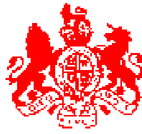

The Court of Appeal for Bermuda

CIVIL APPEAL No Ad of 2015

Between:

THE MINISTER OF FINANCE

Appellant

-v-

AD

Respondent

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

Appearances: Mr. David Kessaram, Cox Hallet Wilkinson, for the Appellant
Mr. Jeffrey Elkinson, Conyers Dill & Pearman, Amicus

Date of Hearing: **10 June 2015**

Date of Judgment: **12 June 2015**

JUDGMENT

Kay, JA

Introduction

1. International agreements to which Bermuda is a party provide for the rendering of assistance by Bermuda to the tax authorities of other countries which seek information about persons present in Bermuda. The assistance is now in the form of a production order whereby the Minister of Finance (the Minister) serves upon a person an order requiring the production of information. The system is governed by the International Cooperation (Tax Information Exchange Agreements) Act 2005 (the 2005 Act), as amended by the International

Cooperation (Tax Information Exchange Agreements) Amendment Act 2014 (the 2014 Act), which came into force on 8 December 2014. In the present case, the Minister received a request for assistance from the French tax authorities. On 30 December 2014, he applied to, and obtained from, the Supreme Court a production order in relation to AD. This appeal is concerned with what transpired following the making of the production order.

The statutory provisions

2. The procedure for obtaining a production order is set out in sections 5 and 6 of the 2005 Act in the following terms :

> "5(5) An application for a production order under this section may be made ex parte to a judge in Chambers and shall be in camera.
> (6) 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 within21 days of the date of service of the order."

3. The amendments introduced by the 2014 Act now add the following into section 5 of the 2005 Act :

> "(6A) A person served with a production order under subsection (1) who seeks information from the Minister pertaining to the production order, must first file an application with the court to review the production order.
>
> (6B) Upon the application under subsection (6A) having been filed with the court, the court shall decide whether to grant the person a right of review."

The issue

4. The question at the heart of this appeal is whether a person upon whom a production order is served is entitled to disclosure of the documents which were placed before the judge by the Minister in support of his ex parte application for

the production order. In accordance with general common law principles, the subject of the production order was entitled to such disclosure: *Ministry of Finance v E, F, H and O* [2014] Bda LR 54. We are told that, following that judgment, the Minister informed all those against whom production orders were made of their right to receive disclosure of the documents which had been before the court on the ex parte application.

5. The present dispute results from a change in the stance of the Minister since 8 December 2014. His stance now is that, by reason of the amendments, he is no longer required to disclose the material which had supported his ex parte application. If the subject of the production order wishes to apply for a review under section 5(6A), he must do so without sight of that material. He is not even entitled to know the source of the originating request for assistance. The Supreme Court will then proceed to decide "whether to grant the person a right of review". If a right of review is refused at that stage, the subject must comply with the order, which is supported by criminal sanctions, without ever having had the opportunity to see the material upon which the order was based.

The present case

6. AD did not accept the lawfulness of the Minister's stance. He sought disclosure of the relevant material so as to satisfy himself that the production order had been properly made and to decide whether or not to make an informed application for a review pursuant to section 5(6A). His case is that, at common law, there is a fundamental right to disclosure of the material upon which an ex parte order was based and a right of that importance can only be abrogated by a clear and unambiguous statutory provision. He disputes that the amendments deriving from the 2014 Act amount to such a clear and unambiguous abrogation.

7. On 26 January 2015 in the Supreme Court, Hellman J accepted the submission of Mr Jeffrey Elkinson, then appearing for AD, and ordered the Minister "to provide copies of all the documents placed before the court on the making of the

production order on 30 December 2014”. The Minister now appeals against that decision.

8. The appeal was first listed in this Court in March. By then it had become a matter of indifference to AD because the Minister had chosen to make the disclosure voluntarily. As AD had obtained the material, he had no further interest in resisting the appeal and, on that occasion, only Mr David Kessaram, representing the Minister, appeared. He indicated that the Minister wished to pursue the appeal because of its importance for other pending and anticipated cases. The Court agreed to hear the appeal if, but only if, it could have the benefit of submissions from an *amicus curiae* because it considered that the issue is too important to be resolved upon submissions from only one party. Thereafter, Mr Elkinson, who had triumphed before Hellman J, agreed to appear before us, this time as amicus. We are most grateful to him.

The judgment of Hellman J

9. Hellman J began his judgment by observing :

> “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.”

10. He then recorded the submission on behalf of the Minister to the effect that, by reason of the amendments, in particular section 5(6A), the common law right to disclosure has been modified so that it only arises once the court has granted a right of review. The submission was predicated on the assertion that the purpose of the amendments was “to avoid fishing expeditions”. Hellman J continued :

> “The grounds of review, [the Minister] submits, must be confined to grounds which are apparent from the face of the order. Thus an applicant would be unable to seek a review on the grounds that the statutory conditions for the making of a production order had not been satisfied because he

> would not have access to the material which would enable him to assess whether there were grounds to make such an application. However, [the Minister] submits, applicants can draw comfort from the fact that the request for a production order will have been subject to independent scrutiny by both the Minister when deciding whether to provide assistance to the requesting party and the Court when making the order."

11. Ultimately the case for the Minister was that, unless subsection (6A) bore the meaning for which he contended, "why bother to enact [it]?"

12. Hellman J rejected these submissions. He characterised the right to disclosure of the material deployed by the Minister in support of the ex parte application as a "fundamental right" of the kind referred to by Lord Hoffmann in *R v Secretary of State, ex parte Simms* [2000] 2 AC 115, 131. As such, it could only be removed by express language or necessary implication (which is not the same as reasonable implication: *Morgan Grenfell & Co Ltd v Special Commissioners for Income Tax* [2003] 1 AC 563, per Lord Hobhouse at paragraph 44). He added :

> "Subsection (6A) does not expressly remove the right of a person served with a production order to see the evidence which was before the Court when the production order was made. Neither does the removal of that right necessarily follow from the express provisions of the statute in their context."

13. He therefore ordered the Minister to disclose copies of the requested documents.

<u>The grounds of appeal</u>

14. The grounds of appeal are drafted quite subtly but their principal contentions are that (1) in their plain and ordinary meaning the words used were clear and unambiguous and the applied to all documents lodged in court by the Minister on an application for a production order; (2) the subsection was intended to prevent fishing expeditions (which the judge ought to have found were commonplace); and (3) the judge erred in finding that the subsection was

intended to apply to redacted information in a request when there was no suggestion of any mischief of persons served with production orders wishing to see redacted parts of underlying requests.

Discussion

15. Like Hellman J, I consider that a person who is served with an order which has 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. It is important to keep in mind the context of the present case. A production order is the result of an invocation of the judicial process which, at the behest of a public authority, imposes a burden upon the person to be served. He may be a person with a potential tax liability in another jurisdiction but this is not always the case. The order may be directed to, say, a bank, a professional adviser or a financial intermediary in relation to the tax affairs of a customer or client. To the extent that the case for the Minister goes so far as to contemplate that the subject of an ex parte order may be fixed with its burden, reinforced by criminal sanctions, without being assured of a right of review and without being permitted to see the material upon which it was based, it is highly exceptional. Moreover, there is no overriding public interest such as national security , which might, in exceptional circumstances, justify a departure from the normal fundamentals of fairness.

16. The only factor relied upon by the Minister is the need to prevent "fishing expeditions". Just how pressing this need may be is not the subject of specific evidence. There is simply an assertion that Hellman J ought to have found such fishing expeditions are "commonplace". On the other hand, a request for disclosure does not impose a significant burden on the Minister. He is simply being asked to disclose the material which has previously been collated for deployment in the ex parte application. It is a matter of record that, in the three year period ending on 31 December 2011, the Minister received 15 requests for

assistance from 5 different jurisdictions. We are told (and I am content to accept) that the number of requests is rising, albeit not spectacularly.

17. All this leads me to the view that this case concerns the possible abrogation of a fundamental common law right for a reason which may be understandable but which is not especially compelling. The central question then is whether the statutory language introduced by subsection (6A), clearly and expressly, or by necessary implication, has the effect for which the Minister contends.

18. In my judgment, it does not. The correlative of the fundamental right to disclosure is the obligation to disclose. Having obtained an ex parte order, the Minister is under a duty at common law to disclose the material upon which his application was based. The legislature did not make it "crystal clear" that the fundamental right was being abrogated : *Jackson v Attorney General* [2006} 1 AC 262, paragraph 159, per Lady Hale, and *Evans v Attorney General* [2015] UKSC 21, paragraph 56, per Lord Neuberger. Subsection (6A) is concerned with the situation where the person who has been served with a production order "seeks information from the Minister". It does not expressly abrogate the common law duty to disclose the material upon which the ex parte application was based. It is possible, and certainly not fanciful, that a person upon whom a production order has been served will seek information over and above that upon which the ex parte application was based. One possibility, which was contemplated by Hellman J, is information relating to redacted parts of documents which accompanied the ex parte application. As Mr Elkinson points out, it is quite possible that a person upon whom a production order is served will seek information about oral statements or about documents not exhibited to the filed documents, but expressly referred to in them. Subsection (6A) can properly be applied to such matters without extending to the abrogation of the fundamental right to disclosure of the filed documents.

19. For these reasons, I share the view of Hellman J as to the position in this case.. To do otherwise would be to countenance the possibility that the subject of a

production order could be prevented from ever seeing the filed documents. Not only would he be compelled to make an application pursuant to subsection (6B) without prior knowledge of the filed documents or their contents. If the judge were then to refuse to grant a review, he could never gain access to the documents. I do not accept that he would be adequately protected by the fact that the Minister has considered it appropriate to seek an order and a judge, on the ex parte application, probably (as in this case) without a hearing, has seen fit to grant the order. Either or both may have been misled by the filed documents. Indeed, the requesting authority itself may have been misled by the information upon which it seeks to rely. All this could occur in circumstances in which only the subject of the production order has material which refutes or satisfactorily explains the information. An obvious example would be mistaken identity of the subject by the original informant. In this context, it is helpful to keep in mind the words of Lord Kerr in *Al Rawi v Securities Service* [2012] 1 AC 531, at paragraph 98 :

> "Evidence which has been insulated from challenge may positively mislead. It is precisely because of this that the right to know the case that one's opponent makes and to have the opportunity to challenge it occupies such a central place in the concept of a fair trial. However astute and assiduous the Judge, the proposed procedure hands over to one party considerable control over the production of relevant material and the manner in which it is presented. The peril that such a procedure presents to the fair trial of contentious litigation is both obvious and undeniable."

20. It is next necessary to refer to a submission of Mr Kessaram which seeks to equate the position of a person who is seeking a review pursuant to subsection (6) with an applicant for permission to apply for judicial review of an administrative decision. It is true that that latter may only be entitled to disclosure of the administrative decision-maker's documents once permission to apply for judicial review has been granted. However, the present context is not one in which the applicant under sub section (6) is the originator of the litigation. It is the Minister, at the behest of a foreign public authority, who has resorted to

the judicial process and obtained an ex parte order. It seems to me that different considerations of fairness apply in such a situation and authorities such as *R v Lancashire County Council, ex parte Huddleston* [1986] 2 All ER 941 and the recent decision of Commissioner Michael Beloff QC in Jersey in the case of *Larsen v Comptroller of Taxes* (2015) JRC 104 are not analogous. What is being challenged under subsection (6) is not a decision of the Minister but an ex parte order made by a judge. Until the recent amendments, the procedure in Bermuda was based on executive decision subject to judicial review. The choice of moving to an originating judicial process necessarily carries with it the fundamental rights which inhere in such a process.

21. This also impacts on another of Mr Kessaram's submissions. He contends that, if the decision of Hellman J is upheld, it will have the consequence of causing Bermuda to be in breach of its international obligation of confidentiality. By Article 8 of the OECD Agreement on Exchange of Information on Tax Matters :

> "Any information received by a Contracting Party under this Agreement shall be treated as confidential and may be disclosed only to persons or authorities (including courts and administrative bodies) concerned with the assessment or collection of, the enforcement or prosecution in respect of, or the determination of appeals in relation to, the taxes covered by this Agreement. Such persons or authorities shall use such information only for such purposes."

22. However, Article 8 goes on to provide :

> "They may disclose the information in public court proceedings or in judicial decisions."

23. This applies precisely to the present case. By legislating for a decision-making process in which the production order is made in judicial proceedings in relation to which the Minister is simply an applicant for a court order, Bermuda has created a situation in which the dispensation from the international obligation of

confidentiality arises. The disclosure is made "in public court proceedings or in judicial decisions".

24. I should mention a further irony. It is common ground that, quite apart from the fundamental right to disclosure which is the central issue in this case, a person served with a production order has a statutory right to apply for facilities to inspect and copy the documents filed in support of the ex parte application: Supreme Court (Records) Act 1955, section 3. Counsel also agree that, in the absence of a contrary order by the judge (and none was made or, indeed, sought in this case, the Registrar would have acceded to the application by a party to the litigation.

25. Finally, in his submissions in reply, Mr Kessaram suggested that if (contrary to his primary submission), an application to the Minister pursuant to section 5(5) instigates a judicial process, it is one of an exceptional kind which does not necessitate the application attracting the same rigorous standards of fairness by way of fundamental right as arose in cases such as *Al Rawi and R (BSkyB Limited v Central Criminal Court* [2012] QB 785. I do not agree. If Mr Kessaram were correct, it would mean that the fundamental right to disclosure of an opponent's evidence would be no more than a qualified right, to be enjoyed or withheld at common law depending on the context. That is not the case. It is a fundamental right which can only be abrogated by "crystal clear" statutory provision and, as I have said, that is not he case here.

<u>Conclusion</u>

26. It follows from what I have said that I would dismiss the Minister's appeal. I take comfort from the facts that the duty to disclose the filed documents but no more is not arduous and any subsequent application for a review will be based on relevant material and will not be merely speculative. It is pertinent to record that, in the present case, once the relevant documents (amounting, typically, we are told, to some five pages) were voluntarily disclosed by the Minister , the subject of

the production order soon complied with it and produced the required documents, without making any application for a review, before the hearing of this appeal. In other words, disclosure, far from assisting an unscrupulous party to procrastinate by making an ill-informed application, actually brought about prompt compliance with the production order.

Signed

Kay, JA

I agree *Signed*

Baker, P

I agree *Signed*

Bernard, JA