



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2022: No. AA013

IN THE MATTER OF A REQUEST FOR EXCHANGE OF INFORMATION UNDER THE
INTERNATIONAL COOPERATION (TAX INFORMATION EXCHANGE
AGREEMENTS) ACT 2005 IN RESPECT OF THE AGREEMENT BETWEEN A
BERMUDA AND THE REQUESTING COUNTRY.

BETWEEN:

MINISTRY OF FINANCE

Applicant

-and-

FGH LIMITED

Respondent

Before: The Hon. Chief Justice Hargun

Representation: Mr. Jordan Knight, Appleby (Bermuda) Limited, for the Respondent

Ms. Arisha Flood, Senior Exchange Information Officer, for the Applicant

Date of Hearing: 25 October 2022

Date of Judgment: 30 November 2022

JUDGMENT

Application for review in relation to the service of a production order under International Cooperation (Tax Information Exchange Agreements) act 2005; the burden to be met by the respondent in order for the court to grant such review under section 5 (6); whether the test of arguability is satisfied in circumstances where the respondent has no information in order to determine whether there is an arguable breach of the Act and of the relevant TIEA

HARGUN CJ

Introduction

1. By a production order, made on the *ex parte* application of the Ministry of Finance (“**the Applicant**”) and dated 19 April 2022 (“**the Production Order**”), Mussenden J ordered that FGH Limited (“**the Respondent**”) produce, in relation to one of the Respondent’s customer’s accounts: (i) account opening application; (ii) documents indicating the beneficial owner and the authorised signatories of this account; and (iii) Bank statements for 2015 (transaction records).
2. By Summons dated 21 July 2022 the Respondent seeks an order that pursuant to section 5(6) of the International Cooperation (Tax Information Exchange Agreements) Act 2005 (“**the 2005 Act**”) there be a review of the Production Order for the purposes of either varying the Production Order to confirm that (i) the tax period in respect of which the request for the Production Order was made; (ii) the requesting party’s country of origin; or, in the alternative, setting the Production Order aside. This application again requires the Court to address the requisite standard of proof which has to be met by the Respondent in order for the Court to grant a right of review under section 5(6B) of the 2005 Act.

Background

3. The Respondent contends that the Production Order fails to disclose the tax period under investigation. Accordingly, the Respondent asserts that it cannot confirm whether the information requested relates to a period of more than 6 years prior to the tax period under investigation in accordance with section 4(2)(b) of the 2005 Act (“*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*”). The Respondent argues that in the absence of the information requested there is *a possibility* that the information requested relates to a period of more than six years prior to the tax period under investigation and the existence of *the possibility* is sufficient to discharge the burden of an arguable case.
4. On behalf of the Minister, it is contended that section 4(2) merely states that the Minister *may* decline a request for assistance in the circumstances and not that he *must* do so. Furthermore, Counsel for the Minister relies upon the 2017 Bermuda Assessment OECD Report which recommends that, if at all possible, the Minister should not disclose the taxable period under consideration. At paragraph 358 of the Report, it is recommended that:

“As a matter of practicality, it is generally accepted that a request jurisdiction needs to disclose minimum information in an EOI Request as necessary for it to obtain the requested information. In that context, Bermuda is recommended not to disclose the taxable period under investigation in all cases, but to specify the year in which the information is being requested for.”
5. The Respondent also contends that the Production Order fails to disclose the identity of the requesting country. As such, the Respondent contends that it cannot confirm whether the

requesting country would be able to, under its own laws or pursuant to applicable tax information sharing agreement, obtain the information sought in accordance with section 4(2) (d) of the 2005 Act (*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*). The Respondent argues that in the absence of the information requested there is *a possibility* that the requesting country would not be able to obtain the information under its own laws or in response to a valid request from the Minister under the agreement and the existence of that *possibility* is sufficient to discharge the burden of an arguable case.

6. In response, it is said on behalf of the Minister that the Production Order confirms that “*The Judge read the evidence in support of the application and was satisfied that the conditions of the applicable agreement relating to the requests have been fulfilled*”, and that confirmation should be sufficient to satisfy the Respondent. It was also suggested in argument by Counsel for the Minister that the identification of the requesting country may place in jeopardy the safety of individuals involved in making the request.
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Relevant provisions of the 2005 Act

7. The statutory context in which this application is made was reviewed by this Court in the *Ministry of Finance v DEF Ltd* [2019] Bda 59 and is reproduced below for ease of reference.
8. The Preamble to the 2005 Act states that it is expedient to make general provision for the implementation of a tax information exchange agreements entered 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 agreements.

9. 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.
10. 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 the request of the Production Order.

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*.

11. 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.
12. Section 5(6A) provides that a person served with the 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.

13. 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.

14. 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 or authority in its own jurisdiction for the purposes of the administration and enforcement of its tax laws; or (ii) a person employed or authorised by the government of the requesting party to oversee data protection.

15. In *Ministry of Finance v DEF Ltd* of the Court reviewed the historical position and cases dealing with the ability of the aggrieved party to obtain full disclosure of material provided to the court when making the *ex parte* production order. The Court referred to and reviewed the decision of Hellman J in *Ministry of Finance v E,F,H,O* [2014] Bda LR 54; decisions of the Court of Appeal in *Lewis & Ness v Minister of Finance*[2004] Bda LR 66; and *Minister of Finance v Bunge Ltd* [2013] Bda LR 83; the decision of Hellman J in *Ministry of Finance v E,*

F, H, O [2014] Bda LR 54; the judgment of Kay JA in *Minister of Finance v AD* [2015] Bda LR 52. The Court noted that in the judgment of Kay JA in *Minister of Finance v AD*, the Court of Appeal took the view that the wording of subsections 6A and 6B did not make it “*crystal-clear*” was being abrogated. Both Hellman J and the Court of Appeal accepted that even common law fundamental rights can be abrogated provided that it is “*crystal-clear*” from the language used that is indeed the intention of the legislature.

16. In *Ministry of Finance v DEF Ltd*, it was argued on behalf of the Ministry that the practical effect of the amended section 5(6B) was that the respondent had to make a *prima facie* case for review before the Court can consider whether, exercising its discretion, it is appropriate to order disclosure of the material before the court at the *ex parte* stage. It was argued that the court must have before it something factual from the respondents that gives rise to an arguable case that there is some material deficiency in the application before the court. The Court decided that:

“21. It will be seen that it is common ground between the parties that before the court can consider making an order of disclosure of the *ex parte* material the Court must conclude under section 5(6B) that this is a case where the affected party should be given a right of review. To this extent it does appear that the common law fundamental right of a party to obtain all the material seen by the court at the stage of making an *ex parte* order has been modified.

22. A related issue which arises for consideration is the test which the court should apply in considering whether it should grant the right of the under section 5(6B). The subsection itself does not expressly set out the test which should be applied in granting such a right of review.

23. Mr Knight argues that the test should be no higher than “*stateability*” or “*arguability*”. He relies upon the decision of the Irish Supreme Court in *Hugh Governey v The Financial*

Services Ombudsman[2015] 2 IR 616, a case concerning the absence of express statutory criteria for appeal in circumstances where a fundamental right had been restricted by Parliament...

24. I accept that the test to be applied in considering whether a party should be granted a right of review under section 5(6B) is that the Court has to be satisfied that there is an arguable ground for review of the Production Order made by the court. This test is consistent with the test applied in relation to applications for judicial review.”

17. On the facts in *DEF Ltd* the Court held that a general complaint by a respondent that without knowing what information has or has not been provided to the court by the Minister, the respondent is unable to ascertain potential grounds for seeking to set aside the order would not be sufficient for the court to grant a right of review. The Court held that the current scheme of section 5(6A) and (6B) is based on the premise that the Court has to decide whether to grant a right of review without recourse to the documents which were made available to the court on the *ex parte* application for the production order. The Court further stated that: “*In particular the Court is looking for grounds for declining assistance set out in section 4(2).*”

18. *DEF Ltd* was followed by the *Minister of Finance v GER* [2019] Bda LR 64, and the judgment in that case was delivered on 21 August 2019. The contention by the respondent in that case was that he was entitled to review under section 5(6) because there was a *possibility* that the request may be seeking information which is more than six years prior to the tax period in respect of which the request is made. The Court accepted that that possibility was sufficient to discharge the burden of an arguable case and held:

“6. I agree with Mr Knight’s submission that at this stage all he has to show is that he has an arguable case for seeking a review. In support of this application, Mr Knight relied

upon section 4(2)(b) which provides that the Minister may also decline a request for assistance 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. Mr Knight argues that as the Production Orders do not specify any time periods and as a consequence, this request potentially may be seeking information which is more than six years prior to the tax period in respect of which the request is made. Counsel for the Minister accepted this contention and agreed to limit the period, for purposes of answering this question, to within the six year period calculated from the tax period in relation to which the information is sought. Counsel for the Minister advised that the relevant tax year for which the information is required is 2013 and accordingly that the Court should amend the order so that the answer to the question posed by question 8 is limited to the period 2007 to present.

7. I agree that having regard to the terms of section 4(2)(b), the Production Orders should be amended so that question 8 seeks information from the Respondent “during the period 2007 to the present was or is [the taxpayer] a beneficiary of trusts based in Bermuda”. In my view this amendment avoids any potential breach of section 4(2)(b) of the 2005 Act.” (emphasis added)

19. In the following case in the *Ministry of Finance v LJK Limited* [2021]SC 8 Civ (26 January 2021) Mussenden J held at [16] that an arguable ground for a right of review can be established in reliance on (a) the grounds for declining assistance under section 4(1) and section 4(2) Of the 2005, (b) in respect of the common law safeguards in respect of non-disclosure in *ex parte* applications and (c) the court’s ability to control its own process. At [70]-[71] the learned judge expressed his view that the respondent is entitled to the minimum information which is required in order to satisfy himself that the statutory requirements of the 2005 Act and the applicable agreement had been satisfied:

“70. In my view, the nature of the statutory scheme provides tactical advantages to the Minister in several ways (a) by way of the ex parte process in granting a Production Order; (b) with a penal notice; (c) the requirement for an application for a right of review subject

to the Court being satisfied that there is an arguable ground for review; and (d) such right of review is not automatic. In Minister of Finance v AD [2015] Bda LR 52, Kay JA referred to these kind of circumstances as “highly exceptional”. Therefore, it can be argued that the Minister has all the information and the subject has none, and continues to have none, whilst engaging in court hearings in order to satisfy the Court that he has an arguable ground for review, in order to see the information.

71. In relying on the principles of justice and fairness, the common law rights and Article 1 of the TIEA, I am of the view that the Respondent should be provided with as much information of the Request as necessary, redacting any sensitive material, to show that the requirements in Article 5, paragraph 6(a)-(h) have been complied with.”

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20. The judgment of Mussenden J was subject to an appeal and the Court of Appeal’s judgement was delivered by Smellie JA [2022] CA (Bda) 4Civ. The judgment of the Court of Appeal cast no doubt upon paragraphs 70 and 71 in the judgment of Mussenden J noted above. At [60] (iv) the Court of Appeal held that the function of the court, in light of its jurisdiction to review production orders, and at a minimum, to satisfy itself that the request is strictly in compliance with the requirements of the Act and with the relevant Tax Information Exchange Agreement (“TIEA”), and in particular, with the foreseeable relevance test.

Discussion

21. Section 5 (6) of the 2005 Act expressly provides that a person served with a production order under the 2005 Act may seek a review from the court within 21 days of the date of service of the order. This statutory provision clearly seeks to provide a statutory right and remedy to a person who has been served with a production order issued by the court. In *DEF Limited* this Court held that in order to seek review of the production order a person must show that it is at least arguable that the production order may not be complying with the 2005 Act or the provisions of the relevant TIEA. If there is a possibility that the production order approved by

the court may not comply with the 2005 Act or the provisions of the relevant TIEA, then there is a possibility that the production order or a part thereof is liable to be set aside by the court. The existence of that possibility, in the judgment of the Court, would satisfy the test of arguability so as to satisfy the requirement to be granted a right of review under section 5 (6A) of the 2005 Act.

22. Having reviewed the relevant authorities which considered the standard of proof which has to be discharged by the respondent in order for the Court to grant a review, the Court notes that section 5 (6) expressly provides that a person served with a production order who is aggrieved by the service of the order may seek review of the order from the court.

23. Initially, the Court was attracted to the submission on behalf of the Minister that the test of arguability is only met if a respondent can make an arguable case of breach of the 2005 Act or the relevant TIEA even in circumstances where the Minister has elected not to provide the minimum information which could enable the respondent to make that determination. However, it seems to the Court that a person served with a production order can only decide whether there has been compliance with the 2005 Act or the relevant TIEA if he has been provided with the relevant minimum information. It is clear that the statutory scheme, in terms of section 5(6A) does not contemplate that a person served with the production order is entitled to the supporting documents provided to the court at the *ex parte* hearing. However, a person served with a production order should be provided with the minimum information (not documents) so that he can determine whether there is an arguable claim for breach of the 2005 Act or the relevant TIEA.

24. In this case Counsel for the Minister argues that the Minister is entitled to withhold information in relation to the relevant tax period (without which the Respondent is unable to determine whether section 4(2)(b) has been complied with); or the identification of the requesting state (without which the Respondent is unable to determine whether section 4(2)(d) has been

complied with). Counsel for the Minister urges the Court that in the circumstances the Court should conclude that there is no arguable case of non-compliance with the 2005 Act, or the relevant TIEA and the Court should refuse to grant a right of review to the Respondent.

25. The Court has given anxious consideration to the submissions made on behalf of the Minister. The Court is concerned that the acceptance of the submissions on behalf of the Minister means that in the event the Minister elects to provide no relevant information to the person served with the production order that person has no effective right of review. The acceptance of the Minister's submissions would render the statutory right to apply to the court to seek a review effectively nugatory.

26. In the Court's view the statutory right to seek a review of the production order, set out in section 5 (6) of the 2005 Act, must entail that a person served with the production order is provided with the minimum information (not documents) from which he is able to determine whether there is an arguable breach of the 2005 act and/or the relevant TIEA. In the event the Minister elects not to provide that minimum information to the person served with the production order, the Court will accept that the arguability threshold is met if it can be shown that there is a theoretical possibility that the provisions of the 2005 Act or the relevant TIEA had not been complied with. That possibility of a breach of the 2005 Act or the relevant TIEA will provide a sufficient ground for the Court to consider granting the right of review.

27. The Court accepts that there are countervailing policy arguments in favour of the contention that the Minister should not be required to provide the requested information in this case. However, even the 2017 Bermuda Assessment OECD Report acknowledges that "*as a matter of practicality it is generally accepted that a requesting jurisdiction needs to disclose minimum information.*" In the Court's view that "*minimum information*" comprises information from which the person served with the production order is able to consider and determine whether

there is an arguable breach of the 2005 Act and/or the relevant TIEA. Accordingly, the Court is persuaded that it is appropriate to require the Minister to disclose to the Respondent (i) the tax period in respect of which the request for the production order was made; and (ii) the requesting party's country of origin. The Court orders that the Minister should provide this information within 21 days of the delivery of this judgment. The Court grants to the Respondent an extension of time for compliance with the Production Order by or before 21 days after the provision of the above information by the Minister to the Respondent or until further order.

28. The Court records that during argument Counsel for the Respondent accepted that in principle the request for "*Bank statements for 2015 (transaction records)*" could not be objected to in principle and the Respondent was prepared to comply with this request in the Production Order.

29. Counsel for the Respondent also appeared to accept that in principle he could not object to the "*Account opening application*". The Court notes that even if the account opening application documentation is more than six years prior to the tax period in respect of which the request is made, the Minister could still decide that this information should be provided. In this regard the Court refers to the judgment of Smellie JA in *Reliance Globcom Limited v Minister of Finance* [2022] CA (Bda) 4 Civ where the Court considered the two limbs of the jurisdiction set out in section 5(2) of the 2005 Act : "*The Supreme Court may if on such an application it is satisfied that the 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 in the interest of Bermuda, make a production order requiring the person referred to in the request...*" In relation to the second limb of the jurisdiction Smellie JA held at [8]-[9]:

"8. The second limb of the jurisdiction – that which speaks, it must be noted, in somewhat vague terms to the Court being satisfied with the Minister's decision – is not in issue on this appeal because it was not the basis of the Minister's application to the Court, nor was

it the basis upon which the Court granted the PO, either at the ex parte hearing or upon the review.

9. But given the vagueness of the language used, it may be helpful in future to note this Court's understanding of it here. As it is expressed in the disjunctive, it appears to envisage the Supreme Court being able to grant a production order, even while itself not being satisfied under the first limb that the conditions of the applicable Agreement are fulfilled, but if it is satisfied (presumably by appropriate certification to that effect) that the Minister is so satisfied and has decided, that it is in the interest of Bermuda to grant the request. Whether and to what extent any such decision of the Minister might be open to challenge will have to be determined by reference to the facts of any case in which he does so."

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30. The real point of contention at the hearing related to the request in the Production Order that the Applicant provide "*Documents indicating the beneficial owner and the authorized signatories of the said account.*" Mr Knight, for the Respondent, was concerned to ensure that this documentation did not go beyond the six-year period prior to the tax period in respect of which the request is made. This may or may not be in issue after the Minister has disclosed the tax period in respect of which the request for the Production Order was made.
31. The Court records that Counsel for the Minister submitted that the reference in section 4(2) to "*The Minister **may** decline also decline a request for assistance*" gives the Minister the discretion whether or not to decline a particular request. The Court does not determine this point as some of the provisions in section 4(2) would not appear to be susceptible to such discretionary jurisdiction (for example, section 4(2)(d), which provides that the Minister may decline a request for assistance if "*the information is protected from disclosure under the laws of Bermuda on the grounds of legal professional privilege*").

Conclusion

1. In conclusion the Court orders that the Minister provide to the Respondent within the next 21 days information relating to (i) the tax period in respect of which the request for the Production Order was made; and (ii) the requesting party's country of origin. The Court grants to the Respondent an extension of time for compliance with the Production Order and orders that the Respondent must comply with the Production Order by or before 21 days after the provision of the above information by the Minister to the Respondent or until further order.
2. The Court will hear the parties in relation to the issue of costs, if required.

Dated this 30th day of November 2022



NARINDER K. HARGUN
CHIEF JUSTICE

