the “**Company**”), applies to discharge the Production Order granted by the Chief Justice on 4 March 2020 (the “**2020 Production Order**”). It was made on an *ex parte* application by the Minister of Finance (the “**Minister**”) under section 5 of the International Cooperation (Tax Information Exchange Agreements Act 2005 (“**the 2005 Act**”) and the Tax Information Exchange Agreement between Bermuda and the Government of the Republic of India (the “**Bermuda-India TIEA**”).
2. On 26 January 2021 this Court granted the Respondent a right of review of the 2020 Production Order on the following bases:
 - a. Ground 1 - The application for the 2020 Production Order should not have been heard *ex parte*; and
 - b. Ground 4 - The information sought in the 2020 Production Order is irrelevant to the tax investigation against the Respondent itself and in any event is oppressive and a fishing expedition. Further, on the evidence before the Court, there is concern that the information is sought for an impermissible, collateral purpose.
3. The right of review granted by the Court allowed the Respondent to obtain sight of the documents that comprised the *ex parte* application at which the Chief Justice made the 2020 Production Order.
4. It is useful to set out the various central documents and applications as follows:

- a. The Minister received a request for information from the Government of India dated 27 December 2018 (the “**Request**”).
- b. An application was made in February 2019 (the “**2019 Application**”) which resulted in a Production Order dated 22 February 2019 (the “**2019 Production Order**”), which was subsequently discontinued by the Minister on 1 April 2019.
- c. An application was made in March 2020 (the “**2020 Application**”) which resulted in the 2020 Production Order dated 4 March 2020.

The 2020 Production Order

5. The 2020 Production Order ordered that the Respondent produce the following information to the Minister:
 1. Lists of assets (both current and non-current) of the Company along with location of the assets for fiscal year 2013-14, fiscal year 2014-15 and fiscal year 2015-16.
 2. Information of all the employees of the Company, together with their location of work, country of residence, nationality and payroll expense (including salary, bonus, pension and other benefits) for fiscal year 2013-14, fiscal year 2014-15 and fiscal year 2015-16.
 3. Total payroll expense of the Company for fiscal year 2013-14, fiscal year 2014-15 and fiscal year 2015-16.
 4. The location and name of country of residence of senior management (such as Managing Director, Chief Executive Officer, Chief Financial Officer, Heads of Division or Departments) and their direct support staff for fiscal year 2013-14, fiscal year 2014-15 and fiscal year 2015-16.
 5. The total income from transactions where both purchase and sale of goods is from/to its associated enterprises for fiscal year 2013-14, fiscal year 2014-15 and fiscal year 2015-16.

6. The income by way of royalty, dividend, capital gains, interest or rental income earned for fiscal year 2013-14, fiscal year 2014-15 and fiscal year 2015-16.
7. The total sales and other income for fiscal year 2013-14, fiscal year 2014-15 and fiscal year 2015-16.
8. The location of board of directors' meetings and names of persons who attended the meeting. If the meeting was conducted by circular resolution then the location of parties involved for fiscal year 2013-14, fiscal year 2014-15 and fiscal year 2015-16.
9. Copies of minutes of meetings and board resolutions for all board of directors' meetings for fiscal year 2013-14, fiscal year 2014-15 and fiscal year 2015-16.
10. The location of shareholders' meetings and the names of persons who attended the meetings. If the meeting was conducted by proxy vote, then the location of parties involved and the entity to which proxy vote was given for fiscal year 2013-14, fiscal year 2014-15 and fiscal year 2015-16.
11. Copies of minutes of meeting for all shareholders' meetings for fiscal year 2013-14, fiscal year 2014-15 and fiscal year 2015-16.
12. Information in relation to delegation of authority of board members to any executive committee/promoter/shareholder for fiscal year 2013-14, fiscal year 2014-15 and fiscal year 2015-16.
13. Information in regards the person(s) who is/are funding releasing/cheque signing authority in fiscal year 2015-16.
14. The address of the principal place of business of the Company in fiscal year 2015-16.
15. The address of the headquarters of the Company in fiscal year 2015-16.
16. Copies of all documents submitted by the Company to the Bermuda Government for incorporation.
17. The names of beneficial shareholder(s) of the Company.
18. Copies of Return of Income filed by the Company in Bermuda for fiscal year 2013-14, fiscal year 2014-15 and fiscal year 2015-16.

19. Information on all bank accounts of the Company with bank account number, bank branch and authorized signatory name and country of location.
20. Copies of bank statements of the bank accounts (as above) for fiscal year 2013-14, fiscal year 2014-15 and fiscal year 2015-16.
21. Identify the location(s) of all server(s) of the Company and/or 'a network centre' of the Company in fiscal year 2015-16.

The Documents in support of the *Ex Parte* 2020 Application

6. The documents in support of the *ex parte* 2020 Application consisted of the following:
 - a. Letter from the Consultant and Senior Exchange of Information Officer, Ministry of Finance – Treaty Unit (the “**Consultant**”) dated 26 February 2020 to the Registrar of the Supreme Court;
 - b. The Minute of the Minister dated 26 February 2020;
 - c. *Ex Parte* Originating Summons for a Production Order;
 - d. Affidavit of the said Consultant sworn on 26 February 2020 (the “**Consultant’s Affidavit**”);
 - e. Exhibit to the Consultant’s Affidavit consisting of the following documents:
 - i. A letter from the Competent Authority of India dated 27 December 2018 (the “**Covering Letter**”);
 - ii. Part II of Form A – the Request for Information from Bermuda;
 - iii. Affidavit of Senior Corporate Counsel of the Company, sworn on 28 February 2019 (the “**RHR Affidavit**”) and its exhibits which comprised the following:
 1. The 2019 Production Order as made against RGL on 22 February 2019.
 2. Affidavit of RHR sworn on 27 July 2018;
 3. Second Affidavit of RHR sworn on 23 August 2018;
 4. Summons of the Company dated 6 March 2019 for the grant of a right of review of the 2019 Production Order;

5. Notice of Discontinuance dated 1 April 2019 in respect of the 2019 Production Order.

Relevant provisions to the 2005 Act

7. The Chief Justice set out the relevant provisions of the 2005 Act in *Ministry of Finance v DEF Ltd*¹. Both parties cited this case in their submissions.

“The preamble to the 2005 Act states that it is expedient to make general provision for the implementation of tax information agreements entered into by the Government of Bermuda with other jurisdictions and to enable the Minister to provide assistance to the competent authorities of such jurisdictions under such agreement.

Section 5 of the 2005 Act deals with issuing of Production Orders by the Supreme Court. Section 5(1) provides that where the Minister has received a request in respect of which information from the person in Bermuda is required, the Minister may apply to the Supreme Court for the Production Order to be served upon the person referred to in the request, directing them to deliver to the Minister the information referred to in the request.

Section 5(2) provides that the Supreme Court may, if on such an application it is satisfied that conditions of the applicable agreement relating to a request are fulfilled or where the Court is satisfied with 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 of making request of the Production Order.

¹ [2019] SC (Bda) 47 Civ

Section 5(5) provides that an application for a Production Order under this section may be made *ex parte* to a judge in Chambers and shall be *in camera*.

Section 5(6) deals with challenge to the Production Order and the issue of disclosure of the material relied upon by the Supreme Court when it made the *ex parte* Production Order. Section 5(6) provides that a person served with a Production Order under subsection (1) who is aggrieved by the service of the order may seek review of the order within 21 days of the date of the service of the order.

Section 5(6A) provides that a person served with a Production Order under subsection (1) who wishes to view the documents filed with the Court on the application for the Production Order (a) shall not be entitled as against the Minister to disclosure of such documents until the person has been granted a right of review under subsection (6B) and that the Court has directed disclosure of such documents as it considers appropriate for the purposes of the review; and (b) shall not (notwithstanding anything to the contrary contained in the Supreme Court Records Act 1955) be permitted to view such documents on the court file until such a right of review has been granted and the Court has directed disclosure of the documents.

Section 5(6B) deals with the determination of the right of review. It provides that upon the application under subsection (6) having been filed with the Court, the Court shall decide whether to grant the person a right of review.

Section 4 deals with the grounds for declining a request for assistance. Section 4(2) provides that the Minister may decline a request for assistance if:

- (a) the information relates to a period that is more than six years prior to the tax in respect of which the request is made;
- (b) the request pertains to information in the possession or control of the person other than the taxpayer that does not relate specifically to the tax affairs of the taxpayer;

- (c) the information is protected from disclosure under the laws of Bermuda on the grounds of legal professional privilege;
- (d) the requesting party would not be able to obtain the information (i) under its own laws for the purposes of the administration or enforcement of its tax laws; or (ii) in response to a valid request from the Minister under the Agreement;
- (e) the disclosure of the information would be contrary to public policy; or
- (f) the Minister is not satisfied that the requesting party will keep the information confidential and will not disclose it to any person other than (i) a person of authority in its own jurisdiction for the purposes of administration and enforcement of its tax laws; or (ii) a person employed or authorized by the government of the requesting party to oversee data protection.”

The 2013 Amendment to the 2005 Act

The Respondent’s Argument

8. The Respondent submitted that the legislation passed in December 2013 amending the 2005 (the “**2013 Amendment**”) had the effect to interpose the Supreme Court between the Minister and the persons in Bermuda from whom information was sought by a TIEA treaty partner. The 2013 Amendment required the Minister to apply to a judge of the Supreme Court for a Production Order compelling the production of the information requested by the TIEA treaty partner. He submitted that the law was instituted to provide protections for persons in Bermuda from an excessive use of governmental power in enforcing TIEA treaty obligations. In the case of the Bermuda-India TIEA, the protection of the legal rights of persons in the requested country is expressly recognized in Article 1.

The Minister’s Reply

9. Mr. Elkinson provided the Court with a review of the history of the regime and legislation of production orders in Bermuda, in which it appears counsel for both parties in the present case have been long deployed on the litigation battlefield for one side or the other in many

cases over the years. He submitted that the Court should reject the notion that the 2013 Amendment was to provide a level of fundamental rights to the Bermuda public. He argued that on the contrary it was an attempt by Parliament to make the obtaining of the information as required under Bermuda's treaty obligations easier and to restrict the right of any party served with a Production Order to delay the process, not least in seeking to have sight of the documentation issued by the requesting country to the Bermuda Treaty Unit which processed the request. He submitted that it was these factors which led to the Court becoming part of the administrative process of issuing Production Orders.

General Submissions

The Respondent's submissions

10. The Respondent's submissions to set aside the 2020 Production Order centered on the following issues:

- a. There were serious failures by the Minister in the exercise of his discretion in respect of the 2019 and 2020 Production Orders due to non-compliance with the Bermuda-India TIEA in the Request by the Indian Authorities.
- b. The Minister's decision was one that no reasonable Minister would have made.
- c. There were serious breaches of the Minister's duties of utmost good faith to the Court and of full and frank disclosure as well as the Minister having seriously misled the Court.
- d. The Minister failed to put forward arguments both for and against the 2020 Application.
- e. On the basis of (a) to (d) above it is justified for the Court to discharge the 2020 Production Order and not grant any further Production Order in respect of the Request.
- f. On the basis that the material non-disclosure is established, the Minister should be deprived of the advantage that he has gained as the approach on an application to discharge is penal towards the applicant in order to deter other applicants from taking lightly their duties of full and frank disclosure. Mr. Kessaram relied on the

case of *Tugashev v Orlov et al*² where Carr J stated that immediate discharge is the likely start point and that it was only in exceptional circumstances in cases of deliberate non-disclosure or misrepresentation that an order would not be discharged.

- g. The 2020 Production Order should be discharged as an example to others and because there were serious and deliberate breaches of the duty of utmost good faith.
- h. It should also be discharged because in the present form, the Request does not and cannot now conform with the Bermuda-India TIEA.

The Minister's Reply

11. Mr. Elkinson submitted that it appeared the Respondent had abandoned the two grounds on which the right of review was granted and had now focused on new grounds, namely that there was breach of the duties of utmost good faith to the Court and of full and frank disclosure as well as the Minister having seriously misled the Court. However, the Minister would still reply to those Grounds as set out below.

12. The Court is now required to consider the application to discharge the 2020 Production Order in light of the submissions in the present application notwithstanding the reasoning set out in its Ruling dated 26 January 2021 in respect of the application for a right of review.

Ground 1 - The application for the 2020 Production Order should not have been made *ex parte*

Additional Ground – Whether the Court was Seriously Misled

The Respondents Argument

13. The Respondent submits that the Court was seriously misled for a number of reasons. The Respondent argues that neither the Minister's Minute nor the Consultant's Affidavit made it clear that (a) the 2020 Application was the second application for a Production Order

² [2019] EWHC 2031 (Comm) at [7]

based on the Request and Covering Letter; alternatively (b) why the Minister was coming back to Court on the same facts for the 2020 Production Order, having withdrawn the previous 2019 Production Order; (c) and what was different about the 2020 Application from the previous 2019 Application. Therefore, Mr. Kessaram argued that the Court was seriously misled into believing: (a) that the 2020 Application on 4 March 2020 was the first such application; further or alternatively (b) that certain defects in the previous 2019 Application had been cured by the 2020 Application; and (c) that the 2020 application was now in accord with the Bermuda-India TIEA.

14. First, Mr. Kessaram took issue with the statements made in the Consultant's Affidavit that the application had not been "*processed*" but that the Requesting Authority still wished to have it "*processed*". He complains that the Consultant only touched on the fact there were previous applications later on in her affidavit and, in any event, even that was not accurate because there was only one previous application based on the Request, not several. That one previous application was "*processed*" and resulted in one Production Order, that is, the 2019 Production Order which was served on the Respondent.
15. Second, Mr. Kessaram submitted that it was not accurate for the Consultant to state that the Respondent had highlighted "*various defects*" as the Respondent, in the RHR Affidavit, did not refer to any "*defects*" in the Request and in any event, the Respondent had not seen the Request when the affidavit was sworn. The RHR Affidavit was filed in support of an application for disclosure of the *ex parte* application upon which the 2019 Production Order was made, but that 2019 Production Order was discontinued by the Minister before the application for a right of review was heard. Mr. Kessaram submitted that the Respondent's complaint about the 2019 Production Order was that it failed to identify the taxpayer under investigation in India.
16. Third, Mr. Kessaram submits that the failure to alert the Court that the 2020 Application was the second occasion seeking a near identical Production Order based on the very same Request seriously jeopardized the Court's consideration of the 2020 Production Order, including whether the 2020 Application should have been heard on an *inter partes* basis rather than an *ex parte* basis, as provided for by section 5(5) of the 2005 Act. He submitted

that as the first aspect for consideration was whether the hearing should be *inter partes* or *ex parte*, the Court's attention should have been drawn to that section which provided the Court's ability to hear the matter *ex parte* as discretionary rather than mandatory. Therefore, the Court was deprived of considering the primary issue.

The Minister's Reply

17. Mr. Elkinson submitted that the 2020 Production Order was properly dealt with by the Court on an *ex parte* basis. He noted that the Respondent was only focused on Section 5(5) of the 2005 Act while the Rules of the Supreme Court Order 120, which was followed, provides that an application shall be made by an *ex parte* Originating Summons supported by affidavit. He argued that there was no reason why the Minister should have adopted any other procedure due to the mandatory nature of RSC Order 120 rule 2 which is not discretionary.

RSC 120/2 Application for production order or other relief

2 (1) An application for a production order under section 5 of the Acts shall, with the necessary modifications, be made by an ex parte originating summons with respect to which no appearance is required and shall be supported by an affidavit.

18. Mr. Elkinson submitted therefore that the Respondent's claim that the Court's attention was not drawn to Section 5(5) of the Act was wholly inappropriate in light of the RSC Order 120 rule 2.

19. He submitted that the Consultant's Affidavit had provided extensive disclosure of the history of the matter, had made it clear that there had been previous applications and had directed the Court to the RHR affidavit for further history whilst referring the Court to the previous 2019 Production Order which had been discontinued by the Minister. He denied that there was a tactical advantage to the Minister as this was a statutory scheme implementing Bermuda treaty obligations to another nation, in this instance India.

20. Mr. Elkinson submitted that the argument that the Court was misled by the Consultant's affidavit should be rejected. He argued that the Respondent had ignored the core statements in the Consultant's Affidavit where she had made it clear this was not the first application in relation to Production Orders concerning the Respondent or an associated individual. Mr. Elkinson submits that the Consultant had provided more than sufficient information to the Court to establish that previously there was the 2019 Production Order as the RHR Affidavit refers to it as the fourth Production Order, going on to say that the previous three Production Orders were all related to the same tax investigation. Therefore, the Consultant's reference to "*previous applications*" was an informative statement supported by further evidence provided by the Respondent's own witness.

21. Mr. Elkinson submits that the Respondent's complaint that the Consultant in her affidavit did not state that the 2020 Application was based on the same Request as the 2019 Production Order should be rejected. This was on the basis that the Consultant made it clear that the 2019 Production Order was determined by the Minister to be withdrawn and a fresh application was made, with the Request cited in the Minister's Minute. Further, the Consultant had confirmed with the Requesting Authority that they still wished to have the Request processed. Mr. Elkinson submitted that it was very clear on the papers before the Court that it was the same Request which was the basis of the 2020 application for a Production Order. Therefore, there is no basis to suggest that the Court had been deprived of the true facts or of information which would allow it to determine if the matter should have been heard on an *inter partes* basis.

Discussion and Analysis

22. In the application for a right of review in this matter, I found that in light of the history of the Production Orders in respect of the Respondent, an *inter partes* hearing would have been preferable to an *ex parte* application. This would have allowed all the issues to be ventilated and allowed the Judge to exercise his discretion whether to grant or decline the 2020 Production Order. It was on that basis that I granted a right of review on that ground.

23. In respect of the hearing to set aside the 2020 Production Order, the Respondent had the benefit of disclosure of the documents that were before the Chief Justice when he granted the Production Order.
24. In my view, there is some inconsistency in that section 5(5) of the 2005 Act provides that the application for a Production Order “*may*” be made *ex parte* but the RSC Order 120/2 provides that the application for a Production Order under section 5 of the Act “*shall*” be made by an “*ex parte originating summons with respect to which no appearance is required*”. Each party has gone to their respective corner of the ring on this point. In my view, in practical terms it was open to the Minister to make the *ex parte* application with a request to make an appearance. At that *ex parte* appearance in presenting the application, it was open to the Minister to request an *inter partes* hearing in light of the history of the matter.
25. As it turns out, the Minister instead proceeded *ex parte* according to the RSC. Having reviewed the Minister’s Minute wherein he satisfied himself that he comply with the Request and seek a Production Order, I am unable to criticize the Minister or those acting on his behalf for proceeding *ex parte* according to the RSC. Further, in light of the substance of the Consultant’s Affidavit and the RHR Affidavit which provided the substantial history and context of the 2020 Application, I am also unable to criticize the Minister for proceeding *ex parte* on the basis that there was sufficient information before the Court to allow it to give full consideration to the matter. As it was set out in the Consultant’s Affidavit that this was an application following the withdrawn 2019 Production Order, I am not persuaded that this fact jeopardized the Court’s consideration of the matter and whether it should have been heard *inter partes*.
26. However, in my view, the real issue now is whether the Chief Justice was apprised of all the relevant issues in respect of the 2020 Application in the papers that were put before the Court. It is clear to me that the 2020 Application before the Court comprised of a volume of documentation as set out above that explained the Minister’s application for the 2020 Production Order. Significantly, it included the Consultant’s Affidavit and the RHR Affidavit, both which went to great length to explain the history of the applications and

production orders as well as the nature and context of the 2020 Application. Whilst no doubt an *inter partes* hearing would have allowed counsel to further expand upon the application and object to it, I am not satisfied that by the Court considering the application on an *ex parte* basis it has rendered the grant of the Production Order to be so flawed such that it should be discharged.

27. In respect of the Court being misled, I disagree that the Court was misled as set out by the Respondent. I agree with Mr. Elkinson that the Consultant's Affidavit set out sufficient detail of the history of the matter, stated that there were previous applications, had directed the Court to the RHR Affidavit which provided an extensive background and referred the Court to the 2019 Production Order which was withdrawn.

28. I do not agree with Mr. Kessaram that the Court was misled by the use of the words "*previous applications*". The Consultant's Affidavit spoke of the 2020 Application and the 2019 Production Order. She then referred to the RHR Affidavit which in turn made references to previous Production Orders including using words or phrases such as "*The 2019 Production Order is the fourth Production Order*" and "*The previous three Production Orders ...*". It then committed one or more paragraphs of detail to each of the previous Production Orders namely the "*2012 Notice*", the "*2015 Production Order*", the "*2018 Production Order*" and the "*2019 Production Order*". In my view, the Consultant had placed relevant information before the Court for its consideration. The use of the words "*previous applications*" would have been helpful to the Court rather than misleading the Court as alleged. The attempt to cast the use of the words "*previous applications*" as misleading is completely without merit.

29. I disagree with Mr. Kessaram's submissions that the Consultant misled the Court when she stated words to the effect that the Request had not been "*processed*". In my view, the Consultant was providing the Court with the information that the 2019 Production Order was withdrawn so the Request was still outstanding, that is, it had not been processed to completion meaning the requested information was not provided by the Company. Therefore, I am not persuaded that the Court was being misled.

30. I disagree with Mr. Kessaram's submissions that the Consultant did not make it clear that the 2020 Application was also based on the Request. In my view, I agree with Mr. Elkinson that the Consultant had made reference to the RHR Affidavit and made it clear that the 2019 Production Order was withdrawn by the Minister and a fresh application made. In my view, it was clear that she was referring to the 2020 Application. In my judgment, these statements by the Consultant were providing information to the Court rather than misleading the Court as alleged.
31. In respect of the Consultant's statement that "*there were various defects, highlighted by the served party ...*" was misleading, I disagree that the Consultant misled the Court. Mr. Kessaram has complained that the RHR Affidavit did not make any complaint about the Request, primarily because RHR had not even seen the Request noting that it was filed in support of any application for disclosure of the *ex parte* application for the 2019 Production Order. However, in reviewing the RHR Affidavit, it is clear that RHR had made a serious complaint about the 2019 Production Order stating that "*The 2019 Production Order does not identify anyone by name as being the subject of a tax investigation in India. It simply refers to the taxpayer*". The complaint followed on that the various requests for information in the Production Order did not refer to a named taxpayer and that the Minister could not be expecting the company "*to infer who it [the taxpayer] is from the previous Production Orders*". In my view, it was reasonable for the Consultant to classify these issues as highlighted by RHR as "*various defects*". On that basis, I reject Mr. Kessaram's argument that the Consultant was misleading the Court in this respect, rather, in my judgment, the Consultant was providing useful information to the Court. As it turns out, in the 2020 Production Order, the "*the taxpayer*" term complained of as set out above was replaced with the term "*the Company*".
32. In light of the above reasons, I am not satisfied that the Court has been misled and accordingly I decline the application that the 2020 Production Order should be set aside. I also decline the application that the Production Order should be set aside because it was made *ex parte*.

Ground 4 – The information sought is irrelevant, oppressive and a fishing expedition.

Additional Ground – Whether the Minister complied with Duty of Full and Frank Disclosure

The Respondent’s Argument

33. The Respondent submitted that Bermuda law requires that a person making an *ex parte* application for an order affecting the rights of others to act with utmost good faith to the Court by disclosing all material facts to the judge. Mr. Kessaram submitted that the principles of utmost good faith and the duties of full and frank disclosure are applicable to *ex parte* applications made by Minister under the provisions of the 2005 Act. He relied on the case of *Minister of Finance v AP*³ where Bell LJ stated as follows:

“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 obligations 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”.

34. Mr. Kessaram submitted, now having sight of the documents that were before the Judge for the 2020 Application when the 2020 Production Order was made, that there was a clear breach of the Minister’s duty of utmost good faith in presenting it. This was for several reasons. First, in the Consultant’s Affidavit it was misstated to the Court that the Request had not been processed when in fact it had been.

35. Second, material facts were not brought to the Judge’s attention even though they may have been contained in the various documents supporting the application. Mr. Kessaram relied on a passage from *Commercial Injunctions* by Steven Gee where it emphasised that the onus was on the applicant to ensure all the relevant points are presented clearly to the Judge and which also cited the case of *Siporex Trade SA v Comdel Ltd* where Bingham J

³ [2016] SR (Bda) 30 Civ

emphasised that applicants must identify crucial points for and against the application not just relying on numerous documents.

36. Third, Mr. Kessaram submitted that the Minister made only a half-hearted and inadequate attempt to explain why he discontinued the 2019 Production Order and was applying for another 2020 Production Order based on the same Request. He complained that in respect of the term “*various defects*” as used in the Consultant’s Affidavit, it was never clarified whether those defects were in the 2019 Application or in previous applications, noting that more information needed to be provided to the Court about what the defects were, in which application did they exist, when did the Minister become aware of them and how were they rectified.

37. Fourth, Mr. Kessaram submitted that there were questions to be answered in respect of whether the Request complied with the Bermuda-India TIEA and these questions still pertained for the 2019 Application and the 2020 Application. The first question was whether the Request was still valid after 31 December 2018 because the Request had indicated a statute of limitations date of 31 December 2018. The second question was whether the Minister satisfied himself about the relevance for each of the three purposes for which the letter sought information, namely:

- a. In respect of the determination, assessment and collection of income tax on revenue collected by the Respondent from fibre optic services and maintenance of the fibre optic network. Mr. Kessaram argued that the Minister should have satisfied himself that the information was still required for the primary purpose as the limitation period had already expired by the time of the applications for the 2019 Production Order and the 2020 Production Order. Further, such failure amounted to a breach of the Minister’s duty to take into account all material facts vitiating the decision to apply for the Production Orders, such that it was unreasonable for the Minister to make the 2020 Application, and it was a breach of the Minister’s duty to make an application in the absence of an explanation why the information was still required after the expiration of the limitation period.

- b. In respect of other proceedings under the Indian Income Tax Act. Mr. Kessaram argued that the Request and Covering Letter do not set out what the nature of the “*other proceedings*” was and that the information was scant in relation to what was provided for the primary tax purpose. He submitted that the Minister had a duty to ensure that the “*other proceedings*” complied with the Bermuda-India TIEA and a bare statement was inadequate. Further, without more information, it would not be possible for the Court to determine if the information request was relevant to the purpose requested. On this basis, as well as the wide ranging and oppressive nature of the Request, it amounted to a classic fishing expedition in particular because there was no geographical limitation to India or rational connection to the specific tax issues in dispute or was being used for collateral or other purposes as the Covering Letter refers to “*other proceedings*” or “*appellate proceedings*”, and the additional issue of the limitation date. Again, such failure amounted to a breach of the Minister’s duty to take into account all material facts vitiating the decision to apply for the 2019 and 2020 Production Orders and it was unreasonable for the Minister to make the applications.
- c. In respect of “*appellate proceedings*”, Mr. Kessaram argued that the December 2018 Request did not specify the purpose of the information being required for appellate stages although the Covering Letter does. Also, no information was provided to identify what appeal proceedings are referred to and what issues the request was aimed at resolving. Again, such failure amounted to a breach of the Minister’s duty to take into account all material facts vitiating the decision to apply for the Production Orders and it was unreasonable for the Minister to make the applications.

The Minister’s Reply

38. Mr. Elkinson submitted that neither the Minister nor the Court can determine what is exactly relevant. The test is ‘foreseeable relevance’ under Article 1 of the Model TIEA as held in *Minister of Finance v AP*⁴. He submitted that it is for the Requesting Party, in this

⁴ [2016] Bda LR 34 SC

case, India, to determine what is foreseeably relevant and it does not have to be demonstrably relevant. He cited the case of *Minister of Finance v MNO*⁵ which rejected the contention that the requesting party had not set out to the fullest extent why the information being sought was relevant. Also, he submitted that allegations of “*fishing*” had also been made in *Minister of Finance v AAA Group Limited* and there the Court held that it can infer from the Request that the information sought is foreseeably relevant to the tax investigation which informs the Request and, in respect of the reasonableness of the Requesting Party to request information from the Respondent in Bermuda, neither the Respondent nor the Court are in a position to say whether seeking information in India would cause disproportionate difficulties. This was a matter for the Indian Tax Authorities.

39. Mr. Elkinson submitted that the Court should reject the Respondent’s arguments on the basis that a reading of the Consultant’s Affidavit with appropriate references to Respondent’s RHR Affidavit, shows that all necessary disclosure was made. He highlighted the differences between the typical commercial injunctions where urgency is usually a governing factor with the tax exchange regime where there are various stages and applicable due dates with extensions granted as necessary along with a Right of Review. He submitted that the Minister did inform the Court about the defects in the previous 2019 Production Order but that was different from the present request. He submitted that the Minister’s Minute was self-evident as to why the Minister considered that Bermuda had complied with the Bermuda-India TIEA and that the Consultant stated that further contact with the Indian authorities confirmed that they still wanted the Minister to pursue the Request. Further, Mr. Elkinson submitted that there were no patent deficiencies in the Request and that it is not correct that the decision made was one which ‘*no other Minister of Finance would have made*’.

40. In respect of the purposes of the Request and the limitation date, Mr. Elkinson submitted that the Respondent’s interpretation was a misreading of the Request and Covering Letter because the documents do state that the information would be useful even beyond the date as regards the statute of limitations. Also, the reference to other proceedings in the

⁵ [2018] SC (Bda) LR 7 Civ

Covering Letter does not diminish the Minister's obligation to consider the Request itself and whether he is satisfied that the conditions of the agreement relating to request are fulfilled, noting that the Minister's Minute adequately addressed these matters.

Discussion and Analysis

41. I am not satisfied that the Minister breached the duty of full and frank disclosure in the 2020 Application for several reasons. First, for reasons stated above, I have rejected the submission that the Court was misled when it was told that the Request had not been processed. For those same reasons, I am not satisfied that there was a breach of utmost good faith in presenting the Request with the statement that it had not been processed. In my view, the Consultant had taken the view that the matter was not processed as a result of the 2019 Production Order being withdrawn. This was a reasonable approach for the Consultant to take and she made that clear in her affidavit.
42. Second, I reject Mr. Kessaram's argument that material facts were not brought to the Judge's attention and that the use of the term "*various defects*" was not clear. As I stated above, it appeared that the Consultant, having reviewed the RHR Affidavit, accepted as defects, the issue of the complaints that the taxpayer had not been identified. It follows that the 2020 Application addressed these points as the references using the "*the taxpayer*" was changed to the "*the Company*". Also, in the paragraph that dealt with the "*various defects*", the context was in relation to the 2019 Production Order that was withdrawn with the RHR Affidavit identifying the specific issue that the taxpayer was not named. On this basis, in my view it was clear to the Court what the defects were, that they were in the 2019 Production Order and how they were rectified. Accordingly, I am not satisfied that there is any merit in this argument.
43. Third, in respect of the expiry of the limitation period, I am satisfied with the explanation in the Consultant's Affidavit that prior to filing the 2020 Application, she had confirmed with the Indian authorities that they still required the information. On that basis, and upon a review of the Minister's Minute, I am satisfied that it was appropriate for the Minister to

proceed with the 2020 Application even though there was a limitation period which had expired, but there were still various purposes for which there was a legitimate reason to proceed with the 2020 Application.

44. In respect of the various purposes for which the Request was sought in the 2020 Application and whether it was irrelevant, oppressive and a fishing expedition, I am satisfied that the Request complied with the Bermuda-India TIEA. I agree with Mr. Elkinson that it was for India to determine what is foreseeably relevant and that it does not have to be demonstrably relevant. I rely on the case of *Minister of Finance v AP* in that I am not satisfied that the Request has to give the level of detail argued for by the Respondent for the various purposes set out in the Request and Covering Letter. The Covering Letter itself stated that the India Tax Authorities believed the information requested was foreseeably relevant for the purposes of the Indian tax legislation. Also, the Minister's Minute demonstrated that the Minister considered the Request against the requirements of the Bermuda-India TIEA and was satisfied that he should proceed with the 2020 Application. As can be seen, that investigation included the determination, assessment and collection of income tax on revenue collected by the Respondent from fibre optic services and maintenance of the fibre optic network as well as for appellate and/or other proceedings under the Indian income tax laws in the case.

45. In respect of the actual information requested, I note the time period for which the information is sought to determine applicable taxation was “*for the financial years 2015-16*”⁶ although the information requested extends to the financial years 2013 -14, 2014-15 and 2015-16⁷. In my view, I am inclined to give a wide extent to the 2013 – 2016 year range to fulfill the investigation purposes. In respect of the categories of information requested, again I am inclined to give a wide extent to fulfill the investigation purposes. I rely on the case of *Minister of Finance v AAA Group Limited*, in that it can be inferred from the Request that the information sought is foreseeably relevant to the tax investigation and that the Court should give effect to the intention “*to provide for exchange of information in tax matters to the widest possible extent ... and to clarify that Contracting Parties are*

⁶ Box 9 of the Request and in the Covering Letter

⁷ Box 13 of the request

not at liberty to engage in fishing expeditions or to request information that is unlikely to be relevant to the tax affairs of a given taxpayer.”

46. In light of the reasons set out above, I am not satisfied that the Minister breached the duty of full and frank disclosure to the Court. Further, I am not satisfied that the Request was irrelevant, oppressive and/or was a fishing expedition.

Conclusion

47. The Respondent has failed to satisfy the Court that the 2020 Production Order should be set aside on various grounds including that it should not have been made *ex parte*, that the Court was seriously misled, that the Minister breached his duty of full and frank disclosure and that the information sought is irrelevant, oppressive and a fishing expedition.

48. Unless either party files a Form 31TC within 7 days of the date of this Judgment to be heard on the subject of costs, I direct that costs shall follow the event in favour of the Minister against the Respondent on a standard basis, to be taxed by the Registrar if not agreed.

Dated 10 November 2021

**HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT**